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Contents

Editorial vii
<https://doi.org/20.500.11825/693>

Articles

Citizen agency, human rights and economic development in the context of populism and new democratic leadership models in Latin America

by *Héctor Santiago Mazzei*..... 1
<https://doi.org/20.500.11825/692>

Sustainability of food systems: The role of legal and policy frameworks

by *Nicholas W Orago* 16
<https://doi.org/20.500.11825/691>

Freedom of religion and the securitisation of religious identity: An analysis of proposals impacting on freedom of religion following terrorist attacks in Flanders

by *Willem Vancutsem* 41
<https://doi.org/20.500.11825/689>

The development of Uganda's military justice and the right to a fair trial: Old wine in new bottles?

by *Ronald Naluwairo*..... 59
<https://doi.org/20.500.11825/687>

The forced displacement of indigenous peoples in Colombia

by *Felipe Gómez Isa* 77
<https://doi.org/20.500.11825/686>

Recent regional developments

Human rights and democracy in the Arab world in 2017: Hopeless within, doomed abroad

by *Hafsa Bennis, Razane Boustany, Anna Lucky Dalena, Henriette Josephine Gentil, Yasmine Jamal Hajar, Hind Sharif, Salma Sharif, Marta Welander and Martina Zucconi* 96
<https://doi.org/20.500.11825/685>

Challenges to the European Union in 2017: Brexit implementation, populism, and the renewed attempt at advancing the social dimension of the European integration project

by *Chiara Altafin and Wiebke Lamer*..... 127
<https://doi.org/20.500.11825/684>

Selected developments in human rights and democratisation during 2017: Sub-Saharan Africa
by Michael Gyan Nyarko and Trésor Makunya 147
<https://doi.org/20.500.11825/683>

Selected regional developments in human rights and democratisation in the Asia Pacific during 2017: ‘Diverse region with divergent stance’
by Ravi Prakash Vyas and Sachin Siwakoti 174
<https://doi.org/20.500.11825/682>

Regional perspectives on democratisation of Eastern Partnership countries
by Arusyak Aleksanyan 193
<https://doi.org/20.500.11825/681>

Editorial

This is the third issue of the *Global Campus Human Rights Journal*. It consists of five articles of a general nature, covering a diversity of geographic and thematic concerns, and five reviews of recent regional developments in human rights and democracy, covering 2017.

The articles in the first part of this issue deal with global concerns, in the process placing the spotlight on countries in three regions in particular: Europe, Latin America and Africa. One of the articles, by Vancutsem, is a complement to the special focus on securitisation in the immediately preceding issue (2017 No 2) of the *Global Campus Human Rights Journal*. This contribution analyses three proposals impacting on freedom of religion following terrorist attacks in Flanders, which is one of the federal units making up Belgium. In his article, Orago examines the role of legal and policy frameworks in more effectively addressing one of the most pervasive global challenges: food insecurity. Two articles deal with Latin America. Taking an expansive view, Mazzei situates his contribution against the background of increasing populism and new democratic leadership models in the region. Gómez Isa focuses on a particular issue (the forced displacement of indigenous peoples) in a specific country in the region (Colombia). Naluwairo traces developments in the Ugandan military justice system, posing the question of to what extent the right to a fair trial has been and continues to be compromised within the setting of military trials.

As in earlier issues, the second part of the issue reviews and analyses regional developments related to human rights and democracy during the previous year (2017). This issue covers developments in the Arab world, Europe, sub-Saharan Africa, the Asia Pacific and the countries making up the Eastern Partnership (Armenia, Azerbaijan, Belarus, Georgia, Moldova and Ukraine).

In all five regions, rising populism, fundamentalism and extremism challenged the tenets of democracy. In Europe (The Netherlands, France and Germany), right-wing, nationalist and Eurosceptic parties rode the wave of populism to increase their political influence as a result of elections. In Zimbabwe, a dangerous precedent was set when the removal through military intervention of the incumbent, President Mugabe, was met with little international condemnation.

Some of the most dire places on earth to live in during 2017, characterised by war and conflict, and repeated instances of terrorism, kidnappings and the use of prohibited chemical weapons, were in the Middle East and North Africa (Libya, Iraq and Syria). Refugees, most of whom were fleeing war and conflict, persecution and protracted emergencies in countries such as Iraq, Libya, Sudan, Syria and Yemen, upon their arrival in Europe were exposed to large-scale human rights infringements, seemingly due to a combination of insufficient resources

allocated to the European refugee response combined with an unforgiving implementation of policies regulating movement into and across Europe.

On the basis of existing methods of measuring the state of democracy, in particular Cutright's 'Index of Political Development' and Vanhanen's 'Index of Democracy', Aleksanyan develops an 'Aggregate Democracy Index'. The application of this method to the states comprising the Eastern Partnership revealed the democracy deficits of Azerbaijan and Belarus, in particular. Despite Azerbaijan being characterised by clamp-downs on dissent by imprisoning political opponents and restrictions on the media, international criticism has been muted due to the importance of the country's energy sources and its cooperation on security issues.

Democratisation the Arab world remains incomplete, leaving the promise of the 'Arab Spring' elusive and mostly unfulfilled. Nation-wide protests and strikes in Morocco, sparked by the death of a fish vendor, Mouhcine Fikri, were met with arrests and violent repression by the Moroccan regime.

The picture of human rights violations in 2017 is as bleak as it has been at any time during this century. It emerges that human rights are under threat in all five regions that are covered, and that elected governments all too often are not upholding the rights of those under their jurisdiction. General trends include the failure to protect minorities, such as religious and ethnic minorities, sexual minorities, women, children and refugees; the curtailing of freedom of expression through internet shutdowns and the criminalisation of free expression; the targeting of human rights defenders and journalists; and impunity for human rights violations.

Among the most notorious instances of human rights violations during 2017 are the spectacular failure of the government of Myanmar in its obligation to protect people in its territory in the context of the attacks, rape and killing of Rohingya Muslim villagers; and the excesses of the Duterte government in the Philippines committed as part of the political panic created through the 'War on Drugs'. In Tunisia, legislative advances were offset by the adoption of an amnesty law providing for amnesty to civil servants accused of corruption under the previous regime. Following the global trend to curb civic space, the Egyptian government in 2017 passed NGO Law 70 to restrict NGO activities to development and charity work, thereby excluding their involvement in any 'politically-related' activities.

With international institutions aimed at advancing human rights being undermined and weakened during 2017, the very notion of multilateralism is increasingly being placed under pressure. Following the 2016 referendum in the United Kingdom, the process of formalising the first-ever departure of a member state from the European Union continued. The great expectations about fledgling institutions often remained unfulfilled. By refraining from dealing with complaints, the ASEAN Intergovernmental Commission on Human Rights, for example, has not yet engaged in human rights protection.

The limitations emanating from the diplomatic and consensual nature of the Universal Periodic Review (UPR) became increasingly apparent from the widespread rejection of UPR recommendations by states. The Philippines, for example, rejected all UPR recommendations related to

extra-judicial killings, the abolition of the death penalty, and the treatment of human rights defenders and journalists – all issues of crucial concern in that country. Now in its second cycle, the UPR still needs to establish itself as an effective mechanism to improve the actual enjoyment of human rights around the world. Current trends show little promise of the UPR becoming more than a formulaic process through which states largely legitimise sovereignty-based arguments to justify the denial of rights.

Despite these setbacks, there are a number of positive developments from which some solace may be drawn.

Contradicting the trend towards greater support for right-wing parties elsewhere in Europe, the 2017 elections solidified the two-party character of democratic politics in the United Kingdom. In some African states (Angola and Liberia, in particular), elections concluded with a peaceful transfer of power, with new leadership being installed.

While the International Criminal Court contended with various challenges, at least the foreboding of a massive withdrawal from the ICC by African states did not come to fruition.

Although formal acceptance (usually in the form of ratification) in itself does not guarantee an improvement in the observance or realisation of human rights, it is nonetheless reassuring that states – particularly in the Asia Pacific – during 2017 continued to become state parties to important human rights treaties.

Human rights standard-setting continued during 2017. At the domestic level, Tunisia adopted legislation criminalising violence against women, including marital rape; revoked the prohibition on marriage between Muslims and non-Muslims; and relaxed mandatory minimum sentences for minor drug-related offences. Lebanon repealed ‘rape-marriage laws’, which had enabled rapists to escape prosecution upon marrying the victim. At the regional level, new soft law standards related to the prohibition of child marriage and gender-based violence were put in place with the African regional human rights system.

In a number of important instances, the judiciary emerged as a counterweight to legislative and executive neglect or excesses. Notable examples are the Supreme Court of India, which continued its progressive interpretation, giving a wide and potentially far-reaching construction to the right to privacy, and declaring unconstitutional the triple *talaq*. Although not an apex court, a court of first instance in China handed down a potentially trend-setting decision extending benefits to same-sex partners. The ECOWAS Court of Justice, functioning within the West African region under the auspices of a regional economic community, delivered a significant judgment holding Nigeria accountable for gender-based violence.

The first visit by a United Nations special procedure to North Korea gave some indication of the continued relevance of international human rights systems in processes of the opening up of closed societies.

We thank the reviewers who have sacrificed their time to assist in ensuring the quality of this *Journal*.

Editors

Citizen agency, human rights and economic development in the context of populism and new democratic leadership models in Latin America

Héctor Santiago Mazzei*

Abstract: *This article reviews the concepts of governance and governability in light of the emergence of new leadership models at the turn of the century and after the 1990s in Latin America. The article reviews the challenges of democratisation processes in Latin America to strengthen and broaden the exercise of human rights, in the context of the new democratic and so-called populist leadership. After a period of foreign debt crisis, and with the emergence of new leaders in Latin America at the turn of the millennium, a different type of agenda is taking shape, centred on the characteristics of leadership, plebiscite democracies, 'decisionism' and the search for institutional quality. These agenda points are connected to themes such as the idea of 'republic' versus the idea of 'democracy'; constitutional stability; and the notion of personal and populist leadership as against democratic leadership. The article reviews these concepts and highlights the meaning of the so-called neo-constitutionalism in Latin America, both from a legal and a political perspective.*

Key words: *Latin America; governability; populist leaderships; republic; democracy; constitutional stability; neo-constitutionalism*

1 Introduction

Nothing ... renders a republic more firm and stable, than to organise it in such a way that the excitement of the ill-humours that agitate a state may have a way prescribed by law for venting itself.

Machiavelli *N Discourses on the First Ten Books of Titus Livius*, Book I, VII

This article offers a review of the concepts of governance and governability in light of the emergence of new leadership models at the turn of the century and after the 1990s in Latin America, where – following Weber (2002) – neoliberal ideas shaped a new 'iron cage'. New leadership emerges in different ways, but generally it appears in response to moments of severe and structural crisis. New leadership models generate new policy tools and, while stimulating growth, engender new debates around the tension between governance and institutionality. As expressed by sociologist Rouquié, 'those types of hegemonic democracy

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regimes have an origin, an emergence, in a context of social crisis' (Rouquié 2017). One of the hypotheses proposed in this article is that these leaders have a similar profile to that of the problems they confronted during the crises they originally faced, and that, although this could have afforded them a short-term advantage, they remained trapped in a limited repertoire of policies as prisoners of their initial success.

The article reviews the challenges of democratisation processes in Latin America to strengthen and broaden the exercise of human rights, in the context of new democratic and so-called populist leadership – with all the ambiguity of the term. In order to do this, it is essential to broaden the scope of the analysis to include concepts such as citizen agency and human development and ensure a comprehensive and overriding approach as the basis of public policies for the expansion and consolidation of democracy and human rights.

With the return to democracy in Latin America in the early 1980s – after the era of the military dictatorships in the 1960s and 1970s – the debate on institutionality and politics was primarily focused on the transitions from totalitarian to democratic regimes. Next, discussions prioritised the consolidation of nascent democracies, and later on the strengthening of state institutions in a context of macro-economic adjustment.

After a period of foreign debt crisis, and with the emergence of new leaders in Latin America at the turn of the millennium, a different type of agenda is taking shape, centred on the characteristics of leadership, plebiscite democracies, 'decisionism' and the search for institutional quality. This debate is connected to several recurring themes: the idea of 'republic' versus the idea of 'democracy'; constitutional stability confronted with popular will and the legitimacy derived from the electoral result; and the notion of personal and populist leadership as against democratic leadership.

The objective of the article is to review the concepts at stake and uncover the elements that supersede the alleged contradictions between them, as well as to highlight the meaning of the so-called neo-constitutionalism in Latin America, both from a legal and a political perspective.

2 Republic and democracy

Republic and democracy are two concepts that are often mistakenly used as being similar, but that do not convey the same meaning: While the idea of the 'republic' stands opposed to that of 'monarchy', the idea of 'democracy' is associated with the expression of the popular will with the participation of qualified citizens. The republic has been associated, on the one hand, with the establishment of a set of human, political and social rights limiting the state's power over the individual. On the other hand, it has also been closely linked to the idea of a division of powers or branches; weights and counterweights between these powers; the publicity of the acts of government and the establishment of authorities; their attributes and the manner of access to positions based on a constitution; and, finally, the fixed length of mandates in opposition to the monarchical perpetuity mandates.

Perhaps this last element connects the notions of republic and democracy through the selection of government officials by a mechanism that seeks to express popular sovereignty at its highest possible level: the egalitarian vote – where each citizen casts one vote – under the principle of majority rule. Montesquieu distinguishes between the nature of the democratic republic in which ‘the people as a body have sovereign power’, and the principle of the democratic republic ‘which is what makes it act ... the passions that set it in motion’. This principle is what he calls ‘political virtue, which is the love of country and equality’ (Montesquieu 1989). In this fundamental principle, Montesquieu’s idea is centred on a territory, the nation, and what later will become the national state, and on the recurring idea of balance and equality. Recognising others as equals is a virtue that enables mutual recognition of rights and participation in decisions. This idea of balance and moderation is present because that form of virtue seeks to ward off the dangers of the loss of virtue. In his own words, ‘formerly, the wealth of the individuals constituted the public treasure, but now (when the virtue is lost) the public treasure becomes patrimony of the individuals’ (Montesquieu 1989: Book III, ch 3).

The republic is also linked to the idea of political freedom which in the view of this author is not necessarily present in democratic or aristocratic governments. The division of powers is precisely the mechanism that guarantees freedom. Montesquieu states that ‘democratic and aristocratic states are not in their own nature free. Political liberty is to be found only in moderate governments, and even in these it is not always found. It is there only when there is no abuse of power’ (Montesquieu 1989: Book XI, ch 3). At this point we see that the division of powers is an indispensable but never sufficient condition to guarantee political freedom, which for the author was also limited to compliance with the laws of the state.

This idea was adopted by both the revolutionaries of North and South America, along with Rousseau’s views on the general will. In the first case, the debate on the Philadelphia Constitution followed a pragmatic way of interpreting Montesquieu’s ideas about the separation of powers. For this writer, the relationships among themselves, with their origins, with the object of the legislator and with the order of things on which they legislate, also in light of physical, geographical, religious aspects, the climate and size of the state, its wealth, and so forth, constitute what he calls ‘the spirit of the laws’ (Montesquieu 1989: Book I, ch 3). Given these conditions, the Philadelphia Founding Fathers reinterpreted the division of powers not as separate areas of absolute concern, but as an area of mutual convergence of one over the others, striking a balance where the legislative power – under certain circumstances – could remove the executive power with the concurrence of the judicial power through impeachment. Similarly, the executive power could introduce Bills, veto legislation or propose the appointment of judges with the consent of the senate. These mechanisms of mutual control are called ‘checks and balances’. The main ideas that inspired the American constitutionalists were, on the one hand, the need for a strong federal power and, on the other, the need to make decisions and govern. In that political process, if necessary, the three powers intervene.

At that time, according to Foucault, two answers were given to the question of how to put legal limits on the exercise of political power. The first answer was the so-called ‘Roussonian way’, based on the natural or

original rights of each individual as such and the definition of those rights 'the cession of which has been accepted ... and from the rights of man to reach the delimitation of governmentality, going through the constitution of the sovereign' (Foucault 2004b). The second answer involved starting not from the law but from government practice in connection with the factual limits that can be put to that governmentality, articulated essentially with the new economy of the reason to govern. For the author, the idea that the rules of the market were part of natural law made state intervention useless, and constituted a new limit to government action. The law as an expression of the popular will against the separation of governmental spheres and individuals from a utilitarian and economic logic, marked a clear limit to this state action.

This is the context in which the modern ideas of nation state, political economy, constitution and democracy are born. Classical constitutions are born as *corpus juris* at a time when political economy begins its development and – as from the understanding of the mechanics of the market as a natural law – it begins to impose its logic in all orders of life.

3 Democracy, representation and republic

In his work *Metamorphosis of representation*, Manin argues that Madison distinguishes democracy, as it presented itself in the small cities of antiquity, from republican governance. Far from considering republican governance a necessity arising from the impossibility of direct representative democracy, he envisions it as a superior system of government. Such system expands public views through a chosen body of citizens whose wisdom positions them to better identify the true interests of the country. In this way, the public voice is expressed by the people's representatives in a manner that can better coincide with the public good than had it been formulated by the people themselves, gathered for that purpose (Manin 1992).

For Madison, one of the fundamental features of representation was the possibility that representatives, through 'debate' and 'mature judgment', resist the 'disordered passions' of the popular assemblies. Public decision precisely derives from debate and deliberation. According to Manin, 'discussion' is at the centre of decision making, based on the existence of a plurality of individuals with free opinions, following a single procedure by which a plurality of actors without an agreement between them can reach a common political decision without resorting to coercion: the persuasive discussion. The reasoning that – according to Manin – prevailed in the authors who linked debate and representation referred to the rule that 'the truth must make the law and discussion being the best method for the truth to arise, the central political instance must be a place of discussion, that is, an assembly' (Manin 1992: 46).

For Sieyès (Manin 1992:14), the idea of representation was related to the division of labour that arises with the greater complexity of societies, the advance of trade and the diversity of interests and, therefore, another central idea is that of 'plurality'. Hence, with the development of parliamentarism in the nineteenth century, the possibility of exchanging opinions becomes vitally important. This freedom of expression of the legislators' opinions are guaranteed in modern constitutions.

The idea that collective decision making is the result of deliberation remains throughout the history of the modern idea of republic but, according to Manin, has undergone significant changes from the classical parliamentarism of the last years of the eighteenth century to the present. A first change appeared with the emergence of large political parties where debate is not restricted to parliamentary sessions but rather is structured through agreements and political accords. A second change emerged in what Manin qualifies as the 'democracy of the public', characterised by the personalisation of political leaderships, the existence of an increasingly large floating electorate that is not committed to particular political parties, with a large margin of independence of those who govern over those who choose. Debate does not remain isolated to parliament or to the political parties, but extends to pressure groups, interest groups, the media and civil society organisations. Within each of these groups, there are processes of debate that follow a certain democratic logic.

4 Iron cages

The structuring of modern bureaucracy, according to Weber a system of 'rational legal' domination, is linked to the formation of national states. For this author, this process is determined by three elements: (a) competition between capitalist companies; (b) competition between states; and (c) bourgeois demands for the protection of their rights under the law (Weber 2002). According to Weber, the three elements are ultimately linked by the first one: The capitalist market economy demands that the official affairs of the administration be carried out with precision, unambiguously, continuously and as quickly as may be possible. In general, very large modern capitalist companies are unrivalled models of strict bureaucratic organisation (Weber 2002).

However, Weber warns that this rationalist order was becoming an iron cage that imprisoned humanity. In his view, freedom could only be achieved through new leadership that proposed superior answers; and a new prophetic awakening.

From my point of view, the measures adopted on the basis of the Washington Consensus offered a negative view of the traditional bureaucracies that held back the processes of globalisation. The homogeneity in the policies of state reduction, indiscriminate commercial opening, the de-structuring of social bonds as a result of the uprooting caused by the loss of employment; the unravelling of trade union organisations due to labour market flexibility policies and indiscriminate economic deregulation became a new *iron cage*. Freedom from this new iron cage was only possible after generalised crises, social mobilisation and the consequent emergence of new leaderships – in that order.

5 Governability, governance, governmentality

The debate on government action has alternated between the subject of government and its processes. From this point of view, supported, among others, by Aguilar Villanueva, with the development of parliamentarism in the nineteenth century, two complementary approaches arise from this displacement, namely, that of governability and that of governance. From

my point of view, at present this debate in turn has shifted towards the administration of agendas that are not *a priori* explicit, but are raised by the new leaderships. These agendas materialise through political initiatives from the centre of power that are contested by the opposition with the problematisation of new issues. That is why Foucault's concept of governmentality, which we will develop later, is useful and complementary to the other two.

Aguilar Villanueva maintains that the term 'governability' 'denotes the possibility or probability that the government governs its society; while the opposite, ungovernability, refers to the probability that the government will stop governing its society' (Aguilar Villanueva 2009). He also states that it is an approach strictly linked to the government and not to the state as a whole and that it focuses on the technological, administrative, and organisational capabilities of the government. This approach is criticised for not taking into account society and its capacity for self-organisation and for implicitly considering that only the reproduction of order can arise from the government.

The concept of governance, in a complementary fashion, interprets the government process as an institutional and technically stable process for determining management priorities. It is a collective action involving a plurality of actors in its design and implementation and coordinated by certain government agencies that articulate cooperation among relevant actors. Finally, Aguilar Villanueva (2009) calls

governance, in the strict sense, the process by which the sense of direction of society, the manner of organisation to achieve its objectives and the distribution of costs and benefits can no longer be defined exclusively by the government, as a single or dominant actor, but it is the result of joint deliberation-interaction-interdependence-co-production co-responsibility-partnership between government and private and social organisations ...

It is safe to assume that this idea is far from reflecting the realities with which we are in touch. The defining feature of post-crisis leaderships – the current and the past ones – has been the need to restore presidential authority and governability. Agendas and initiatives are centred on the peak of power. The Argentine President of the 1990s, Carlos Menem, is credited with the phrase 'information, secrecy, surprise' as a way of acting and adopting a policy. Nevertheless, it is fair to say that the constitutional rules have not been altered in these times, except during the long periods of emergency.

For this reason, it seems more useful to explore the concept of 'governmentality' coined by Foucault in several of his works. This concept has varied over time, but in his vision that 'not everything is political but everything can be politicised', the term defines the strategic field of power relations, which exceeds government itself, and that describes 'how people conduct themselves; government of the children, government of the souls or of the consciences, government of a house, of a state or of itself' (Foucault 1978). The domination devices – intersected by formal and informal institutional rules – ultimately describe the macro and micro-grid of how power relations are structured. For Foucault, the counter-power is part of the concept. This positioning and its strategies are inseparable from the forms of resistance or counter-conducts that face power and that shape the 'governmentality crises' (Foucault 1978).

This allows one to look at the phenomenon from the constitutional, institutional and the organisational planes. In the first plane we have the 'play field'; in the second plane we see the 'daily game', the political struggle to impose the rules, provide a 'tone' to the institutions and shape them. Power tries to constantly expand its functions, while counter-power attempts to install a material brake and take power at some point, with the same rules but seeking to alter and re-signify them. The struggle for the broadening of human rights that we know is very similar to this description.

Republican democracies allow for this scenario where conflict is possible but remains framed in its rules. Conflict and moderation, two apparently contradictory terms, are both present in this institutional scheme.

Without being exhaustive, structural inequality, patronage relations, the weakness of political parties, the crisis in representation, the day-to-day politics in the face of electoral rites that freeze political reality for two or more years, all define forms of macro and micro-domination in Latin America. Organic constitutional legal rules cannot capture them because of their inescapable generality. These structural, organisational, ritual, informal cracks penetrate and alter the meaning of norms and laws.

6 Crises and leadership

The recurrent crises in the countries of the Latin American region have given rise to a set of policies and to the emergence of a particular brand of leadership. Regarding the scope of the policies, there is a second hypothesis in connection with the mechanisms of social coordination and organisational behaviour: In times of generalised crisis, the agenda is concentrated on a small but crucial set of issues that involves a narrow field of state apparatus, where attention is focused on both the strategic centre of government and the public opinion agenda. Meanwhile, the rest of the organisations in the state apparatus reinforce their routines, structure their own agendas and press for more resources, faculties and margins of autonomy. Alternatively, they remain insignificant or powerless.

The outcome of the crisis of the 1980s resulted in a set of public policies aligned with the so-called Washington Consensus seeking to address the problems arising from the deep fiscal crisis of state insolvency in Latin America. Aguilar Villanueva (2009) contends that the Public Policies (PP) study and the New Public Management (NGP) approach

appeared in Latin America as disciplinary and professional proposals to overcome the financial vulnerability or the fiscal crisis in which the developing social states had fallen and/or to restore the public nature distorted or perverted by authoritarian governments and/or to improve public services. In this critical context, the two PP and NPM proposals have been disseminated promptly and have been received by governments, society and academia as useful knowledge and management tools to rebuild governance in trouble ...

During this period, leadership that forced institutional limits and even initiated processes of constitutional reform emerged in countries such as Argentina, Colombia and Brazil, but governments tended to implement

severe fiscal reforms, the indiscriminate opening of the economy and the disempowerment of public companies. At the same time, a second phase of the renegotiation of the gigantic public debt contracted during the dictatorships was initiated.

A new bureaucratic model oriented towards reforms in favour of the market was established, with the aspiration that with stability and growth, the available wealth would at some point 'trickle down' towards the most neglected sectors of society, or that it would reach those sectors based on 'focused' social policies.

In a second stage of the crisis, towards the beginning of this century, things changed. Problems were not related to fiscal crises, since adjustment policies had done their work, but to governance crises. For example, in the case of Argentina, there was a clear governability crisis in that the government was unable to set its agenda; the presidential authority was atomised with a recovery of power by provincial governments (the so-called 'League of Governors'); the streets were taken over by pickets and popular demonstrations; and there was a loss of parliamentary majorities in Congress. The situation clearly translated into a crisis of federal government power and the presidential institution. The resolution of that crisis inexorably required a recovery of the federal government through a set of institutional, tax, fiscal, monetary and social measures based on the incorporation of human and social rights movements into the government's agenda. The recovery of presidential power depended on the emergence of a type of leadership that sought to take over the initiative and use political, economic and social resources. This leadership style reopened for discussion classical issues such as federalism and fiscal relations with the provinces; the relationship with the Congress in a scenario of approval of the executive power initiatives, supposedly without substantive debate; or the changes in the Supreme Court's composition at the beginning of the first post-crisis government (O'Donnell 2010):

These democracies by delegation are born of deep crises that naturally prompt the citizen's demand to reconstitute a strong enough power to extract the country from the crisis ... but later this policy is a victim of its success ... the leaders continue believing that what worked well in times of crisis, will work also in times of normality ...

Initially, the authorities and the measures that remove a society from a situation of deep crisis, by themselves, acquire legitimacy. Later, it is the organisational issues and the institutionalised practices generated in parallel with the exit from the crisis that make management and leadership styles endure. Emergency measures, the distribution of resources, the generation of new financial sources that later become essential and difficult to do without, the alliances with political and social stake-holders that now have accumulated power, all these constitute a new governmentality, a new way of leading society that becomes stronger at every step.

According to Fabbrini (2009: 23), modern democratic leadership must be considered in the context of government systems:

From this point of view, it is not considered in light of personal features, but in light of the function it fulfils in the formalised system of public authority.

Every function is made of a combination of opportunities and limitations. In a democracy, the exercise of leadership has an institutional nature.

The same author argues that *leaders* and *leadership* should not be confused with each other: The former refers to political actors; the latter denotes a power relationship that seeks to solve problems by activating a decision process. A pluralist society, divided by diverse interests, finds in a leader someone who can unify collective action on the basis of a set of material and symbolic decisions that ensure a feeling of belonging (Fabbrini 2009). That is why 'leader' and 'leadership' are words that imply each other: There are no leaders without leadership, nor is there leadership without leaders.

7 Conflict and legal norms

For O'Donnell, from a perspective concerned with the adoption of norms, it is necessary to put the emphasis on the conflict and on the traces that these relations of force and power leave in a normative system and its institutions. The legal structure, and especially the state apparatus, are shaped by that conflict and its moments of negotiation. When analysing the Argentinian case at this stage, O'Donnell (2008: 60) highlights the fluidity and instability of the different dominant political alliances:

This was a state recurrently devastated by changing coalitions of civil society. At its institutional level, the pendulums were like great tides that covered everything for a moment and, when they retreated, dragged pieces of that state with them.

The result was a state colonised by different alliances within civil society, lacking autonomy to develop policies.

From a broader perspective, D'Alessandro summarises that in O'Donnell we find four dimensions of the state: (a) the state is a set of hierarchical bureaucracies oriented towards efficiency; (b) the state is a legal system that claims to be effective; (c) the state is a focal point of collective identity (credibility); and (d) the state is a regulator of diverse borders of the territory, the market and the population in search of well-being (D'Alessandro & Ippolito-O'Donnell 2015).

Subsequently, O'Donnell addressed the intersection between political science and law. In his view, *politicising* definition or a regime-based definition only is a necessary but insufficient element in the definition of democracy (D'Alessandro & Ippolito-O'Donnell 2015).

For O'Donnell, the effectiveness of the rule of law entails certainty, on the one hand, and accountability, on the other. In this way it expands the classic definitions of the rule of law, reinforcing the indispensable legal system with a number of features that go beyond the authorised procedures for the passing of laws. It is a set of guaranteeing law enforcement and in particular an institutionalised accountability system ensuring that non-compliance by the authorities with the constitutional rights of the most disadvantaged sectors of the population does not go unpunished. According to O'Donnell (D'Alessandro & Ippolito-O'Donnell 2015: 66)

the rule of law should be considered the norms based on the legality of the democratic state. This requires assuming that there is a legal system, in essence, democratic in three ways: one, defends political liberties and the

guarantees of political freedoms; two, defends the civil rights of the entire population; and three, establish networks of responsibility and accountability.

8 Agency and citizenship

The concept of citizenship that O'Donnell aims to explore is the micro-foundation of the supremacy of the democratic rule of law. In this sense, the concept of citizenship is not passive but is based on personal autonomy and equality derived from citizens being legal subjects whose human rights are actively respected. However, in turn they are consecrated as an 'autonomous and responsible agency', with a particular relationship between the citizen and the state that is not as in other types of regimes. The concept of 'agency' – not traditionally used in law – is used by O'Donnell to structure a broad idea of citizenship integrating the notion of social anthropology and transferring them productively to political science and law. For jurists, citizenship refers to a subject of political and civil rights in a territorially-determined state. Two broad criteria were used to establish that connection: the *ius soli* – all those born in a given territory, mostly found in new states that have received large immigrant contingents – and the *ius sanguinis* – rights based on the nationality of the predecessors, mainly adopted in European countries – a concept that is in crisis at a time when the immigration issue begins to have a gravitational effect in that region of the world. Although the Argentine legislation adopts the first criterion, in principle for historical reasons, the Preamble of the Constitution establishes as part of the object and purpose of constitutional project 'to promote the general welfare and ensure the benefits of freedom, for us, for our posterity and for all the men of the world who want to inhabit the Argentine soil'. The correct interpretation of this sensitive paragraph illustrates that the concept of citizenship and enjoyment of rights is universal, setting a criterion of 'hospitality' to develop the personal project of each citizen with autonomy and open to the world (Corti 2008). The neo-constitutionalists try to solve this dilemma based on the Constitution and its human, political, social and cultural rights as the axis of the determination of citizenship: The principles, guidelines and norms of the Constitution are directly and universally applicable, extending citizenship, the enjoyment of rights and their guarantees. Regarding the legal dimension of the state, O'Donnell (2001: 69) argues that

democracy is not only a democratic regime, but a particular mode of relationship between state and citizens, and among citizens themselves, under a legal regime that, together with political citizenship, supports civil citizenship and a complete network of accountability.

For O'Donnell, democracy is the only political regime that allows for double accountability: a horizontal accountability – the mutual control of governmental bodies over the legitimacy of their actions; and vertical accountability – what citizens and their organisations do when petitioning and controlling state public bodies.

O'Donnell defines 'citizen agency' as the capacity of every human being – with practical ability and moral discernment to decide in accordance to their situation and goals in their own view – to make political decisions (D'Alessandro 2015: 245). Sen's ideas (Sen 2001) on the understanding of

true capacities to exercise rights and carry out autonomous life projects beyond those formally recognised by the legal system for each individual subject to the law are relevant here. However, O'Donnell incorporates them into a complete system where democracy is the macro, the regime the meso and the citizen agency the micro, in a coherent whole.

Delving deeper into the concept of 'agency' from the vantage point of anthropology and political science, this term is also found in Giddens when he refers to agency as a power capable of transformation, which will be mediated by the resources available to each subject of the law, highlighting the asymmetry of relative power among members of a society. The anthropologist Ortner (2017) seeks to clarify the concept of agency in two fields of meaning: 'In a field, it is linked to the intentionality and the pursuit of culturally defined projects. In another field, the meaning has to do with power, with acting in a framework of social inequality, asymmetry and strength.' Latin American democracies are good examples of this since the citizen's personal autonomy to realise desires and projects are framed in realities of deep inequality where the pair 'domination-resistance' turn the 'orders' achieved by the transitory balance of power unstable. In this sense, Ortner (O'Donnell 2001: 72) points out that

if, on the one hand, poverty and inequality signal the long way to go for the attainment of civil citizenship (not to mention the achievement of societies that are more equal) ... the law suggests a point of hope and a broad strategy. The issue is that being the bearer of formal political and civil rights is, at least potentially, a sign of empowerment of individuals and associations'.

It is interesting how O'Donnell finds a productive path for the superficial challenges to democracy and formal rights based on his concept of 'democratisation', defined as the deepening of the democratic system, an objective that can always be perfected and its limits overcome in the sense of greater and better rights for all, especially for those at the margins of society. For O'Donnell (2001), following Ronald Dworkin, when we speak of law in earnest, we do not stop at mere formalities since the law is always 'a trump card' (Dworkin 1984: 37).

9 Tensions between citizenship and democracy

As maintained by Balibar, the concepts of democracy and citizenship are indissoluble concepts. However, in different historical situations, both concepts have been reformulated, advancing and receding by virtue of the greater or lesser possibility of participation of social actors in the political process. Every political regime seeks an 'order'; the extension of rights to the members of a community can make visible conflicts so that substantive portions of society have access to new rights. This is clear in conflicts over the economic distribution, but it is not as clear in conflicts relating to access to power.

The constitutional recognition of fundamental human rights represents a great advance for every society. However, we know of the difficulties for effective access to them in many of our countries. Balibar puts in the centre of this dialectic 'democracy-citizenship', 'exclusion-inclusion' of the access to those rights to the participation in the decisions and in economic distribution, that feature of the democratic republics to productively manage conflicts through institutional mechanisms. This author, in its

development, invokes Hannah Arendt and her idea of the ‘right to rights’, not as the act of instituting reciprocity on the basis of supposed equality, but as a possibility of actively expanding the sphere of equality, transgressing the imposed limits (Balibar 2013: 31).

Following the thread of Balibar, it is Machiavelli who recognises that the idea of conflict is always present in the republic as a condition of the possibility of a dynamic balance, but who also contends that the republic will allow for the administration of these conflicts. We know that Machiavelli studied the history bequeathed by Titus Livius, in the book cited at the beginning of this work, where the virtue of the republic consists in managing the changing social ‘humours’ through the laws.

Finally – from the reflections of Balibar (2013: 34) – a quote is provided by Claude Lefort on the continuous invention of democracy:

It is about conceiving the Charter of Fundamental Rights as the symbolic expression of a set of powers conquered by the people throughout its history, the totality of its movements of emancipation and the point of support of new inventions before the shell of an established order, that *a priori* the future struggles for freedom and equality.

10 Human development, human rights and citizenship

There is a point where, in order to be effective, the ideas of citizenship and human rights require other components that are often consigned to the background. One of these concepts is that of human development. Sen’s idea of linking human development with the capacities to effectively exercise citizenship and rights is particularly important because of the range of issues involved in terms of generating public policies and expected behaviour on the part of the authorities (Sen 2001).

These capabilities are required to operationalise personal autonomy and to choose between different alternatives valued by citizens in terms of the fulfilment of their life goals; and the opportunity of choosing the course of their own lives with autonomy, information and responsibility. In the 2000 Human Development Report, the United Nations Development Programme defined development as ‘the process of broadening people’s options, through the expansion of human operations and capacities’. These capacities at stake, in principle, are access to health, housing, education and information and a minimum income for the food security of the person and their family.

These objectives demand behaviour defined by the states and the implementation of aligned public policies. An important chapter will be determined by the use of public resources, tax systems that seek equity, and public budgets that tend to comply with the constitutional programmes of political and social human rights to strengthen the capacities of citizens.

11 Latin American neo-constitutionalism

Latin American legal thinking has been influenced by a vigorous trend during the last few years, the so-called ‘neo-constitutionalism’. In light of its European and Latin American variants, its main features, as indicated

by Corti (2010), may be summarised as follows: (a) examining relevant legal practices and not only legal formal aspects; (b) considering the interpretation of legal texts not in neutral or purely descriptive terms but in their social, political and creative dimensions; and (c) enhancing the process of constitutionalisation of the law. The last concept is particularly relevant to our discussion. According to Guastini, the constitutionalisation of the legal system involves a process of transformation with an outcome that is totally impregnated by constitutional rules. Once human, political, social, economic and cultural rights have been defined, agreed and accepted, the task is to ensure the realisation of these rights and make them applicable. In his view, a constitutionalised legal system is characterised by an extremely invasive, intrusive constitution, capable of conditioning the legislation, as well as the jurisprudence and the doctrinal style, the action of political actors, and social relations (Guastini 2005).

The constitution, as a broad consensus agreement by strategic political stakeholders at a specific historical moment, is an action plan that moves from law towards political, social and economic relations. In order to fulfil this plan, a number of conditions must be met: (a) a rigid constitution; (b) jurisdictional guarantee of the Constitution; (c) the binding nature of the legal provisions in the Constitution; (d) the interpretation of constitutional norms as general principles; (e) the direct application of constitutional norms, beyond their regulation through other norms of inferior hierarchy; and (f) the exercise of substantive control of the law that limits legislative discretion (Corti 2010).

However, there is a need for a Latin American vision of neo-constitutionalism (Rodríguez Garavito 2011) accounting for the realities on the ground and the constitutional and jurisprudential production in the region, in light of the challenges posed by new political leadership in the region. Some examples for a new agenda are (a) structural inequality within our countries; (b) the legal acknowledgment of indigenous peoples, multiculturalism, land ownership and autonomous forms of organisation, with the Constitution of the Plurinational State of Bolivia as a prime example; (c) the issue of 'the rights of the land' in the Constitution of Ecuador; (d) the reception of the human rights treaties as a direct source of law in the Constitutions, as in the 1994 Argentine reform; (e) the incorporation of constitutional guarantees based on collective rights as in the 1991 Colombian Constitution; and (f) the role of judges and lawyers in dispensing justice.

12 Concluding observations

By definition, leadership cannot be exercised in isolation; it requires varied degrees of institutional validation. Authoritarian temptations are fenced in by the constitution of each state. In the case of Latin America, national constitutions have evolved from merely formal documents that could easily be set aside by military *coups* to become institutional safeguards. In Latin America, after the military dictatorships of the 1970s and 1980s, transitions to democracy were defined by consensus on allegiance to the constitution. Since the very start of the independence movement in the early nineteenth century, the creation of new states in the Latin American region was influenced by the ideals of the French Revolution and the republican ideas of the separation of powers. These agencies have their

own legitimacy, differentiated mandates and functions, and can exert a veto power over the others. This means that decisions are made in a political process that, in order to be legitimate, must involve the three branches of government.

A positive vision of democratic leadership requires active judicial power in the sense of expanding and protecting human, political, social and economic rights, ensuring access to justice for those in society who require more protection, and promoting equality as a virtue and feature of a democratic republic.

Enhancing democracy implies strengthening the state and each of the constitutional institutions that make up its power. Inwardly, the mechanisms of mutual control must work collaboratively and, outwardly, they must be independent from corporations, pressure and power groups that have a vertical control role but affect the popular will by operating in favour of their particular interests.

The challenge of the present times in Latin America is that of electing governments both capable of decision making and subject to the rule of law, while ensuring expansive access to rights for those historically excluded. Democratization can only be tangible for all on the basis of inclusion. Latin America's new constitutionalism has much to contribute to these challenges from a legal perspective that takes into account a political reading of our realities, with a pluralistic and dynamic interpretation of constitutions.

Fabbrini maintains that 'a democracy is solid if it ensures at the same time a double demand: the decision making and the control of who takes these decisions. In fact, a good democracy requires an effective leader, but also effective institutions to control it (Fabbrini 2009: 16).

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Sustainability of food systems: The role of legal and policy frameworks

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Abstract: *Food plays a critical role in human life for sustenance, nutrition, cultural expression and socio-economic development. It is, therefore, imperative that food production, processing and consumption systems are managed in a manner that ensures access to adequate, quality, safe and nutritious food for all for present and future generations. However, the world continues to struggle with different nutritional challenges such as undernutrition, overnutrition and malnutrition. It is essential that a system of food production, processing and consumption be adopted that effectively responds to these challenges in a comprehensive and holistic manner. This article elaborates on the food sustainability approach as an alternative to the prevailing conventional industrial approach to food production that has failed to end the world's nutritional challenge while, at the same time, adversely degrading the ecosystem. The food sustainability approach adopts a systems approach to the global nutritional challenge, addressing it in an integrated and holistic manner at all levels of the food chain to ensure that food production, processing and consumption be economical, socially just and environmentally viable in the short and long term. The article finds that legal and policy frameworks at the national and global level have played a critical role in the maintenance of the current conventional food systems that perpetuate hunger, inequality and destroy critical ecosystem services. It calls for the review and transformation of these legal and policy frameworks so as to create an integrated and holistic food systems framework for the management of the entire food chain to enhance the realisation of economic, social and environmental sustainability in the food system.*

Key words: *food; malnutrition; food systems; food sustainability; legal and policy frameworks*

1 Introduction

Food is a basic human need that is critical for human health, well-being and socio-economic development. In order to function physiologically and achieve their full potential, it has been stated that human beings daily need between 2 400 and 2 900 kilocalories of food (Helms 2004: 383). It is estimated that 55 per cent of this food energy requirement should be derived from carbohydrates; 35 per cent from lipids; and 10 per cent from

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proteins, with animal proteins contributing only half of the 10 per cent protein requirement (Helms 2004: 383). The current global production of food, estimated at 8,4 billion tons a year, therefore, is sufficient to adequately provide the required food calorie intake and nutrition to the estimated global population of 7,2 billion (FAO 2014: 6).

However, the current reality is that a large section of the human population continues to suffer from different forms of food deficiencies – overnutrition, undernutrition and malnutrition. It is estimated that 821 million people (one of every nine people globally) suffer from chronic undernutrition, with the prevalence at 14,3 per cent in low-income countries (FAO 2014: 9; FAO 2018: xii). Further, 22 per cent of children under five years (151 million) suffer from stunting, while 50 million are wasting and are at an increased risk of mortality (FAO 2018: xii). Micronutrient deficiencies – especially proteins, vitamins and minerals – afflict over one-third of the populations of low-income countries, with the estimation of over 2 billion people suffering from this form of malnutrition (Capone et al 2014: 17). The world is increasingly experiencing the phenomenon of overnutrition exemplified by overweight and obesity. According to WHO figures, in 2016 more than 1,9 billion adults (18 years and over) were overweight, with over 650 million of these being obese (WHO 2018; also see FAO 2018: xii that puts the figure at 672 million obese adults). In this period, 41 million children under the age of five years were overweight or obese, while 340 million children and adolescents (5-19 years of age) were overweight or obese (WHO 2018). The global food security situation is bound to become worse due to the expected 30 per cent increase in the global population to 9,3 billion by 2050; the continuing competition for scarce productive land; water and energy; as well as the adverse impact of climate change in all the processes of the food chain (Capone et al 2014: 13; FAO 2014: 6; Garnett et al 2016: 1). In this context, food production will be required to increase by 60 to 100 per cent to between 13,5 and 16,8 billion tons in order to feed the growing population and to account for dietary transition from a grain-based to an animal product-based diet occasioned by rising income levels in the world (FAO 2014: 8; Garnett et al 2016: 1).

Many questions are asked about how to address the current and future human nutritional requirements in the context of a growing global population and the ecosystem stresses that have been caused by current human activities, food production being key among them (Capone et al 2014: 13). The current conventional industrial approach to global food security advocates the increase in food production through the expansion of production areas, agricultural intensification and the use of nanotechnology and biotechnology; an approach that already has an adverse impact on nitrogen, hydrological and carbon cycles (Helms 2004: 383; Westley et al 2011: 762-765). This approach has come under heavy scrutiny due to its inability to effectively respond to global hunger and its adverse impact on biodiversity and ecosystem services that threatens future food production (Thompson & Scoones 2009: 1; Czarnezki 2011: 263-264).

Due to the challenges of this conventional industrial approach, alternative systems have been proposed, with food sustainability – or the development of sustainable food systems – being one of the systems. The basis of this approach is article 1 of the Rio Declaration that places human

beings at the centre of sustainable development and entitles them to a healthy and productive life in harmony with nature (UNCED 1992: article 1). Due to the importance of food to human health and socio-economic productivity in the short and long term as well as the finite nature of natural resources and their limited capacity to support life; it has been critical that a food system be developed that provides healthy and nutritious food for all while maintaining ecological services (Moldan et al 2012: 5-7). This has led to the proposal for an alternative sustainable food systems approach that is more economically viable in the long term as well as socially and environmentally just. Adopting a systems methodology that incorporates the entire food chain (activities, actors, roles and complex interactions), this approach looks at the economic, social and ecological/environmental aspects of the food system (Capone et al 2014: 14). It envisages a holistic and integrated management of all the processes of the food chain to enhance the achievement of food security and the realisation of the right to food for all (Thompson & Scoones 2009: 2).

This article, adopting a food systems approach, delves into an analysis of the place of legal and policy frameworks in creating sustainable food systems. After this introduction, it undertakes a comprehensive overview of the different dimensions of the global food security challenge that a sustainable food system must deal with in section 2. Section 3 expounds on the concept of sustainable food systems, defining sustainability, food systems and integrating these to enhance an understanding and appreciation of the food systems sustainability approach. Section 4 delves into an analysis of the place of law and policy in the design and development of sustainable food systems. Section 5 briefly concludes the article.

2 Dimensions of the food security challenge

The global challenge in the context of food security is how to adequately feed a growing population while ensuring the sustainable management of the environment, land, water, biodiversity and other critical production resources (Premanandh 2011: 2707). All actors in a food system will affect the sustainability of the food system. Therefore, efforts towards sustainability must encompass all the food system actors – producers/distributors, consumers and policy makers (Grunert 2011: 207; Goggins & Rau 2015: 2). These efforts may be categorised into three aspects: the production/supply efficiency dimension; the consumption/wastage dimension; and the governance dimension (Garnett et al 2016: 1; Capone et al 2014: 15).

2.1 Production/supply efficiency dimension

This dimension entails the transformation of food production and supply processes to improve unit efficiency of production and supply so as to ensure that the population has physical and economic access to enough of the right type of food to adequately meet their nutritional needs (Garnett 2013: 31). There is a dilemma in relation to production: the reality of an increasing population that requires increased food production (by 60 to 100 per cent by 2050), on the one hand, and the recognition that increased food production is having an adverse environmental and biodiversity impact that threatens the increased food production itself, on

the other (Moscatelli et al 2016: 106; Rasul 2016: 15-16; Roy & Chan 2012: 100; Johns & Sthapit 2004: 144). Global warming and the attendant climate change, which is bound to impact largely on the ability of low-income high-population countries to produce sufficient food for their populations, further compound this dilemma (Gonzalez 2011: 512;¹ Thompson et al 2010: 2720). As a result of these challenges, it is estimated that by 2050, crop yields will decline by 8 per cent in tropical areas – Africa and Asia – where the most food-insecure populations live (FAO 2014: 11). In this context, if the world is to ensure continuous production of adequate food to feed its growing population in a sustainable manner, a new system of food production that is in harmony with nature and judiciously uses ecosystem services to enhance production is required.

Effectively dealing with these food production challenges requires the adoption of sustainable food production and supply techniques that maximise efficiency of production and supply while prioritising conservation of the environment and biodiversity (Hamilton 1998: 425; Rao & Rodgers 2006: 441²). Some of the methods for sustainable intensification of agriculture are localised agro-ecological food systems (Johns & Sthapit 2004: 144-148; Thompson & Scoones 2009: 7; Czarnezki 2011: 266). These systems combine crop and livestock production with agro-forestry to enhance efficiency in land use, mitigate climate change, increase carbon sequestration, improve ecosystem services such as soil fertility and generate socio-ecological resilience (Gonzalez: 2011 513-514; Goggins & Rau 2015: 7;³ FAO 2014: 16⁴). The basis for localisation is the spatial specificity or ‘place-based’ challenges of agricultural production, which must be addressed at the local level to integrate local ecological, economic and community development (Marsden 2012: 139-140).

Localisation in itself, however, is not sufficient. There must be incontrovertible evidence that localised food systems are more sustainable, that is, are able to meet the sustainability goals of ecological integrity, social feasibility and economic viability. In response to this challenge, several indicators have been developed and utilised to determine the sustainability of localised food systems (Rao & Rodgers 2006: 439-447).

- 1 Gonzalez states that agriculture is the single largest source of greenhouse gas (GHG) emissions at approximately 32,2%. Direct agriculture contributes 13,5%; land use change related to agriculture produces 17,4%, while the rest is produced indirectly in the manufacture of agricultural inputs as well as in the use of fossil fuel-run farm machinery, in the processing and in transportation of food.
- 2 Rao and Rogers define sustainable agriculture as ‘a practice that meets current and long-term needs for food, fibre and other related needs of society while maximising net benefits through the conservation of resources to maintain other ecosystem services and functions, and long-term human development’. Sustainable agriculture is a critical part of sustainable food systems.
- 3 Goggins and Rau state that the essence of agro-ecology is the production of organic foods with limited use of chemical fertilisers, pesticides and antibiotics to avoid pollution and adverse human health impacts as well as the use of crop diversification and rotation so as to maintain biodiversity.
- 4 FAO states that mixed farming creates synergies, with crops providing fodder and feed for livestock and sequestering GHG emitted by livestock, while livestock produce manure that enhances crop productivity while reducing reliance on unsustainable chemical fertilisers. A combination with forestry further benefits the agricultural system due to the critical ecosystem services provided by forests, such as soil formation and conservation, nitrogen fixation, water purification and retention, biodiversity conservation and climate change mitigation as carbon sinks.

The measurability of the agro-ecological food systems in their contribution to sustainability has been demonstrated through the use of five indicators: productivity; stability; reliability; resilience; and adaptability (Rao & Rodgers 2006: 443). In this context, productivity entails the ability of the production system to profitably produce viable yields to bolster the livelihoods of farmers through increased total production and improved net farm income (Roy & Chan 2012: 106). Stability, derived from ecology, entails the continuous preservation of the natural resource base in the production process through an integrated land, soil fertility, water, nutrient and biodiversity management (Roy & Chan 2012: 108). Reliability is the ability of the system to retain a normal equilibrium when facing general perturbations while resilience is the ability of the system to recover from shocks and stresses. Lastly, adaptability is the flexibility of the system to transform in response to new conditions such as climate change while maintaining productivity (Rao & Rodgers 2006: 443). Localised agro-ecological food systems have been affirmed to meet these criteria of sustainability as they minimise greenhouse gas (GHG) emissions; promote agro-biodiversity; enhance carbon sequestration; rely on local inputs; strengthen rural economies; support the livelihoods of smallholder farmers; and has the potential to produce enough food to feed the current and future populations while conserving biodiversity (Gonzalez 2011: 493-494 & 516-517; Thompson & Scoones 2009: 7). They are also more energy efficient, using 50 to 70 per cent less energy as compared to conventional farming methods (Reisch et al 2013: 6). Marsden contends that 'local-scale food systems are more sustainable because they have "tight feedback loops" linking consumers, producers and ecological effects, which enable positive adaptive responses to negative effects' (Marsden 2012: 142-143). This is corroborated by Goggins and Rau who argue that

[s]ustainable food procurement typically involves purchasing local, organic and fairly traded products from at home and abroad. Local and regional food systems form a central part of the sustainable food narrative and have the potential to foster a more sustainable food system (Goggins & Rau 2015: 5).

Educational and policy efforts aimed at creating sustainable food systems in the production dimension should thus be directed at the adoption and development of localised agro-ecological production approaches as alternatives to the modernist industrial agricultural production approach that has adversely impacted on ecosystem services and failed to provide adequate food for all.

Law and policy have a role to play in this context, especially in creating the necessary regulatory standards for the adoption and implementation of these new approaches as well as the provision of incentives for their adoption by farmers and other actors in the food chain. Such regulatory standards must incorporate an integrated system for the management of the main food production resources such as land, water, seeds, environment, biodiversity and labour. Agricultural and food production and supply laws and policies must integrate the management of these production resources with the objective of balancing the livelihood needs of farmers *vis-à-vis* the consumer needs for healthy and affordable food items while protecting the environment and social fabric (Goggins & Rau 2015: 5; Schneider 2010: 947). Although production efficiency and affordability are key concerns of national food security, ecological and socio-economic sustainability requires that they be honestly balanced

against ecosystem services, food safety and human health, with the direct and indirect long-term human and animal health externalities being critical factors in the balancing (Hodas 1998: 18-19;⁵ Schneider 2010: 953). Production practices such as the heavy use of chemicals in crop production as well as the use of antibiotics and other growth hormones in animal production – even if effective in increasing the quantity of food items produced in the short-term and thus lowering prices – must be balanced with the long-term human health effects such as chemical residue in foods, human resistance to antibiotics and the heavy medical burden resulting from non-communicable diseases generated by unhealthy foods (Kirschenmann 2006: 3-5). If properly balanced taking into account all these factors, food production and supply processes have the capacity to ensure economic, social and ecological sustainability, as discussed more elaborately in section 3 below.

2.2 Consumption/wastage dimension

This dimension requires the transformation of consumption patterns and dietary preferences that determine food production and supply so as to ensure the availability of adequate food for all (Garnett 2013: 30; Capone et al 2014: 13). Consumers – through food choices, preferences and procurement – impact greatly on the type of food to be produced and the manner of its production (Goggins & Rau 2015: 4; Grunert 2011: 207). Due to population growth, globalisation, trade liberalisation, rapid urbanisation, a growing middle class, rising incomes and marketing, food preferences have changed – what is termed as nutrition transition (Capone et al 2014: 15-16; Kearney 2010: 2802-2804; Lang & Barling 2012: 319). This nutrition transition connotes a dietary change from simpler, traditional and locally-produced staple foods to the complex ‘Westernised/modern’ highly processed fatty, syrup-filled and sugary diets (Hawkes & Popkin 2015: 144; Reisch et al 2013: 4; Lang & Barling 2012: 319; Garnett 2013: 32; Johns & Sthapit 2004:145). It is predicted that this dietary transition will in the long term override population growth as the main driver of land, water and energy requirement for food production, thus leading to further biodiversity loss and environmental degradation (Capone et al 2014: 16).

There are different aspects of this nutrition transition. The first is a disconnect between producers and consumers, creating the phenomenon of ‘food from nowhere’ that has resulted in health-related challenges being experienced in most societies today (Czarnezki 2011: 279; Koc 2010: 38; Reisch et al 2013: 4). The ‘food from nowhere’ phenomenon has resulted in food being heavily processed and transported over long distances (between 1 500 and 2 000 miles) using fossil fuels (Kirschenmann 2006: 3; Reisch et al 2013: 2-3; Tai 2011: 10-11). The consequences of this phenomenon have been the loss of food nutrition content; the increased use of chemical preservatives that have an adverse impact on human health; increased GHG emissions that have led to climate change and have also created the problem of food dumping that has distorted national food markets in low-income countries driving smallholder farmers out of

5 Hodas argues that if ecosystem services were actually internalised in pricing decision-making, then the market would encourage sustainable use of resources in a manner that reduces total environmental costs to society.

agricultural production (Ackerman et al 2010: 865 & 867-868; Schneider 2010: 954). The net effect of this has been the reliance by low-income countries on the international food market for food security, a situation that is unsustainable due to the increasing food prices in the international food markets. In order to improve this situation, it is critical that agricultural law and policy prioritise the sustainable national production of diverse and healthy foods for local populations to enhance food security and ensure substantive national food self-reliance. This can be achieved through the adoption of the localised agro-ecological agricultural practices as recommended in section 2.1 above.

This nutrition transition is further symbolised by the consumption of more meat and dairy products, with the global meat consumption projected to double by 2050 (Herrero & Thornton 2013: 20878; Reisch et al 2013: 4). Income is the greatest contributor to this nutrition transition, and Helms (2004: 383) elaborates the transition on account of growing incomes as follows:

- low-income diets that rely on staple foods such as cereals, roots and tubers (consumes about 200kg of grain per person per year);
- initial minimal raise in income is used to satisfy demand for food, with increased consumption of starchy staples (consumes about 300kg of grains per person per year);
- further increase in income leads to a shift from coarse grains like barley and millet to more expensive cereals like wheat and maize (consumes about 400kg of grains per person per year);
- income increase of GDP/capita >\$500 leads to a shift to more luxurious foods such as vegetables, fruits and animal products that partly replaces cereals (consumes about 600kg of grain per person per year directly and indirectly);
- income increase of GDP/capita >\$1 000 leads to the greatest shift to animal products and other affluent foodstuffs like oil, beverages and sweets (consume about 800kg of grains per person per year directly and indirectly).

This indicates that the wealthier populations become, the more food they consume, meaning that more food has to be produced to satisfy the expanding appetite, especially for animal products. The nutrition transition has had, and will continue to have, high adverse environmental, ecological and biodiversity impacts as 70 per cent of agricultural land and a third of arable land is already taken up by livestock production (Herrero et al 2010: 823). An increased demand for meat and its products is expected to lead to a significant increase in livestock production, further contributing to deforestation and loss of biodiversity (Garnett 2013: 7; Lang & Barling 2012: 319; Reisch et al 2013: 7). It has been estimated that it takes between 7 and 10kg of cereals to produce 1kg of meat (Helms 2004: 385). It is further estimated that one hectare of land has the capacity to produce enough rice or potatoes to feed 19 to 22 people per annum, while the same area can produce only enough lamb or beef to feed one to two people per annum (Capone et al 2014: 16). This indicates that the pressure for livestock feed will increase cereal prices, thus depriving low-income populations' access to cereals that they rely on as food – increasing global hunger (Garnett 2013: 30 & 33). It has also been affirmed that farm animals contribute 31 per cent of GHG emissions that enhance global warming, a further indication of the adverse impact of meat and milk preference to the environment and biodiversity (Lang & Barling 2012: 319). Achieving sustainability of the food system thus requires the

transformation of this adverse nutrition transition back to more plant-based diets that conserve and preserve ecosystem services.

Apart from the adverse ecological, environmental and biodiversity impacts; nutrition transition also has deleterious consequences for human health (Kearney 2010: 2801; Johns & Sthapit 2004: 145). Kirschenmann elaborates this by stating that 'human health cannot be maintained apart from eating healthy nutritious food, which requires healthy soil, clean water, and healthy plants and animals. It's all connected' (Kirschenmann 2006: 1). The truism of this statement is clearly reflected in today's societies. A change in dietary preferences and consumption greater than energy requirements, consumption of unsafe foods filled with pathogens and toxic substances, and sedentary physical activity patterns have led to the increase in non-communicable chronic diseases such as obesity, diabetes, hypertension, stroke, hyperlipidemia, cancer and other cardiovascular diseases (Belahsen 2014: 385-386; Capone et al 2014: 16-17; Kearney 2010: 2805; Reisch et al 2013: 7-8). These diseases are bound to cause great socio-economic strain to families due to the high costs of medical management and the lack of an operational governmental support structure to cushion households from these medical costs (Belahsen 2014: 386; Kearney 2010: 2805). Prevention is thus the better method of dealing with these burgeoning human health crises, with food systems producing healthy and nutritious foods as well as plant-based diets being critical cogs in the prevention approach. A sustainable food system must take this into account and ensure that food processes prioritise human health and safety.

Another challenge to food security in the context of consumption is food wastage or loss that occurs in all stages and results from poorly-functioning food systems (Capone et al 2014: 18; Goggins & Rau 2015: 14). It is estimated that about 30 to 50 per cent of the food that is produced annually (1,3 to 2 billion tons of food) is wasted; leading to the loss of the substantial environmental and financial resources expended in their production and processing (Ackerman et al 2010: 873; Capone et al 2014: 18; FAO 2014: 9). Food wastage at consumption level can be addressed through efficient procurement/purchase, storage and usage practices, the redistribution of surpluses to charity, as well as the utilisation of food no longer fit for human consumption as animal feed or for energy production (Goggins & Rau 2015: 14).

Achieving food sustainability thus requires the transformation of these adverse consumption patterns, especially meat and dairy preferences as well as preference of highly-processed fat-heavy foods with extreme food distances (Garnett 2013: 33;⁶ Goggins & Rau 2015: 8; Helms 2004: 384). The reduction of adverse consumption through the transformation of animal product-based diets into more plant product-based diets as well as the reduction of food wastage has the capacity to generate better health outcomes as well as reduce environmental stresses of agricultural production and supply (Herrero & Thornton 2013: 20879; Heller & Keoleian 2003: 1035). This can be done through health and environmental education and awareness raising at all levels of society for behavioural change (food literacy) as well as through the adoption of facilitative legal and policy frameworks at the local and national levels (Czarnezki 2011:

6 Garnett states that by 2050 the consumption of meat and dairy products must reduce to around 20-40% of what it is today to ensure environmental sustainability.

266-267 & 279-280; Reisch et al 2013: 9-10; Westley et al 2011: 773-774). This is affirmed by Kearny who states the need for sustainable food policies that ensure the supply of micronutrient-rich staple foods without encouraging the consumption of energy-dense, micronutrient-poor foods (Kearney 2010: 2805). Czarnezki (2011: 266-267) elaborates on the need for this transformative legal change as follows:

Changing what we eat and the way we eat will require significant and intentional modifications in individual behaviour. While many individuals have the ability, interest and resources to modify behaviors independently of cultural norms and civic structure, such choices are unlikely to bring about *wider* transformative change unless diffused to a broader audience that has the power to effect change through the power of numbers. This is the role of law and public policy, to impact both structure and numbers and alleviate ground-level hindrances to building a new agricultural model.

This framework, therefore, must be coupled with effective institutional implementation mechanisms, as counter-transition of nutrition from animal product-based diets is bound to face opposing social and economic forces.

2.3 Governance dimension

This dimension requires the transformation of food system governance structures to improve efficiency and resilience of food systems as well as enhance equity and social justice in accessing food entitlements (Garnett 2013: 29 & 31; Garnett et al 2016: 1). This dimension sees world hunger and malnutrition as an outcome of unequal power relations between and among producers, suppliers and consumers across and within countries and communities (Garnett 2013: 34). On the basis of Sen's work, this aspect affirms that hunger is not a consequence of insufficient production and supply of food products, but results from the inability of poor households to economically access the available food due to poverty, inequality and destitution (Garnett 2013: 34-35). It thus aims to address the inequality by transforming global food systems to ensure fair and equitable trade between nations; greater food self-sufficiency within nations and communities; and the development of localised food systems and markets producing/supplying a diverse range of healthy and nutritious food items. The essence of this dimension is to eliminate food injustices and enhance food equity with a view to ameliorating poverty and inequality so as to effectively balance food-related excesses and insufficiencies – to effectively deal with all the three dimensions of malnutrition: overnutrition, undernutrition and micronutrient deficiencies (Garnett 2013: 31 & 35; Johns & Sthapit 2004: 145⁷).

The food governance dimension has become an avenue for struggle and solidarity in the quest for socio-economic and environmental justice, with demands for localised democratic governance of food systems as opposed to the current vertically integrated and consolidated modernist/industrial food system (Blay-Palmer 2010: 4-5). This call for the democratic transformation of food governance structures are reflected in the Food

7 They affirm that poverty, environmental degradation and biodiversity loss are intrinsically connected, requiring an integrated management approaches – coupling investment in rural and peri-urban livelihoods and infrastructure development with the sustainable management of food production resources.

Sovereignty and Slow Food Movements, which aim to regain local control of food production, exchange and consumption infrastructure, enhance fair trade in food products, and ensure the socio-economic sustainability of smallholder farmers and their families (Blay-Palmer 2010: 4-5). Legal and policy reforms are especially critical in the transformation of food governance structures to enhance equity and food justice, as discussed more elaborately in section 4 below.

The three dimensions discussed herein – production/supply, consumption/wastage and governance – must be addressed in developing sustainable food systems. This must be done comprehensively in an integrated and holistic manner to ensure the long-term provision of safe, healthy and nutritious food and fibre to the entire spectrum of society – basically the development of sustainable food systems (Heller & Keoleian 2003: 1008). But what does it mean to have sustainable food systems? This is the topic of discussion in section 3 below.

3 Sustainable food systems – Understanding the critical concepts and components

3.1 Understanding the concept of sustainability in the context of food systems

The World Commission on Environment and Development (WCED) brought the need for sustainable management of resources for development to the fore of international consciousness. The WCED report affirmed the ability of humanity to make development sustainable in a manner that meets the needs of the present generation without compromising the ability of future generations to meet their own socio-economic and developmental needs (WCED 1992: para 27).

Sustainability is a compound concept devoid of any single all-encompassing definition. It encompasses social principles (social justice, eradication of poverty/inequality, positive health outcomes and inter/intra-generational equity), economic concepts (socio-economic development and internalisation of the value of ecosystem services) and ecological imperatives (environmental integrity, preservation of biodiversity and socio-ecological resilience) (Aiking & De Boer 2004: 359; Heller & Keoleian 2003: 1008). On this basis, sustainability can be broken down into three aspects – economic, social and ecological. Helms (2004: 381) elaborates on these different aspects of sustainability as follows:

Ecological sustainability requires that development is compatible with the maintenance of ecological processes: the throughput of natural resources is reduced to levels dictated by the earth's carrying capacity, the availability and renewable capacity of resources and the resilience of natural systems. Economic sustainability entails economically feasible development in which production and consumption should serve to enhance quality of life rather than degrade it. Social sustainability entails that development is socially acceptable and should cover the need for global equity: all countries should have equal access to the world's resources and equal responsibility for the management of these resources.

This broad conception of sustainability is critical in understanding and designing sustainable food systems, as the food chain is the single largest human activity with the most adverse impact on the environment and

ecology (Aiking & De Boer 2004: 360; Garnett 2013: 29-30⁸). This is due to its demand on the world's natural resources such as land, water, energy and biodiversity. Food sustainability thus requires the responsible use of these natural resources to ensure the availability, accessibility, acceptability, safety and adaptability of food for the present and future generations (Wognum et al 2011: 66).

3.2 Understanding the food systems approach to food sustainability

Food systems are complex adaptive systems that entail interactions of entities, resources and activities that affect food production, processing and consumption (Chase & Grubinger 2014: 1). They entail interactions between and within biogeophysical and human environments, human activities related to these interactions (production through to waste disposal) as well as the outcomes of these activities in their interaction with the biogeophysical environment (food and environmental security and socio-economic welfare) (Ericksen 2008: 234). The Zero Hunger Challenge Working Group (ZHC-WG) (2015: 1) has defined a food system as follows:

a system that embraces all the elements (environment, people, inputs, processes, infrastructure, institutions, markets and trade) and activities that relate to the production, processing, distribution and marketing, preparation and consumption of food and the outputs of these activities, including socio-economic and environmental outcomes.

The University of Vermont provides a more elaborate definition of food systems as

an interconnected web of activities, resources and people that extends across all domains involved in providing human nourishment and sustaining health, including production, processing, packaging, distribution, marketing, consumption and disposal of food. The organisation of food systems reflects and responds to social, cultural, political, economic, health and environmental conditions and can be identified at multiple scales, from a household kitchen to a city, county, state or nation (Grubinger et al 2010: 2).

Due to the complexities of the interactions in the food systems, a food systems approach demands that these interactions be understood holistically as encompassing social,⁹ economic¹⁰ and environmental¹¹ dimensions. Chase and Grubinger elaborate these interactions in figure 1 below.

- 8 Garnett affirms that the global food system in its entire value chain contributes significantly to GHG emissions (agriculture contributes 30% of the total GHG emissions in the world), to biodiversity loss (agriculture-related deforestation is the main cause of biodiversity loss worldwide), to depletion of water resources (agriculture contributes to 70-80% of human water abstraction, which is unsustainable in the long run) and to pollution (agricultural use of inorganic fertilizers, pesticides, herbicides have adverse impact on soil health and quality and leads to water pollution with adverse consequences to aquatic ecosystems and marine life).
- 9 Focuses on the impact of the food system to human health, well-being and culture – how the food system impacts on culinary, dietary and cultural preferences to ensure healthy, nutritious and culturally acceptable food while eradicating poverty and inequality.
- 10 Focuses on the food value chain of production, processing and distribution – how much food is produced, how much is sold and to which markets.
- 11 Focuses on interactions between the food system and the environment, the impact it has on the ecosystem as well as the ecosystem services it provides.

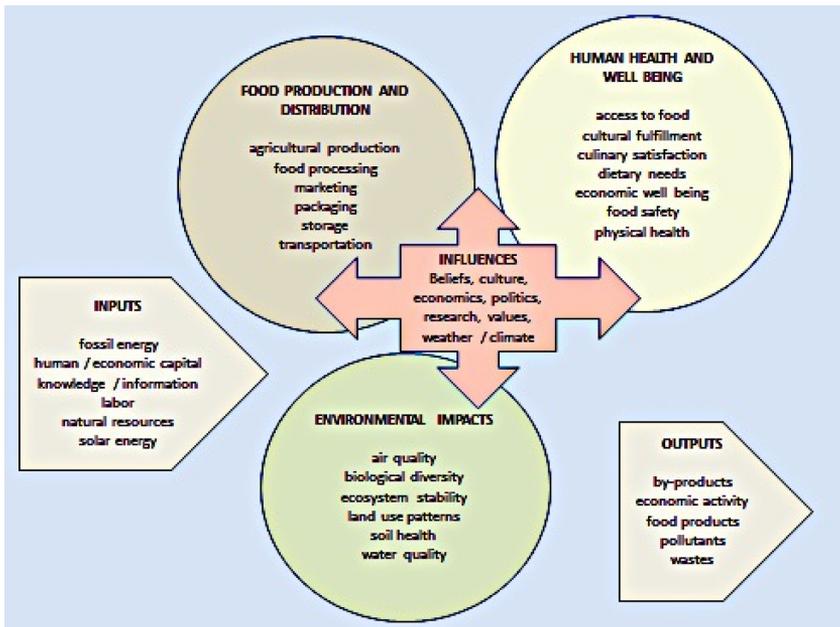


Figure 1: Source - Chase & Grubinger 2014: 3.

Therefore, in order to transform the food systems to enhance their sustainability, it is critical that a holistic, multi-dimensional and integrated approach is adopted at all levels of the food system – the food systems approach (Marsden & Morley 2014: 3).

3.3 Sustainability and food systems – Integrating the concepts for the achievement of sustainable food systems

Agriculture utilises 40 per cent of the earth's surface, shaping ecosystems, habitats and landscapes (Darnhofer et al 2010: 186). It is critical in the provision of food and fibre for human and animal survival, but can also have negative ecological and environmental externalities such as environmental degradation, loss of biodiversity, water pollution and land degradation (Darnhofer et al 2010: 186). The production, supply and consumption of food in a manner that maintains biodiversity and ecosystem services as well as integrates human and environmental health thus is one of the greatest challenges facing the world today.

The above challenge is reflected in the modernist/industrial food system that is mainly focused on the production of more food as the answer to world hunger (agricultural expansion, intensification and use of biotechnology), without the integration of the other components of the food system (Lang & Barling 2012: 314-315 & 319). Lang and Barling (2012: 315) state the dominant policy thinking underpinning the modernist food system as follows:

This proposed that a combination of science and technology, plus capital investment, would enable food production to increase and, if accompanied by better distribution and reduced waste (itself alterable by management, science and technology), this would bring down food prices and enable improved access and affordability. This approach had been championed by the FAO from its inception and would be delivered by raising production via an incremental combination of better management of land, agriculture, technology, requisite investment and aids to efficiency. This productionist policy paradigm was forged by liberal and humanitarian belief that human effort could keep the Malthusian problem at bay: More people could be fed, food could be more affordable, population growth need not be a problem, and farmers could have better livelihoods.

This approach, however, is beset by the following challenges: It is focused on large-scale monoculture leading to biodiversity loss; it is highly energy and capital-intensive (fossil fuel reliance and marginalisation of smallholder farmers); and it entails vertical integration, global concentration and economic consolidation as reflected in the corporate capture of the global food systems (Schneider 2013: 2; University of Michigan 2009: 11; American Dietetic Association 2007: 9; Gupta 2004: 411; Feenstra 2002: 100). Further, despite increasing global food production, it has generated natural resource, environmental and biodiversity degradation; socio-economic emasculation of smallholder farmers; poor health outcomes leading to an explosion of non-communicable diseases; the spiritual and cultural disconnection of a people and their sources of food sustenance; and created a large population of global citizens unable to afford the available food (FAO 2014: 10-11 & 20; Feenstra 2002: 100; Moscatelli et al 2016: 104 & 106-107).

The above challenges have raised questions about the sustainability of the modernist food systems, and whether there are alternative modes of production/consumption that are environmentally sound, socio-economically viable, healthy, culturally and spiritually acceptable and have the ability to feed the growing global population while maintaining production resources for future generations (Feenstra 2002: 100; Marsden & Morley 2014: 1; Darnhofer et al 2010: 186-188; Lang & Barling 2012: 316). One of the alternatives that have come up to respond to the above challenge is the advocacy for the design and development of sustainable food systems.

The ZHC-WG defines sustainable food systems as ‘a food system that delivers food and nutrition security for all in such a way that the economic, social and environmental bases to generate food security and nutrition for future generations are not compromised’ (ZHC-WG 2015: 1). According to the ZHC-WG, sustainability has three dimensions – environmental/ecological, economic and social (ZHC-WG 2015: 1). The UK’s Sustainable Development Commission (UK-SDC) (2009: 10), on the other hand, argues that a genuinely sustainable food system is

where the core goal is to feed everyone sustainably, equitably and healthily; which addresses needs for availability, affordability and accessibility; which is diverse, ecologically sound and resilient; and which builds the capabilities and skills necessary for future generations.

A further elaboration on the definition of sustainable food systems is provided by ERA-Net SUSFOOD project who define it

as a food system that supports food security, makes optimal use of natural and human resources and respects biodiversity and ecosystems for present and future generations, is culturally acceptable and accessible, environmentally sound and economically fair and viable, and provides the consumer with nutritionally adequate, safe, healthy and affordable food (quoted in Capone et al 2014: 14).

It is thus clear from these definitions that a sustainable food system must be environmentally and ecologically sound,¹² socially acceptable¹³ and economically viable¹⁴ through its entire systems of production, processing, exchange and consumption (American Dietetic Association 2007: 16; ZHC-WG 2015: 1; Schneider 2013: 7).

Lang and Barling juxtapose the old modernist food system thinking and this new sustainability outlook to food systems as follows:

| Focus | 'Old' food security analysis | 'Emerging' sustainable food analysis |
|---------------------------------|--|--|
| Core concern | Under-production | Mismatch of production, consumption and policy |
| Route to food security | Produce more | Redesign food system for sustainability, defined by multiple criteria: social, environmental and economic |
| Analysis of 2007-08 food crisis | A sudden crisis caused by external shocks (eg banking and oil price crises) then exacerbated by national tariffs and export controls | A long-running failure coming to a head exposing new complex combination of factors straining an already stretched food system; a forewarning of a possible coming 'perfect storm' |
| Preferred action | Improved coordination amongst international food bodies; better information exchange on national production levels and food stocks | Begin long-term reorientation of food production, supply and consumption patterns better to align environment, health and inter- and intra-society inequalities; rebuild buffer stocks as safety net |
| Conception of Health | Malnutrition and hunger | A wide range of non-communicable diseases (NCDs), including malnutrition |
| Environmental concerns | Primarily on farm | Throughout food production, supply, consumption and waste management chain |

- 12 This requires the utilisation of inputs in a manner that conserves, regenerates and enhances natural resources, protects biodiversity and minimises negative environmental impacts.
- 13 This requires that food systems equitably respond to prevailing poverty and inequality in access to food and other production resources, ensure social justice to smallholder farmers and farm workers, enhance the production of safe, healthy and nutritious foods that are culturally acceptable and accessible to all, including future generations.
- 14 Economic viability requires that food systems provide livelihoods that support families through fair prices, good working conditions and fair national and international trade; contribute to economic development; and, is not concentrated in the hands of a few corporations.

| | | |
|-----------------------|---|---|
| Where waste lies | At farm and distribution | Throughout the system, particularly consumption |
| Consumer issues | Under-consumption | Over-, under- and mal-consumption |
| Energy focus | Land use for energy generation | Carbon emissions through food chains |
| Geographical hotspots | Low-income developing countries | Global (markets are distorted by high-income countries) |
| Economic approach | Generate efficient supply | Need to internalise full costs |
| Role of science | Agricultural Research and Development, mainly life sciences | Social as well as natural sciences covering the entirety of the food system |
| Locus of power | Mainly government but also commercial interests | Concerned about split between private governance (commerce) and government; international institutions and regimes; global governance |

Source: Lang and Barling (2012: 316-317).

It is clear from the above elaboration that a sustainable food systems approach looks at the entirety of the food system with the aim of its reformulation and re-orientation to better utilise natural and human resources at all levels to enhance sustainability. It recognises that if the challenges of undernutrition, overnutrition and micronutrient deficiencies are to be comprehensively and holistically tackled, a sustainable food system must effectively respond to the three challenges of food security – production/supply, consumption/wastage and governance – in an integrated manner. It calls for the internalisation of ecosystem costs in the pricing of food produce to ensure that costs to the environment and biodiversity are taken into account at all levels of production, supply and consumption so as to engender better ecosystem stewardship. It also calls for fair trade in agricultural produce so as to reform market distortions and bolster food entitlements for all sectors of global society, especially smallholder farmers and farm labourers. Lastly, it takes into account human health and well-being, affirming the responsibility of sustainable food systems to produce safe, healthy and nutritious food that is physically and economically accessible to all sectors of the society.

Chase and Grubinger in Figure 2 below elaborate the benefits to society in designing and developing sustainable food systems.



Figure 2: Benefits of sustainable food systems, Source: Chase and Grubinger 2014: 5

The food systems approach thus provides the necessary tools to respond to all the challenges of food security that have been elaborated in section 2 above, which is the production/supply, consumption/wastage and the governance dimensions. The next level of analysis is the place of law and policy in the design and development of sustainable food systems.

4 What is the role of law and policy in the development of sustainable food systems?

4.1 The global and national legal and policy challenges to sustainable food systems

The current conventional food system is a creature of the current international and national legal and policy frameworks, especially agricultural, land, water and trade laws and policies. These prevailing legal and policy positions have presented obstacles in the adoption and development of alternative more sustainable food systems (Westley et al 2011: 767). At the national level, this is reflected in the current disjointed frameworks for the management of the diverse production resources such as land, water, environment and biodiversity that would benefit from a more holistic, systemic and integrated management to enhance local production, food diversity and rural livelihoods. It is further exemplified

by policy failures to adopt a food systems approach that integrates the food system challenges of production, supply, exchange and consumption as critical components in the achievement of food security. Further, national and local urban planning laws, policies and regulations have prohibited urban agriculture that has the potential to supplement urban food consumption and ensure household access to diverse and fresh foods (Hamilton 2011: 12-13).

National laws and policies have also failed to integrate national health, food, nutrition and environmental policies, leading to food-induced health crises like the explosion of obesity and related cardiovascular and cancerous diseases (Reisch et al 2013: 2 & 7). Lastly, national trade policies that prioritise agricultural production of raw materials for export at the expense of food production for local consumption have also been detrimental to overall national food security (De Schutter 2011: 13-14; Gonzalez 2011: 503-504 & 507). This is due to the volatility of the world market for agricultural raw materials; agricultural market protectionism by developed countries; the increasing international food prices; and the declining balance of trade for agricultural commodities in relation to manufactured goods (De Schutter 2011: 10; Gonzalez 2011: 502 & 507; Thompson & Scoones 2009: 3). It is critical that states, especially developing countries, focus on food production for domestic consumption and empower smallholder farmers through increased public investment in agriculture to enhance national food self-reliance (De Schutter 2011: 13-14).

The transformation of these laws and policies is critical for the creation of the necessary framework for sustainable food systems. The basis for the transformation of these laws can be the international human rights framework that entrenches the rights to self-determination, food, water, health, human dignity, social justice and environmental rights (Gonzalez 2011: 517-518; Gonzalez 2006: 374 & 377). These rights are already entrenched in international human rights instruments ratified by many states,¹⁵ and have been affirmed in several soft law instruments adopted by states and further incorporated into national constitutions and legislation. The ratification and incorporation of these rights engender state obligations to respect, protect, promote and fulfill these rights. It has been affirmed that these rights are the primary responsibility of states, and that if there is conflict between them and any other state obligation, these rights reign supreme (De Schutter 2011: 2). Olivier de Schutter, the then UN Special Rapporteur on the Right to Food, stated this as follows (De Schutter 2011: 7):

Food security programmes should be assessed on their capacity to contribute to the realization of the right to food. Whether new policies distort markets should be a secondary consideration and accorded much less weight in political decision-making.

The transformation of national laws and policies to enhance the development of sustainable food systems that have the capacity to

15 Universal Declaration on Human Rights, art 25; International Covenant on Economic, Social and Cultural Rights (ICESCR), arts 1, 11, 12; Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), art 12(2); Convention on the Rights of the Child, arts 24(2) and 27(3); Convention on the Rights of Persons with Disability, arts 25 and 28, among others.

guarantee the realisation of the entrenched rights thus is a primary obligation of states. This is affirmed by article 2(1) as read with article 11(2)(a) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which requires states

to improve methods of production, conservation and distribution of food by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilisation of natural resources.

The legal and policy transformation for sustainable food systems guarantees the development of a system of production, exchange and consumption that achieves the most efficient utilisation of natural resources as required by ICESCR. States, therefore, as a priority must adopt these legal and policy reforms to ensure the development of sustainable food systems at the national level.

The other basis for the transformation of national laws and policies to develop sustainable food systems are the Sustainable Development Goals (SDGs) as reflected in the UN Agenda 2030 Framework. The SDGs have been embraced by almost all nations as the new paradigm for international development. Sustainable food production and consumption (SCP) – the core of sustainable food systems – has been recognised in the context of the SDGs as a critical policy agenda for addressing the current ecological crises, enhancing human well-being and achieving sustainable socio-economic development (Akenji & Bengsston 2014: 513-516). This is because SCP effectively integrates all the dimensions of sustainability (economic, social and environmental), requiring states to adopt a systems approach in responding to these dimensions – the very approach recommended in the development of sustainable food systems (Akenji & Bengsston 2014: 519 & 522). Therefore, in order to realise the SDGs, states must adopt legal and policy frameworks that adequately respond to the economic, social and cultural factors that facilitate and constrain food consumption and production patterns (Akenji & Bengsston 2014: 516). This will contribute to the effective realisation of the SDGs requiring states to reduce hunger, poverty and inequality; to enhance good health and well-being; to ensure responsible production and consumption; as well as to mitigate the impacts of climate change.

Hawkes and Popkin affirm the need for the transformation of the current conventional global food system in order to realise the SDGs, especially those targeting nutrition and nutrition-related non-communicable diseases (Hawkes & Popkin 2015: 144-145). They call for multiple actions at multiple levels to achieve the necessary transformation of the current food systems, a transformation that is only possible through inclusive and expansive legal and policy frameworks. As discussed in this article, the alternative system to the current conventional food system that is capable of achieving all the food-related components of the SDGs is the sustainable food systems. The commitment to the SDGs thus provides a critical basis for legal and policy reforms for the adoption and development of sustainable food systems at the national and local levels.

The framework of rights and obligations entrenched in the international human rights framework as well as the commitments in the SDGs provide states with the necessary legal and policy space to adopt transformative laws, policies and practices that enhance the development of sustainable food systems. However, despite these available frameworks, many states

continue to face challenges due to the lack of political will at the national level as well as the constrained policy space resulting from global agricultural, trade, economic, investment and intellectual property laws, policies and practices, as elaborated below.

Global agricultural laws and policies, focused exclusively on increasing production, have encouraged industrial agriculture that entails massive monoculture, fossil fuel-intensive heavy mechanisation and the use of synthetic fertilisers and pesticides for agricultural production (Gonzalez 2011: 495 & 505-506; Czarnecki 2011: 266). Although successful in increasing per capita food production outputs, these policies created challenges of poverty, equity and social justice as they benefited the affluent large commercial farmers to the detriment of poor smallholder farmers, especially those in developing countries (Gonzalez 2006: 359-361; Thompson & Scoones 2009: 5). It also created other challenges such as the loss of plant-genetic diversity, the pollution of water sources, land degradation, increased GHG emissions and the production of unhealthy or contaminated foods that have negatively impacted on human and animal health (Gonzalez 2011: 495-496 & 505-506; Thompson & Scoones 2009: 5). Despite these adverse impacts, these agricultural policies still enjoy wide support in the global scientific and policy arena, with efforts being put in place to launch 'a New Green Revolution for Africa' irrespective of the expected detrimental impact on biodiversity and ecological conservation (Thompson & Scoones 2009: 5).

International trade and economic laws, policies and agreements that champion trade liberalisation of developing countries' markets – coupled with agricultural production and export subsidisation policies and practices of developed nations – have encouraged the dumping of highly-processed, cheap and unhealthy foods on the world markets or in developing countries as food aid (De Schutter 2011: 4-14; Gonzalez 2006: 345-347 & 362-368; Thompson & Scoones 2009: 3). This has generated adverse market competition against unsubsidised smallholder farmers in developing countries, limiting production capabilities, reducing food self-sufficiency and encouraging overreliance on the international food market for national food security (Gonzalez 2011: 506-507). Further, international trade, economic, investment and intellectual property laws, policies and agreements that constrain national policy and regulatory space for purposes of enhancing trade and investment have encouraged vertical food chain integration and consolidation creating large monopolistic global food corporations (Ahmed 2006: 140-141 & 153-159; De Schutter 2011: 3; Gonzalez 2011: 493 & 509-510; Thompson & Scoones 2009: 3). The consolidation has generated political and economic power for these multinational food corporations and loosened their accountability to national governments and consumers (Swinburn et al 2015: 2; Reisch et al 2013: 11). Attempted reforms of trade policies at the World Trade Organisation (WTO) have generally failed to tackle the agricultural trade-distorting practices of these multinational corporations, with the effect that their quasi-monopoly powers in the global food system have derailed efforts to create sustainable food systems in the global south (Gonzalez 2011: 510). If the transformation of food systems to sustainability is to be realised, the growing influence in public policy making of these food conglomerations at the global and national level has to be curtailed and effective/enforceable accountability mechanisms

established to tame their adverse practices at the global and national levels (Swinburn et al 2015: 4).

Further, regional (European Union (EU)) and national (United States of America) trade-distorting energy policies that subsidise biofuel production (tax concessions, credits and direct support) have led to competition for land, water and other natural resources with food production, reducing available food and feed for human and animal consumption (Gonzalez 2011: 520-521; Thompson & Scoones 2009: 4). This competition has increased food prices while displacing smallholder farmers from their land due to international land grabs for biofuel production (FAO 2008: 3-4). Due to the integrated nature of the global food chain, these legal and policy frameworks impact directly and indirectly on, and determine the sustainability of, food systems at the national level. If sustainable food systems are to be developed at the national level, there is, therefore, an urgent need for the reformation and transformation of these global legal and policy frameworks in an inclusive, multidisciplinary and multi-sectoral manner to integrate the different processes of the food system to enhance food production, processing and consumption in an economic, social and environmentally sustainable manner (De Schutter 2011: 3).

4.2 Suggested national legal and policy reforms for sustainable food systems

As stated above, the development of sustainable food systems requires legal and policy reforms that adopt an integrated systems approach that is inclusive of all the role players in the food system. A systems approach in itself is not prescriptive as to the exact form and nature of legal and policy reforms that must be put in place to ensure sustainable food systems. This is due to the place-based nature of food systems as well as the incompleteness of knowledge and unpredictability of responses on food systems (Thompson & Scoones 2009: 2-3). The framework for the transformation of laws and policies for the development of sustainable food systems must thus be interdisciplinary and cross-sectional, ensuring the equal and inclusive participation of all the stakeholders in the food system (Thompson & Scoones 2009: 3 & 7).

The role of law and policy in the realisation of sustainable food systems, therefore, is the adoption of a reflexive, multidisciplinary and cross-sectoral dialogical framework of measurable integrated and holistic guiding standards that determine acceptable conduct and action in the food chain to achieve specific sustainability goals (Premanandh 2011: 2711; Westley et al 2011: 767). This can be done through the creation of facilitative legal and institutional frameworks that achieves the following:

- clearly defining the meaning, scope and goals to be achieved in the adoption of sustainable food practices (Hamilton 2011: 427);
- recognising the rights and responsibilities of different actors in the food systems (Hamilton 2011: 427-428); and
- providing incentives or subsidies for sustainable food practices as well as the provision of infrastructure and services to enhance sustainability (FAO 2014: 35; Westley et al 2011: 769).

If laws and policies are to create the necessary framework for sustainable food systems, they must adopt a food systems perspective that integrates and transforms the entire food value chain to enhance sustainability (Lang

& Barling 2012: 317). This would require that the legal framework interconnects the interrelated production sphere with its environmental, natural resources and ecosystem impacts; exchange sphere with its energy economic and socio-cultural impacts; and the consumption sphere with its public health and wastage impacts (Lang & Barling 2012: 317).

Transformative laws and policies, if integrated and holistic, can play a critical role in influencing the key determinants of sustainability so as to create the requisite enabling environment for sustainable food systems. They can create an incentive and reward system for the adoption of sustainable production, supply, exchange and consumption patterns, or develop regulation, taxes and subsidy regimes to enhance the sustainability of food systems, especially at the local and national levels (FAO 2014: 34; Herrero & Thornton 2013: 20880). The ZHC-WG (2015: 2) detail the potential for transformative laws and policies creating sustainable food systems as follows:

Policy measures for sustainable food systems should increase agricultural productivity and gender-sensitive agriculture production, enhance climate resilience, reduce greenhouse gas emissions from agriculture and related land use change, improve nutrition, strengthen value chains and improve market access.

In the food system processes of production, processing, exchange and consumption, the key determinants are land, water, environment, biodiversity, labour and trade. The management of these determinants must be based on a system-wide multi-dimensional and integrated approach at all the levels of the food system (Moscatelli et al 2016: 109-110; ZHC-WG 15: 2). This is to facilitate collaboration between all the sub-systems of the food system and to ensure that adopted sustainability programmes in the different sub-systems are compatible (FAO 2014: 34). For example, the creation of predictable land and water tenure systems through integrated land and water laws and policies have the capacity to increase investment in land and encourage the adoption of sustainable long-term agricultural practices that would increase agricultural productivity, enhance ecosystem and biodiversity conservation and improve household livelihoods (FAO 2014: 26). This is affirmed by the FAO as follows (FAO 2014: 30):

Promoting and improving people's ownership of the natural resources they need and use, through appropriate rights recognition and allocation policies, and their full participation in decisions on their management, will contribute to the efficient use, conservation and protection of natural resources.

Equitable integrated land and water tenure systems especially should enable access to land and water for prior marginalised groups such as women, who have the capacity to enhance agricultural production while conserving land, water, biodiversity and the environment (FAO 2014: 26).

Land and water integration laws and policies on their own cannot achieve the desired sustainability outcomes. Farms must be integrated with the markets through the adoption of fair trade policies that enable farmers to get fair prices for their products. Policy incentives such as 'local production for local consumption' or direct government procurement from smallholder farmers for school, hospital and prison feeding programmes can go a long way towards creating the necessary links between producers

and consumers. This would result in increased agricultural production and incomes as well as better health outcomes (FAO 2014: 27).

Law and policy should especially develop built-in resilience structures to cushion food system resources and participants from adverse shocks and stressors so as to enhance long-term sustainability (FAO 2014: 28). Some of the shocks and stressors, which may have an adverse impact on food systems, include climate variability, extreme weather, market volatility and political instability or civil strife. Taking into account these shocks and stressors, some of the resilience structures that can be built into laws and policies include mixed farming with a diversity of crops and livestock; the use of technology to create drought/pest/disease resistant varieties and breeds; climate change adaptation measures; social safety nets; better exchange and consumption governance; as well as favourable or subsidised access to credit and insurance (FAO 2014: 28). The adoption of these laws and policies and their diverse but integrated mechanisms will require multi-disciplinary and cross-sectoral cooperation and participation by all stakeholders in the food system, a critical factor in the development of sustainable food systems.

5 Conclusion

Food plays a critical role in human life for sustenance, nutrition, cultural expression and socio-economic development. Despite the importance of food, many people in the world continue to face food-related challenges such as undernutrition, overnutrition and nutrient deficiencies. Adopting a holistic food systems approach, the food security challenges can be discerned in three dimensions: production/supply; consumption/wastage; and governance. Responding to these challenges and ensuring long-term availability, accessibility, acceptability and adaptability of food require that an alternative food system be adopted, with this article advocating the adoption of localised agro-ecological food systems that have been recognised as being sustainable in the long term. Adopting this approach requires the cooperation and active participation of all the stakeholders in the food system, with law and policy, as mechanisms for the ordering of society, playing a critical role in creating the necessary buy-in for the development of sustainable food systems. The article thus calls for the reformation and transformation of the legal and policy frameworks on the management of land, water, environment, biodiversity, labour and trade so as to create an integrated and holistic food system-wide framework for the management of the entire food chain to enhance the realisation of economic, social and environmental sustainability in the food system.

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Freedom of religion and the securitisation of religious identity: An analysis of proposals impacting on freedom of religion following terrorist attacks in Flanders

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Abstract: *This article develops an adapted, discourse theory-based framework of securitisation theory to assess possible violations of the human right to freedom of religion. The relevance of this framework is illustrated by the analysis of three political proposals that would limit freedom of religion, made in Flanders after the terrorist attacks of 22 March 2016: a change to the Constitution; the criminalisation of 'radicalism'; and a ban on the wearing of the burkini. While none of these proposals has subsequently been put in place, the article demonstrates how securitisation and identity constructions may impact on freedom of religion in illegitimate ways, while drawing attention to the possible effects of a particular construction of Flemish identity on the right of Muslim citizens to freedom of religion. After first outlining the securitisation theory and its original shortcomings – most notably the failure to take the discursive context and the role of identity constructions into account – the article links this theory to the human right to freedom of religion, through the limitation criterion of a 'legitimate aim' in article 9 of the European Convention on Human Rights. It is shown that a manifestation of religion has to be securitised, or constructed as a threat to a 'legitimate aim', in order to be limited. However, it is argued that there are different ways in which this securitisation can occur: First, a manifestation of religion can be securitised in its own right; or, second, on the basis of an interpretation of the religion it belongs to. Embracing the insights of discourse theory, it is argued that both are related to identity constructions and the threats that ensue from clashing identities. The second instance, it is argued, constitutes a violation of the human right to freedom of religion. This insight is subsequently applied to the three proposals, demonstrating the relevance of the theory and its practical implications. All proposals, it is shown, ensue from a wider construction of 'Islam' as a 'threat' – the result of a Flemish identity construct that regards Muslims and Islam as the 'other'. It is this construction that has given rise to the three proposals that aim to securitise manifestations of Islam. This identity construct, it is concluded, therefore is not compatible with freedom of religion for Muslims, and alternatives should be supported.*

Key words: *securitisation; freedom of religion; legitimate aim; Islam; identity; discourse, European Convention on Human Rights*

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1 Introduction

On 22 March 2016, two terrorist attacks were carried out in Brussels, Belgium. In almost simultaneous explosions at the national airport and a central underground station, 32 people were killed when three perpetrators committed suicide attacks (Heylen & Huyghebaert 2016). It soon became clear that the three considered themselves soldiers of the Islamic State, the same movement that had earlier claimed the deadly attacks of November 2015 in Paris (Huyghebaert & Willems 2016).

Shortly after the attacks, Belgian politics reacted in an expected, forceful way. However, along much criticised new measures, giving the government more powers to arrest those who encourage terrorism, keep suspects in temporary custody for longer periods (Amnesty International 2016) and extensive data-retention laws (Human Rights Watch 2016), politics also turned its focus to religion. Within a span of less than six months, the Belgian Constitution and the role of religion in it came under review; a proposal to criminalise 'radicalism' was advanced; and an attempt was made to ban the *burkini*, a swimsuit worn by Muslim women.

The aim of this article is to approach these proposals from the perspective of a newly-elaborated version of securitisation theory, applied specifically to the right to freedom of religion. While none of these proposals has been implemented, their analysis illustrates the relevance of securitisation theory to the right to freedom of religion. Additionally, the analysis demonstrates the relevance of these proposals as an expression of identity constructions in their particular historical context, with problematic implications for the right to freedom of religion of Muslim citizens in Flanders.

In order to demonstrate this, first, the specific framework of securitisation theory adhered to in this study is elaborated. Building on the scholarship of Stritzel, McDonald and McSweeney, and incorporating aspects of Laclau and Mouffe's discourse theory, it is argued that the original 'Copenhagen school' framework of securitisation theory is defective in two ways: The importance of the discursive context and identity constructions for making possible *securitising moves* is neglected; and the emphasis on the 'extraordinary' nature of *securitising moves* is too strict. Taking this into account, it is revealed that securitisation is part of everyday politics, and closely related to clashing identity construction.

Having established this, the human right to freedom of religion is briefly expanded upon. According to the European Convention on Human Rights (European Convention), the right is qualified: Manifestations may be limited only when specific requirements are met. More specifically, limitations have to be prescribed by law, be necessary in a democratic society, and pursue a legitimate aim. The aims mentioned are the interests of public safety; the protection of public order, health or morals; and the protection of the rights and freedoms of others. Put another way, the right to manifest a religion or belief may be limited when a manifestation is considered a *threat* to public safety, to public order, health or morals, or the rights and freedoms of others. In terms of securitisation theory, this means that a manifestation has to be *securitised* for it to be limited.

This securitisation, however, can occur in different ways, and the way in which this securitisation happens should therefore be taken into

account – a matter that will be clarified with reference to the *Dahlab* case of the European Court of Human Rights (European Court). It will be argued that if a manifestation as such is considered a threat for reasons *external* to any specific religion, it possibly might legitimately be limited. Yet, if this is the case because of the meaning attributed to a manifestation, on grounds deemed *internal* to the religion, it is a manifestation of something that is the result, it will be argued, of a particular identity construction. This constitutes an undue interference with the right to freedom of religion, and thus a violation of this human right.

Based on this distinction, the case studies at hand are subsequently analysed, illustrating the relevance of the theory to the right to freedom of religion; and the problematic consequences a particular construction of Flemish identity may have for the right to freedom of religion for Muslim citizens.

2 Securitisation theory: Towards a consistent theory of discourse

The securitisation theory forced a paradigmatic breakthrough in the field of security studies by shattering the dogma of security and threat as objectively-existing facts. Writing in the early 1990s, Buzan and Waever proposed a radically different paradigm, thenceforth known as securitisation theory: the idea that security, instead of being an objective situation, is socially constructed.

It was, they claimed, ‘when an issue is presented as posing an existential threat to a designated referent object’ that securitisation happens, and (in)security is constructed. Constructing security in this way, is called a *securitising move*. It is through this move that, if successful, the use of extraordinary measures to handle the created threat could be justified (Buzan et al 1998: 21). Security, therefore, it was argued, involved the construction of *existential threats* to justify *extraordinary measures*, a process that takes place when a *securitising actor* describes a threat to a *referent object* in a *speech act*, and the *audience* accepts this as such (Buzan et al 1998: 36).

Theirs has ever since remained the basic framework of securitisation theory, also referred to as the Copenhagen School’s theory of securitisation. However, this theory has not been without its critics. Stritzel, McDonald and McSweeney are the most significant for this study. It is on the basis of their criticism, in combination with the insights offered by discourse theory, that an alternative version of securitisation theory will be elaborated in this article, one that makes the theory both more consistent and complete, and gives it an emancipatory facet that is lacking in the original version.

2.1 Discourse: From instrumentalism to constructivism

A first point of critique concerns the Copenhagen School’s use of the concept of discourse. According to Buzan and Waever, discourse is constructive of reality, as it is through discourse that security is constituted. However, they, problematically, appear to limit this construction to the conscious and instrumental acts of securitising actors: Only *they* can construct security, while the *audience* merely has a *receiving* role. Discourse is hence made to be a weapon in the hands of state elites.

It is, of course, true that *securitising actors* use language in a strategic way: They want to achieve something by using it. But what is missing in Buzan and Waever's thesis is the realisation that *securitising actors* strategise only because they, too, already have certain conceptions of reality that are equally constructed. Indeed, when it is acknowledged that discourse is constructive of reality, it should be acknowledged that *securitising actors* also live in such a constructed reality. This means that they do not construct threats out of mere political, instrumentalist reasons: They do so because they are embedded in discursive constructions that inform them. Securitisation analysis has to take into account this context, since it is this context that makes possible *securitising moves* (Stritzel 2012: 553; McDonald 2008: 573).

Acknowledging this has important consequences for the theory. First, it requires realising that *securitising moves* may not be the first step in securitising an issue. Rather, *securitising moves* are a reflection of perceived threats in society at large: They *reinforce* rather than *constitute* security by institutionalising it. As McDonald (2008: 580) notes, "securitisation" is often presented as shorthand for the construction of security', but exactly this difference should be clarified. We will, therefore, reserve the concept of securitisation for the (attempted) institutionalisation of already-existing threat perceptions.

Second, it has to be realised that these threats do not come out of the blue. People do not for no reason consider something to be a threat: They do so because threats are intimately linked to constructions of identity. Discourse theorists (Laclau & Mouffe 2001: 106-128; Torfing 2005: 14-15) have long argued that identity, like everything else, is discursively and relationally constructed: One is defined by what one is not. 'We' are defined in opposition to an 'other', and it is when discourses of identity collide (Jorgensen & Philips 2002: 48) that the 'other' becomes an enemy, and thus a threat. As Mouffe (2009: 7) points out, this happens 'when the others, who up to now had been considered as simply different, start to be perceived as putting into question our identity and threatening our existence', or in more palatable terms, 'we' can be defined as 'Flemish', based on certain characteristics, and opposed to others. It is when those defined as 'other' claim to be 'Flemish' as well, defining it in a different way, that they – and the things they do – become a threat to 'our' identity.

This, however, does not mean that within a given society we either have to be all the same and agree on everything, and if we do not, that we are each other's enemy: An 'other' can be accepted, and become part of an encompassing, higher identity. This happens when a common ground is found that can embrace difference. As Torfing (2005: 16) writes, there are 'political attempts to make antagonistic identities coexist within the same discursive space. Hence, the political construction of democratic "rules of the game" makes it possible for political actors to agree on institutionalised norms.'

'We' can thus define our identity on the basis of our common respect for democracy and human rights, while embracing the difference that this entails. The only 'threats' that will then arise are those that directly undermine these very 'rules of the game': attempts to neglect or abolish (aspects of) democracy or human rights. When such an inclusive identity does not exist, Mouffe (2009: 9) warns, a 'ground is laid for various forms of politics articulated around essentialist identities of nationalist, religious

or ethnic type and for the multiplication of confrontations over non-negotiable moral values’.

2.2 From extraordinariness to the ordinariness of security

Accepting this brings us to the second point of critique. If it is accepted that security is often only institutionalised through a *securitising move*, it has to be asked whether the ‘extraordinary’ nature of measures should still be considered a defining factor to be able to speak of securitisation.

Going against the Copenhagen School’s emphasis on extraordinariness, several scholars have indeed argued that securitisation often happens ‘below’ the level of exceptionality and through normal legal procedures (Stritzel 2012: 565; 2007: 367; Basaran 2008: 340) and it is the premise of this article that this indeed is the case. Securitisation therefore should not be conceptualised as something ‘above’ politics, but rather as embedded *within* politics. *Securitising actors* need not take recourse to emergency measures in their *securitising moves*: They can also make use of the normal legal procedures. McDonald (2008: 567) is therefore right to claim that ‘issues can become institutionalised as security issues or threats without dramatic moments of intervention’.

Taking these points seriously, we end up with a theory of securitisation that differs on important aspects from the original framework of the Copenhagen School: It has received an emancipatory goal through its link with identity, and is broadened to include the ‘normal’, ‘ordinary’ politics of security. A *securitising move* thus becomes more than a merely instrumental act: It is a reflection of society and its identity constructions, and aims to institutionalise the threat constructions that are already existing. *Securitisation analysis* therefore does not reveal how one actor constructs something as a threat – it goes deeper, and can lay bare existing threat constructions and their linked identity constructions, as a ‘retroduction’ can be made from ‘empirical manifestations of discourse to its structures’ (Laffey & Weldes 2004: 28), opening those up for emancipatory critique, an aspect that is lacking in the original formulation.

It is this framework that will be applied to the case studies at hand, after a brief elaboration on the right to freedom of religion, a detour that is necessary in order to establish what would, and would not, constitute a violation of the right to freedom of religion, and adds a securitisation perspective to limitations of this human right.

3 Freedom of religion: Securitisation as a justification for limitations?

Codified as article 9 of the European Convention, the right to freedom of religion reads as follows:

- 1 Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
- 2 Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Much like articles 8, 10 and 11 that precede and follow it, the right to freedom of religion, therefore, is a qualified right: it can lawfully be limited in specific circumstances. Yet this is not the case for all its aspects: Only the freedom to manifest one's religion or beliefs – the so-called *forum externum* – may be limited, and solely when all conditions enumerated in sub-section 2 are complied with. Any limitation on the right to freedom of religion, therefore, must be prescribed by law, serve a legitimate aim, and be necessary in a democratic society – the mentioned legitimate aims being the interests of public safety, the protection of public order, health or morals, and the protection of the rights and freedoms of others.

Interestingly, however, when the requirement of a legitimate aim is looked at through the lens of securitisation theory, it becomes apparent that in order for a manifestation of religion or belief to be limited, a state has to consider this manifestation a *threat*: a threat to 'public safety', 'public order', 'health or morals', or 'the rights and freedoms of others'. A manifestation of religion or belief, in other words, has to be *securitised* in order for it to be limited: Securitisation, it is the premise of this article, is the *sine qua non* for limiting freedom of religion.

Manifestations of religion, admittedly, should be able to be limited in specific circumstances. However, the realisation that the threat required to limit it is constructed, like any other threat, necessitates that this threat construction is taken into account. Indeed, one may feel 'threatened' by a religious manifestation for different reasons, which can be related, or unrelated, to a specific religion, something which is made especially, and problematically, clear by the contentious case of *Dahlab v Switzerland* (ECtHR 2001).

This case concerned a ban on the headscarf worn by Ms Dahlab, a teacher at a primary school, thereby constituting a limitation on her right to manifest a religion. This limitation was allowed because the headscarf was considered a 'threat' to the rights and freedoms of others, as it threatened their right to be educated in a neutral environment, and a 'threat' to public order, since it was argued that the presence of the headscarf might lead to conflict. The headscarf thus was securitised, and explaining *why* the headscarf was a threat, the Swiss government argued that it was a 'powerful religious symbol' which could interfere with pupils' beliefs, a symbol that moreover is 'hard to square with gender equality'. The European Court accepted this explanation but, I would argue, problematically so.

This is the case because what this Swiss explanation for citing the legitimate aims reveals is that the aim of the ban was not the headscarf itself, but the message it was deemed to represent. The piece of clothing that is the headscarf itself obviously did not in any way constitute a threat to the legitimate aims cited in the European Convention. The meaning it was attributed by the Swiss government, as 'powerful' and therefore possibly proselytising, and as opposed to gender equality, did.¹ In other words, the Swiss government *interpreted* a religion, Islam, and this interpretation made its manifestation a threat. That is an undue interference with the right to freedom of religion, since neither the

1 In the same case, the Swiss government claimed that a little cross was not a 'powerful' religious symbol.

government nor the court is qualified to interpret a religion, even less act on the basis of such interpretation. That would constitute an illegitimate interference with one's conscience which, as Nussbaum (2012: 65) argues, is the very basis for the right to freedom of religion.

What the *Dahlab* case, therefore, makes clear, is that it should not be sufficient that a manifestation is securitised to allow a limitation, because the required legitimate aims can be 'filled' with explanations that are illegitimate, and may be based on interpretations of religion. Before any legitimate aim can be cited, and accepted or refused, it has to be studied how the specific threat a religious manifestation is deemed to be, has come to be constructed – something that can be related to the mechanisms of threat and identity constructions pointed out earlier.

Indeed, as discourse theory argues, 'threats' result from clashing identity constructions. It was already pointed out that an 'other' could become a threat when it contested 'our' identity - and the way this relates to the 'threats' that manifestations of religion must be constructed as, can be explained by reference to two examples.

The first example is the following: Imagine a religion, religion X. This religion demands from its followers that they kill a person every day. In reaction to this, a state, say Belgium, forbids it. The manifestation, it claims, is a threat to public order, public safety, and the rights and freedoms of others. This might appear to have nothing to do with identity. However, a closer look reveals that it actually has. It is only because not all of us belong to religion X that we consider this killing a threat. The killing only becomes a threat because it has a different meaning to 'us', who have built our identity upon respect for human rights, including the right to life, and 'them', meanings that are not compatible.

Now consider the second example, concerning religion Y. This religion demands from its followers that they paint a second set of eyes on their faces. Some people take offence at this, since they feel that a religion that prescribes such things is bad and prescribes values they do not agree with. In the former example it was the manifestation as such that was considered threatening since it fell outside 'our' identity of human rights. In this example the manifestation is considered threatening because of the meaning attributed to the religion it belongs to. In this example, it is religion Y that is considered incompatible with 'our' values, and its manifestation therefore is not acceptable.

From the perspective of freedom of religion, the first example could arguably legitimately be limited: 'We' did not hold anything against religion X, but they excluded themselves from 'us' through the killings. Yet, in the second example, the manifestation was considered a threat because people had passed a value judgment on a religion, on the basis of their own interpretation of it. The 'other' had become a 'threat' as a whole. It was because 'we' did not want 'their' values among us that the manifestation became a threat. Such a limitation is unacceptable from the perspective of freedom of religion: It is only for believers to say what a particular manifestation means. Even if it were to be obvious that contestable values are expressed through it, freedom of religion allows people to adhere to these: Freedom of religion is not solely freedom of 'acceptable' religion.

Therefore, there are two mechanisms of threat constructions – one that is acceptable, and one that is not. It is this mechanism that has to be carefully considered every time a proposal to limit a religious manifestation is made. This insight will now be applied to the case studies at hand, illustrating the theory and its usefulness to assess limitations on the human right to freedom of religion, and their link with identity constructions – in this case, constructions of Flemish identity.

4 Flanders post-22/3: Securitising Islam, violating freedom of religion

With the Brussels attacks carried out on 22 March 2016, it took Flemish politics less than six months to formulate three proposals explicitly targeting religion. In May the debate about a revision of the Constitution, which had slowly taken off already after the Paris attacks in November, reached its peak. In July Flemish party N-VA proposed to criminalise radicalism as a form of collaboration, a proposal that was eventually shelved, but was relaunched in January 2017. In August the *burkini* was targeted by the same party, which proposed to ban it in all public places. These are the three proposals that will be analysed using the frameworks of freedom of religion and securitisation theory, as sketched above. More specifically, the debate surrounding each of these proposals will be discursively analysed, to reveal how the threats were constructed that these measures would respond to. By doing so, the analysis reveals which identity constructions made these threat constructions possible, opening them up for emancipatory critique.

4.1 The Constitution: A case of Islam-proofing?

After a few months of low-profile politics, the debate about revising the Belgian Constitution reached its peak in May 2016, when N-VA members Hendrik Vuye and Veerle Wauters brought forward their party's proposal to amend the Constitution. In a newspaper interview, they stated that they wanted to make only one simple change: adding a line that says that 'no one can put himself, on the ground of religious or philosophical motives, above the applicable rules of law, or limit the rights and freedoms of others' (Peeters & Van Horenbeek 2016).

This sentence is quite a conundrum, as its immediate meaning and purpose are not exactly clear. It is, of course, already the case that no one can put himself above the law. Religious exceptions from laws do exist, but those are also prescribed by the law itself: Slaughter without stunning, for example, is generally forbidden in Belgium, but an exception exists for religious slaughter – an exception the annulment of which was being debated in a simultaneous debate about this practice, and has in the meantime been passed by the relevant committee in parliament.

The unpleasant impression therefore is evoked that the purpose, or at least the effect, of such an amendment would be that no religious exemptions from the 'applicable rules of law' would be allowed any longer, which would amount to a frontal attack on the right to freedom of religion. Manifestations of religion that contradict the law would be banned. That would arguably not be much of a problem for the country's Christian majority, which has historically shaped the laws of the country.

However, a heavy burden would be imposed on those religious groups that are relatively new, and seek accommodation by a legal system that has been set up without taking their needs into account – in the case of Belgium, mostly Muslims, who started to migrate in large numbers to the country from the 1960s onwards. Such accommodation would become impossible, and any existing accommodation could be annulled by a simple majority decision.

What this addition would therefore amount to is giving the country's majority a trump card to abolish the right to manifest one's religion or belief for all non-majority religious groups, which would in itself be a flagrant violation of the right to freedom of religion in the European Convention which, contrarily to the proposed amendment, not only demands a law to limit manifestations, but also a legitimate aim and a pressing social need.

The proposed amendment therefore is problematic in and of itself. A further analysis of the arguments adduced to justify it further problematises it, since this makes it clear that the proposal results not from a general concern with the role of religion, but from the construction of Islam as a threat, and thus explicitly aims at restricting one specific religion because of the interpretation given to it.

Indeed, in the same interview, Vuye and Wauters argued: 'You see that today, there is a problem in Islam. A number of believers think that religious precepts stand above the law. Think, for example, about the *burkas*. That is not possible, and we have to be clear about that.'

While the proposed amendment did not on the face of it target any specific religion, this justification makes clear that one group in particular is being targeted, namely, Muslims. The amendment was meant to be a response to 'a problem in Islam', this problem being that some 'believers think that religious precepts stand above the law'. Muslims who aim to – and only aim to, not actually do – live according to religious precepts that are now not accommodated by Belgian law are thus securitised and constructed as a 'threat'. The only way to be a 'non-problematic Muslim' is to not ask for accommodation. The message is: Yes, you can be a Muslim. But no, you cannot have habits different from what 'we', the native majority of Flanders, decide.

This analysis is confirmed by interviews and opinion pieces written by Vuye and Wauters in the subsequent days, in which they explicitly state that the proposed change in the Constitution was a response to the terrorist attacks in Paris and Brussels, and that 'we can only live together in harmony if everyone knows our rules of the game, and accepts them' (Vuye and Wauters 2016a).

This link between the terror attacks and the presumed need to change the Constitution in the proposed way reveals that terrorism is seen as an extension, a result, of those who want to 'put themselves above the law'. Terrorism is the result of the perceived 'problem in Islam', and the way to prevent future terror is to make it clear to Muslims that they have to accept 'our' rules of the game.

A final opinion piece, published one week after the first interview, makes this point forcefully clear. In it Vuye and Wauters (2016b) write:

Let us be honest. This is not a juridical debate. It is a political debate. In our opinion, religion belongs in the private sphere. There is a place for religions in our secular society, on the condition that they adapt to our society. That is what we understand under 'not the state, but religions have to laicise'. Education institutions, care institutions, trade unions ... with a religious inspiration, that is all possible. But religions cannot put themselves above the law ... Our political choice is clear. What we do not accept, is a society in which fundamental values, such as equality between man and woman, are put aside because of religious and belief-related motives. For us no world with *burka's* in the street. Why not? French President Nicolas Sarkozy said it well in 2009: This is not how we, in our culture, see the dignity of the woman. That says it all.

The debate, it is recognised, is political. The authors want to make a point through it, and this is aimed at the securitisation of manifestations of Islam. There is a place for religion in 'our secular society', they say, on the condition that religions 'adapt to our society'. Yet the only religion mentioned, once again, is Islam: It is Muslims' religiosity that is targeted by the proposal. Muslims are welcome, but they have to become 'us' – they have to 'laicise', become secular Muslims to be accepted. They cannot 'put themselves above the law', that is, their religious customs will not be accommodated.

Interestingly, however, the examples the authors mention go beyond the 'law'. Indeed, the authors write that 'what we do not accept, is a society in which fundamental values, such as equality between man and woman, are put aside because of religious and belief-related motives'. This does not concern law: It concerns people's convictions, beliefs and religions – that is, those deemed to be of the Islamic kind, exemplified with reference to the *burka*.

This *burka* was indeed banned in Belgium, but not primarily because it was deemed contrary to the dignity of the woman, or to 'our' culture. The law banning the *burka* also banned all other 'clothing that hides the face entirely or to a large extent', and while arguments were made about 'living together' and gender equality, the main reason cited thus was public safety (Belga 2011). The authors thus recognise that this, in fact, was a façade: The *burka* had to be banned because it was contrary to 'our' values, and their proposal is to serve the same aim: banning religious manifestations that they perceive to be contrary to their values. It is this goal that the proposed change to the Constitution must serve: to make it clear that religious manifestations that are deemed to express values 'we' do not agree with are a problem, which cannot be tolerated in 'our' society, more specifically, 'Islamic' values.

The concerned proposal, which could (but not necessarily would) arguably impact on all religions in Belgium, thus aimed at the securitisation of manifestations of Islam. Islamic manifestations were specifically meant to be targeted, because of the interpretation given to Islam – a 'threat' to our identity – and not for reasons 'external' to this religion. The proposal instead is a response to outsiders' interpretations of its manifestations and the meaning attributed to them and, as such, it cannot comply with any legitimate aim.

4.2 Criminalising radicalism

With the debate about the Constitution temporarily subdued following a lack of agreement among political parties concerning the proposed amendment, July 2016 witnessed a new proposal that would impact on the right to freedom of religion: criminalising ‘collaboration’ with Islamic terrorism. After a hotly-debated summer, the proposal was shelved at the end of August, only to be relaunched in January 2017, in the form of an even more contentious proposal to all-out criminalise ‘radicalism’.

The starting shot for this proposal was given by Peter De Roover, federal parliamentary leader of the N-VA, in an opinion piece on 27 July 2016. Arguing that the terror attacks meant ‘we’ were at ‘war’, De Roover made the case to ‘fight’ the ‘enemy collaborators’, whom he identified as ‘radicalised people’ (De Roover 2016). ‘In times of war’, De Roover argued, ‘words are naturally part of the arsenal of enmities’, and it is the words of radicalised people that provide ‘an easy transition to violence and terror’. If, he asked rhetorically, ‘a free opinion disputes the basic principles of our society, is accepting it then an extreme form of tolerance, or indifference?’ A few sentences later on, he readily answered his own question with the dictum that ‘no-one respects societies that do not make themselves respected. There too lies a ground of explanation for the radicalisation of youth.’

The context in which this opinion piece was written leaves no doubt as to who the radicalised people mentioned are: They are Muslims. More specifically, they are not Muslims that openly promote terror or break the law but, more generally, Muslims who ‘dispute the basic principles of our society’.

Muslims that have a set of values that differ from ‘ours’ are thus readily designated as ‘collaborators’ of terrorists. ‘They’ have to be fought, as it is their radicalism that, if not acted against, will lead to violence and terror. Muslims in ‘our’ society have to adapt to ‘our’ values, and it is because we have not made it clear to the Muslim youth what ‘our’ values are that they follow the path set out by Islam and radicalise, and go on to commit terrorist attacks.

Further on in his piece De Roover attempts to mitigate the foreseeable accusation that he is targeting Muslims with his proposal, noting that ‘this is not against/pro religion, or one certain religion. That many Muslims function perfectly within our society, cannot be denied. But that from within this religious community, a discourse is spread today that fundamentally opposes the model we stand for, can of course also not be covered. Not even with the cloak of multicultural love.’

Yet exactly by making this distinction, De Roover further securitises Islam. First, he explicitly notes that the problem comes from *within* the Muslim community. It is therefore Islam as a whole that is responsible, or rather Islam as a religion – not other factors – that fuels terrorism. Second, he notes that Islam *can* function in our society, but only when Muslims entirely adapt to *our* values. ‘We’ can accept Muslims in ‘our’ society, but on one condition: that they shed any values that ‘we’ think are contrary to ‘ours’. If they do not do that, they are radical, and being radical equals supporting terrorism. Indeed, concluding his piece De Roover notes:

Whoever acts violently and/or promotes hatred, is punishable today already. We have to dare and have a debate about the extent to which words that lead to that, or to a radical rejection of our society, still fall inside the untouchable zone of freedom of expression. Collaborators with the enemy, who waylay our freedom and security, have to be fought, even if they limit themselves to words. Who neglects the basic rule, can only lose the war.

After much debate, the proposal was shelved at the end of August. However, in January 2017 De Roover tried his luck again, this time in an interview. Asked how he would define the crime of 'radicalism', he answered: 'A prominent and consistent glorification of a concrete phenomenon that threatens our society, our values. So radical Islam. Because you cannot deny that there is a clear link between radical Islam and Muslim terrorism' (Justaert 2017). He concluded:

Be not mistaken, those people that are receptive to the discourse of radical Islam can do more harm than their numbers make believe. Why would you wait until it is a significant group? If we do not dare to reject certain opinions, others will do it in our place. That would be a capital mistake.

One can barely imagine a more explicit statement than this one: 'Radical Islam', whatever that may be, is put on the same level as terrorism. Both threaten 'our society' and 'our values', and the only way to counter this threat is by criminalising radical Islam. If we do not do that, our society will be taken over by 'radicals'.

As in the case of the proposal to change the Constitution, there are two aspects to this proposal. The first is the proposal itself, and the second is its justification. As to the proposal, it is clear that in its current form, it would not pass the scrutiny of the European Court, especially since De Roover framed it in terms of freedom of expression: as the Court famously stated in *Handyside v UK* (ECtHR 1976: para 49), freedom of expression also applies to those opinions 'that offend, shock or disturb the state or any sector of the population'.

However, the proposal would also impact on freedom of religion, as it would make it a criminal offence to adhere to a religion that is deemed to be 'incompatible' with 'our society' and 'our values'. As far as the absolute *forum internum* of freedom of religion is concerned, any limitation would without any doubt constitute a violation, although it is unclear how a ban on 'radicalism' itself, as a form of thought, could be implemented. But the logical consequence of the proposal would be that manifestations of 'radical Islam' could be prohibited as well – and this too, would violate freedom of religion because of the justifications adduced.

Indeed, from these it appears that a prejudiced conception of Islam is what drives the proposal. It is Islam as a whole that is securitised, as a result of its perceived incompatibility with 'our' values. Muslims can only become part of 'our' society if they adapt to 'our' values. If they do not do so, they are 'radical', and on the road to terrorism.

It is therefore the construction of Islam as a 'threat', its interpretation by outsiders, that made possible this proposal – a proposal that would violate the right to freedom of religion, as such interpretation cannot comply with the requirement of a legitimate aim.

4.3 The *burkini*: Threatening ‘us’ by dress

With the political debate about ‘radicalism’ still running high, another matter burst into the newspapers in mid-August 2016. Following a ban on the *burkini* in several French cities, Flemish party N-VA proposed to ban the *burkini* everywhere in Flanders. The proposed ban would apply not only in swimming pools, but also on public beaches. This time, the proposal was launched by Nadia Sminate, an outspoken member of the Flemish Parliament. Talking to a newspaper, she argued:

We absolutely have to prevent that in Flanders, women walk around in a *burkini*. Not in swimming pools, nor on the beach. I do not believe that women, in the name of their belief, want to walk around on the beach in such a monstrosity. If you allow this, you also put women at the margin of society.

She continued: ‘We live in Flanders, and we make the rules. If we say that we have to draw borders and have our norms and values complied with, we have to also do it’ (El Mabrouk & Van Loo 2016).

Sminate’s proposal was soon endorsed by Belgian Secretary of State for Asylum and Migration, Theo Francken (N-VA), who stated that

the *burkini* is not a new fashion trend but a political struggle symbol for the oppression of the woman. Not every Muslim woman wears a *burkini*. Who does wear it, most often has conservative or even Salafist ideas. That is why it does not belong to a modern society such as ours. Mayors are free to introduce a ban (Bervoet & D’Hoore 2016).

Even Muslimas who would choose to wear it should therefore be prevented from doing so, he argued: ‘It might be that they grew up with it, and think such a *burkini* is normal. But we have, as a democracy, the right to say that *burkini*’s are not acceptable.’

More support for a ban came from N-VA *alderman* in Antwerp, Nabila Ait Daoud, who noted that ‘there is no one who believes that all those women wear the headscarf or *burkini* of their own free will’ (Justaert 2016) and N-VA president Bart de Wever, who deridingly stated that ‘in former times, a Muslima could only sit in a little tent on the beach. Now she can wear this little tent, and take it into the sea with her. We are making progress’ (Segers 2016).

Clearly, the proposal targeted only one type of religious dress: the *burkini*. According to Sminate, it had to be banned because it was forced upon women, and relegated them to the margins of society. She argued: ‘We cannot let something like that take place, because it constitutes an attack on “our norms and values”’. In her discourse, women wearing the *burkini* are therefore excluded from ‘our’ society; their presence has to be ‘prevented’. It is ‘us’, who live in Flanders, that make the rules, and whoever comes here, has to adapt.

Francken further noted that it was not just a matter of women being forced by others to wear the *burkini*. It was about the *burkini* itself, and the values it was deemed to express. As he explained, the *burkini* was ‘a political struggle symbol for the oppression of the woman’, an expression of ‘conservative or even Salafist ideas’, that does not ‘belong to a modern society such as ours’.

One could not possibly say it in a clearer way. What Francken made clear is that it was not the *burkini* as a piece of clothing itself, but the ideas behind it that were the problem. The *burkini* was deemed an expression of conservative and Salafist Islam, and this Islam did not belong in 'our' society. 'Ours' is a modern society that will not tolerate the – implied – backward Islam. Even if Muslim women would choose to wear the *burkini*, it is not acceptable, and that is because it is the expression of a religion that should not be given a place in 'our' society. 'Our democracy' has the right to decide so.

Clearly, therefore, the proposal to ban the *burkini* resulted directly from the construction of a 'threatening' Islam. The *burkini* need not be banned because the dress itself was a threat. It had to be banned because of the interpretation made of the religion it belongs to. 'Conservative' Islam, with its values that are different from ours, has no place in our society. It is a threat to 'our' norms and values, and has to be acted against. And 'we', the Flemish people, will decide about that.

Much like the other proposals, such a measure – the *securitisation* of the *burkini* – would clearly violate the right to freedom of religion. The façade of a general and neutrally-applicable law was not even reverted to in this instance. From the earliest moment it was clear that only one piece of religious clothing was targeted, and as the analysis of the justifications for such a ban made it clear, it was once again the 'threat' of Islam that fuelled it.

As in the case of the other proposals, this proposal too was eventually shelved as it was deemed to be 'not manageable juridically'. Yet, this did not stop the party from pursuing the aim of banning the *burkini*. Elaborating on the decision to abandon the proposal, N-VA president Bart de Wever noted that '[o]ur party unanimously rejects the *burkini* as a symbol of inequality of man and woman, even if you would choose to wear it yourself as a woman. We therefore support the ban that exists in most of the swimming pools in our cities and municipalities' (KST 2016). The message: We know that a general ban would be found to violate human rights. So mayors, go ahead and try to ban the *burkini* under the pretext of hygiene.

5 Conclusion

After first elaborating a new version of securitisation theory, and pointing out its usefulness to the analysis of the human right to freedom of religion, this article set out to demonstrate the usefulness of this theory through the analysis of three proposals that would impact the human right to freedom of religion in Flanders, Belgium. While none of the proposals has been implemented, the relevance of their analysis, apart from illustrating the usefulness of the theory, lies not only in their respective compatibility with the human right to freedom of religion, but also in the identity constructs that their analysis lays bare – identity constructs that could then be opened up for criticism if necessary.

Throughout the analysis of these three proposals, it is clear that each and every one aimed at securitising manifestations of only one religion: Islam. In turn, this resulted from the construction of the religion of Islam

as a threat to 'our' society and identity – a threat construction incompatible with the right to freedom of religion.

The proposal to change the Constitution, while on the face of it neutral, aimed at targeting the manifestations of only one religion: Islam. It was explicitly recognised that the proposal was a response to terrorism, which itself was considered to be the result of a problem inside 'Islam'. Manifestations expressing this religion, therefore, had to be outlawed.

The proposal concerning the criminalisation of 'radicalism' equally targeted one religion only. While in first instance it appeared to violate freedom of expression, its possible impact on the right to freedom of religion was pointed out: Not only would it outright violate the absolute *forum internum*, it would logically also limit the manifestations of this religion, on the basis of an essentialised interpretation of Islam.

In respect of the third proposal concerning a ban on the *burkini*, too, it was made apparent that the real issue was not the *burkini* itself, but the meaning attributed to it by politicians. It was not the piece of clothing that constituted a threat: It was the religion of which this piece of clothing was an expression.

All three proposals thus ensued from a larger construction of Islam as a threat, and the way they were devised reveals that this threat construction is part of a discourse that is widespread in Flemish society, the discourse of Flemish identity that is propagated by N-VA, the Flemish-nationalist party that is part of both the Flemish and the federal government in Belgium, and has for years been the largest party of Flanders. All the proposals emanated from this party, and it is the identity discourse that this party adheres to, which constructs Islam as a threat, and which fuels proposals such as those analysed in this article.

Indeed, throughout the different analyses it became clear that the Flemish identity construction underlying these proposals and episodes, which provides the conditions of possibility for the *securitising moves* analysed, is one which is based on what are considered 'our' norms and values, perceived to be different from those of 'Islam'. 'We', with our 'Western' values of the Enlightenment, are constructed in opposition to the values of the 'other', 'Islam'. Edward Saïd famously documented this process in his celebrated book *Orientalism*, in which he described orientalism as 'a style of thought based on an ontological and epistemological distinction between "the Orient" and (most of the time) "the Occident"' (Saïd 1979: 2). The 'West', Saïd argued, has throughout history been constructed in opposition to the 'East', and to 'Islam', the 'West' being superior to it in every way. This discourse, he showed, had shaped European imagination, and the practice of colonialism, throughout the ages.

With colonialism largely a practice of the past, the paradigmatic contemporary incarnation of Orientalism arguably is represented by Samuel Huntington's 'Clash of Civilisations' thesis, first formulated in his 1993 *Foreign Affairs* article. According to this thesis, Western civilisation is fundamentally different from the Islamic one, and they can never be compatible. There are 'fault lines' between them, and those at the Islamic side of this line are less likely, for example, to develop democracy. This fault line has repeatedly led to war over a period of 1 300 years, and it will

continue to do so. Islam, Huntington famously wrote, has 'bloody borders' (1993: 35).

It is, arguably, this discourse that N-VA has internalised, and has built its version of Flemish identity on. Being 'Flemish' is identified with adhering to 'Western values', and defined in opposition to 'incompatible' Islamic values. It is this construction that transforms Islam and Muslims into a 'threat' when they are no longer abroad, but living in Flanders itself, and lay claim to Flemish identity.

Indeed, the logical consequence of this Flemish identity construction, constructed in opposition to Islam and 'Islamic values', is that Muslims cannot normally become part of 'our' Flemish identity. Abiding by the law is not sufficient according to such construction. They cannot be Flemish as long as they adhere to the values that Flemish-ness is constructed and defined against.

Integration, therefore, is only possible if Muslims shed those values that are different, and the most visible way to do so is by not manifesting them. Manifestations of a religion that are deemed to be incompatible with our values, therefore, become a threat to 'our' society and 'our' identity – more specifically because those who adhere to it consider themselves 'Flemish' as well.

Indeed, it is because Muslims, who are deemed to have different values from 'Flemish people', lay claim to the Flemish identity that they are transformed from an 'other' into a 'threat'. A struggle is taking place between a nativist conception of Flemish identity and an inclusive one: What is 'Flemish' is being disputed. The former definition at the moment prevails, and the terrorist attacks have only strengthened it: Since they were carried out by people who identified as Muslims, they perfectly fitted into the discourse of Islam as incompatible with our society, and proved the point that if not acted against, Islam will destroy our society. It is this identity construction, reinforced by the terrorist attacks, that has led to repeated proposals, or *securitising moves*, that would limit freedom of religion, in particular that of Muslims.

Religious manifestations of Islam, therefore, are increasingly deemed incompatible with Flemish identity, and in order to safeguard Muslims' right to freedom of religion and, by extension, that of all other religious groups that would be impacted, it is imperative that an alternative discourse of identity is promoted, one that is truly based on pluralism, inclusiveness, and on the universalism of human rights. As pointed out by discourse theory, an inclusive identity that is based upon respect for democracy and human rights is possible. Building it is not an easy struggle, but it is an essential one.

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The development of Uganda's military justice system and the right to a fair trial: Old wine in new bottles?

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Abstract: *Justice demands that all organs and persons that exercise judicial power should adhere to the standards comprised in the right to a fair trial. In the last two decades, many countries have introduced reforms aimed at ensuring that the administration of justice through military tribunals conforms to these standards. In Uganda, the extent to which the country's successive military legal frameworks have been progressive in doing this is contestable. This article analyses the historical foundation and evolution of Uganda's military justice system with respect to the legal protection of the right to a fair trial. The analysis is largely based on desk review. The development of Uganda's military justice system may be categorised into five major stages: military justice during the colonial era (1895-1962); military justice in the immediate post-independence period (1962-1971); military justice in the Amin era (1971-1979); military justice under the NRA Codes of Conduct (1986-1992); and military justice under the 2005 Uganda Peoples' Defence Forces Act (2005 to date). Although compared to the colonial times, there have been some improvements, many of which are said to be or passed off as reforms in the area of protecting fair trial rights in the administration of justice by military courts and are superficial. Many reforms introduced especially after the 1964 Armed Forces Act are reminiscent of the early colonial times, during which time the administration of military justice hardly provided any strong guarantees for the protection and enjoyment of the right to a fair trial.*

Key words: *fair; justice; law; military; rights*

1 Introduction

The right to a fair trial is provided for in several international human rights instruments to which Uganda is party. Key among these is the International Covenant on Civil and Political Rights (ICCPR)¹ and the African Charter on Human and Peoples' Rights (African Charter).² In the

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1 Adopted 16 December 1966; GA Res 2200A (XXI) UN Doc A/6316 (entered into force 23 March 1976). Uganda acceded to the ICCPR on 21 June 1995.

2 Adopted 27 June 1981 (entered into force 21 October 1986). Uganda ratified the African Charter on 10 May 1986.

former, the right to a fair trial is provided for in article 14 and in the latter in article 7. As party to these treaties, in the absence of any reservations, Uganda is obligated to fulfil its obligations in good faith.

The right to a fair trial as provided for in article 14 of ICCPR and other international human rights instruments encompasses the following elements: the right to a fair and public hearing by a competent, independent and impartial tribunal; the presumption of innocence until proven guilty; the right to be promptly informed of the nature and cause of the charge; the right to adequate time and facilities for the preparation of one's defence; the right to communicate with counsel of one's own choice; the right to be tried without undue delay; the right to be tried in one's presence; and the right to defend oneself in person or through legal assistance of one's own choice. It also includes the right of the accused person to examine, or have examined, the witnesses testifying against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her; have the free assistance of an interpreter if he or she cannot understand or speak the language used in court; and not to be compelled to testify against him or herself or to confess guilt. Fair trial rights also include the right to have one's conviction and sentence reviewed by a higher tribunal, and the right against double jeopardy. Together, the guarantees provided for in article 14 of ICCPR constitute the minimum international human rights standards for ensuring a fair trial. These apply to military tribunals in full as they do to the ordinary courts (Human Rights Committee 2007; African Commission on Human and Peoples' Rights 2005).

Before the adoption and entry into force of ICCPR, the major international instrument that provided for the right to a fair trial was the Universal Declaration of Human Rights (Universal Declaration).³ In the Universal Declaration the right to a fair trial is provided for in articles 10 and 11. In totality, these provisions provide for the major elements of the right to a fair trial as provided for in ICCPR. They provide for equality before courts; the right to a fair and public hearing; the right to an independent and impartial tribunal; the presumption of innocence; and guarantees necessary for the preparation of one's defence when charged with a criminal offence. At the time of its adoption as a declaration, the Universal Declaration was not intended to be legally binding (Hannum 1995). As such, its value in protecting human rights, in general, and the right to a fair trial, in particular, was limited. It was for this reason that the international community in 1966 adopted ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR) to transform the rights provided for in the Universal Declaration into legally-binding rights.

This article analyses the legal protection of the right to a fair trial in the administration of Uganda's military justice over the years. For the most part it focuses on the legal instruments governing Uganda's military justice during the different periods. An analysis of the national legal instruments is made against the minimum international human rights standards

3 Adopted 10 December 1948 by the UN General Assembly Resolution 217(III). Prior to the Universal Declaration, the right to a fair trial existed as a rule of customary international law (Robinson 2009). Robinson points out that over the centuries little has changed regarding the major elements of the right to a fair trial.

summarised above. The article also analyses relevant case law where the records exist.⁴ The article is divided into eight sections. Section 1 is the introduction. In section 2 the protection of the right to a fair trial in Uganda's military justice system during the colonial times (1895-1962) is examined. Section 3 analyses the protection of the right to a fair trial in Uganda's military justice system during the immediate post-independence era (1962-1971). Section 4 highlights some of the major issues concerning the protection and enjoyment of the right to a fair trial in the administration of justice during the Amin era (1971-1979).⁵ Section 5 analyses the protection of the right to a fair trial under Museveni's National Resistance Army (NRA) Codes of Conduct (1986-1992). In section 6 some observations are made about the protection of the right to a fair trial under NRA Statute 1992 (later renamed 'UPDF Act 1992'). The analysis in this section is not done in any substantial detail because, for the most part, the provisions dealing with the right to a fair trial in NRA Statute 1992/UPDF Act 1992 essentially are the same as those contained in the UPDF Act 2005 which is analysed in section 7. Section 8 concludes the article.

At this stage some preliminary questions must be posed to guide the analysis that follows: What are the origins of Uganda's military justice system? To what extent, if at all, did Uganda's colonial military justice legislation protect human rights, in general, and the right to a fair trial, in particular? In relation to Uganda's colonial military justice legal frameworks, how has Uganda performed over the years, in terms of guaranteeing the legal protection and enjoyment of the right to a fair trial in the administration of justice through its military tribunals? The first two questions are addressed in the next section.

2 Uganda's military justice system and the right to a fair trial in the colonial era (1895-1962)

Uganda was declared a British Protectorate on 19 June 1894 (Kanyehamba 2002; Morris & Read 1996). In September 1895, the British Parliament passed the Uganda Rifles Ordinance which established the Uganda Rifles as a national army.⁶ The Uganda Rifles Ordinance 1895 was the first legal instrument to provide for the governance of Uganda's army as a national institution. Among other things it provided for the administration of military justice. The fact that the Uganda Rifles Ordinance and the immediate subsequent military legislations emanated from the British Parliament, it is tenable to argue that, in this sense, the origins of Uganda's military justice system were British. The other major legal instruments that governed Uganda's army and issues of military justice during the colonial era were the Uganda Military Force Ordinance 1899; the King's African

4 Unfortunately there are hardly any records of decided cases concerning the administration of military justice during the colonial era, the immediate post-independence period, Amin's era and the NRA Codes of Conduct epoch.

5 This article does not examine military justice and the right to a fair trial in the period 1979-1986 mainly because of a lack of credible information about this subject. The period 1979-1986 is when Uganda's political stability was at its worst. In only seven years, the country underwent a change of government five times.

6 Prior to this, each kingdom in Uganda had its own army. For an exposition of Uganda's pre-colonial armies, see Omara-Otunnu 1987.

Rifles Ordinance 1902; and the King's African Rifles Ordinance 1958 (Uganda Military Forces Ordinance 1958).⁷ Before analysing these military legal instruments, it is important to briefly examine whether Uganda's colonial constitutional order made any provision for the protection and enjoyment of the right to a fair trial in the administration of justice. Uganda's colonial constitutions essentially were the 1902 Uganda Order-in-Council and the 1920 Uganda Order-in-Council.⁸ Although these Constitutions contained provisions concerning the administration of justice,⁹ they never provided for the protection and enjoyment of the right to a fair trial in the administration of justice. For the most part, the colonial Constitutions were more concerned with vesting despotic powers and authority in the Colonial Governors/Commissioners to manage the Ugandan protectorate in a manner that served the colonial interests.¹⁰ To what extent then did Uganda's colonial laws protect the right to a fair trial in the administration of justice through military tribunals?

A critical analysis of Uganda's early colonial military ordinances hardly reveals any concern for human rights, in general, or the right to a fair trial, in particular. All that these Ordinances did was to vest dictatorial and arbitrary powers in the commandant, chief officers and commanding officers.¹¹ Contrary to the right to a fair trial that requires independence and impartiality in the adjudication of cases, these officers had the power to investigate, prosecute and pass judgment with respect to matters of military discipline and military offences. For instance, under section 26 of the Uganda Rifles Ordinance 1895, chief officers were given powers to inquire into and try any offence against military discipline committed by any native officer, under-officer and privates. Under the same provision, on conviction they had the power to impose sentences including imprisonment, with or without hard labour, fines, confinement to barracks and extra guards and piquets. In cases of aggravated or repeated offences, the commandant had the power to charge, investigate and convict any accused soldier and could impose sentences ranging from a reduction in rank, to imprisonment, hard labour, corporal punishment and dismissal from the force.¹²

The establishment of courts-martial did not make a significant difference as far as the protection and guaranteeing the enjoyment of the right to a fair trial is concerned.¹³ The law still gave dictatorial and

7 In 1962 the King's African Rifles Ordinance 1958 was renamed the Uganda Military Forces Ordinance 1958 by the Uganda Military Forces (Constitution and Miscellaneous Provisions) Ordinance 52 of 1962.

8 The 1902 Uganda Order-in-Council was the first colonial constitution of Uganda as a British protectorate. It formally established colonial rule in Uganda. The 1920 Uganda Order-in-Council revoked certain provisions in the 1902 Order-in-Council.

9 See eg secs 15-23 of the 1902 Uganda Order-in-Council and sec 8 of the 1920 Uganda Order-in-Council. These provisions essentially deal with the establishment of courts of justice, the laws to be applied by the courts of justice, and the powers of the colonial governor in the administration of justice.

10 For a detailed analysis of the 1902 and 1920 Uganda Orders-in-Council, see Kanyeihamba 2002.

11 According to sec 2 of the Uganda Rifles Ordinance 1895, the Commandant was the Officer in Chief Command of the Uganda Rifles. Chief officers were defined in the same provision to include wing officers and all officers above the rank of wing officer.

12 Secs 30-31.

13 Sec 43 of the King's African Rifles Ordinance 1902 established two courts-martial, namely, the general court-martial and the regimental court-martial.

arbitrary powers to the commanding officers. Under section 43 of the King's African Rifles Ordinance 1902, the power to convene courts-martial and to appoint members and presidents to these courts was vested in the commanding officers. The same law also granted the commanding officers the power to confirm the findings and sentences of courts-martial.¹⁴ It is significant to note that the commandant, chief officers and commanding officers were all appointed by the commissioner and were answerable to him.¹⁵ Therefore, they cannot generally be regarded as having been independent from the executive and the military command influence – a requirement that is fundamental for ensuring the independence of military courts.

Uganda's colonial military justice legal frameworks were also silent on many other aspects critical for the protection and enjoyment of the right to a fair trial. For instance, there was no requirement for military courts to be legally competent, nor was there any provision requiring their proceedings to be public. The issue here is not so much that Uganda's colonial military justice legal frameworks should have provided adequate guarantees for the protection of the right to a fair trial and other human rights as expected under contemporary human rights law. Rather, the concern is that much of the essence of the colonial military legislation continues to feature in the country's military laws. However, it is important to observe that military justice systems of the time, including those in Western countries, generally were arbitrary and tyrannical in nature. They were 'heavily disciplinarian and generally emphasised the iron hand of discipline over fairness, human rights and justice' (Sherman 1973). In Uganda's case, however, the arbitrariness of the military justice system could have been compounded by the ideology of racial supremacy. As Oloka-Onyango (1993) observes, this ideology refused to equate colonial subjects to other species of humankind, particularly *homo colonialis*.

Towards the end of the colonial era, the administration of justice through Uganda's military tribunals started improving especially in terms of providing guarantees to ensure fair trials. For example, under the Uganda Military Forces Ordinance 1958, an officer who convened courts-martial could not serve as a member of the same court.¹⁶ This Ordinance also granted an accused soldier the right, based on reasonable grounds, to object to any member of a court-martial, including the president.¹⁷ As a way of improving on the legal competence of courts-martial, provision was made for the appointment of judge advocates to advise courts-martial on issues of law and procedure.¹⁸ Most significant to note is that the 1985 Uganda Military Forces Ordinance provided for the right of appeal to a civilian court. Any person convicted by a court-martial could, with leave of the High Court, appeal to the High Court against their conviction.¹⁹ This development set in motion the process of 'civilianisation' of Uganda's

14 Secs 44(a) & (b).

15 According to sec 3 of the King's African Rifles Ordinance 1902, the commissioner was the head of the colonial government and Her Majesty Queen Victoria's representative in Uganda.

16 Sec 80(1).

17 Sec 82(1).

18 Sec 116.

19 Sec 112.

military justice, which is critical for ensuring the independence of military courts and their scrutiny to ensure that they do not abuse their powers.

Three major reasons could explain the positive reforms witnessed towards the end of the colonial era. First, the mission of the colonial government had largely been accomplished, and therefore it was no longer necessary to keep the tyrannical grip over the army, including in the area of military justice. Second, after World War II, Britain, like many other Western countries, started reforming its military justice system to make it more humane and fair (Sherman 1973). This process could also have had an impact on the reforms subsequently introduced in Uganda and other colonies. Third, the governance reforms that took place in Uganda's Legislative Council (LEGCO) from 1945 onwards could also have had a strong bearing on the progressive military justice reforms.²⁰ In 1945, Africans were for the first time admitted to the LEGCO.²¹ Three Africans representing Buganda, Bunyoro and Busoga were admitted to the LEGCO in 1945, but by 1958 African representation had grown to 12. Originally, Uganda's LEGCO was a preserve of Europeans. It was composed of seven Europeans with the colonial governor serving as its president. It is probable that the African members of LEGCO humanised what would otherwise have been tyrannical military justice legislation.

In summary, Uganda's military justice laws enacted during the colonial times were less concerned with the protection and enjoyment of the right to a fair trial, in particular, and human rights, in general. However, towards the end of colonialism the country's military laws started providing for some guarantees for the protection and enjoyment of the right to a fair trial in the administration of military justice. The next section analyses the legal protection of the right to a fair trial in the administration of military justice in the immediate post-independence era.

3 Right to a fair trial in Uganda's military justice during the immediate post-independence era (1962-1971)

The attainment of Uganda's independence in October 1962 marked an important era in the protection of human rights in the country, at least insofar as their recognition in the country's legal framework was concerned. Chapter III of Uganda's Independence Constitution contained extensive provisions for the protection of individual rights and freedoms.²² The right to a fair trial was provided for in section 24. In its totality, section 24 of the Ugandan Independence Constitution provided for the right to a fair trial in similar terms as stipulated in ICCPR.²³ The 1966 and 1967 Constitutions also comprehensively provided for the right to a fair trial as their 1962 predecessor did. In fact, sections 24 and 15 of the 1966 and 1967 Constitutions, which provided for the right to a fair trial

20 Uganda's LEGCO was established by the 1920 Order-in-Council. Sec 8 of this Order-in-Council gave the LEGCO the power and authority to make laws, constitute courts, make rules for the administration of justice, and to make provisions for peace, order and good governance of Uganda as a British protectorate.

21 For a brief history of Uganda's LEGCO, see Okello 2015.

22 This Constitution was attached as a schedule to the Uganda (Independence) Order-in-Council, 1962, passed by the Imperial Parliament on 2 October 1962.

23 The right to a fair trial as stipulated in the ICCPR is summarised in sec 1 of this article.

respectively, reproduced word for word section 24 of the 1962 Constitution. It is therefore correct to conclude that at least with respect to the right to a fair trial, the 1962, 1966 and 1967 Constitutions provided adequate guarantees for its protection. This being the case, the key question to ask at this point is to what extent the immediate post-independence military legal frameworks guaranteed the fair trial rights in the administration of justice by military courts.

In September 1964, the Parliament of Uganda passed the Armed Forces Act which repealed and replaced the Uganda Military Forces Ordinance 1958 as the major legal framework for the establishment, maintenance and discipline of the Ugandan military forces. Four key developments regarding the right to a fair trial in this law are worth noting. First, although it maintained summary trials by commanding officers, it granted the accused persons the right to elect to be tried by court-martial.²⁴ Second, it disqualified officers responsible for convening courts-martial, prosecutors, the commanding officer of the accused person, provost officers and any person who prior to the court-martial participated in the investigations from serving on the courts-martial.²⁵ This was a critical provision for ensuring the independence and impartiality of courts-martial. Third, it provided for the appointment of judge advocates at a general court-martial by the Chief Justice in consultation with the Attorney-General.²⁶ This position contrasts with that under the Uganda Military Forces Ordinance 1958 where the responsibility to appoint judge advocates was vested in the governor and the convening officers of courts-martial. This development was critical not only for guaranteeing that the persons who appointed judge advocates were competent, but also for ensuring their independence from the convening authorities of courts-martial and the army command influence. Fourth, the 1964 Armed Forces Act established the Court-Martial Appeal Court to hear and determine all appeals referred to it from decisions of the general court-martial and the disciplinary court-martial.²⁷ The Court Martial Appeal Court replaced the High Court as the last appellate court on issues of military justice. Beyond the mere replacement of the High Court, the Court-Martial Appeal Court came along with important reforms. The Court-Martial Appeal Court was to be composed of the Chief Justice and all puisne judges of the High Court, with the Registrar of the High Court serving as its Registrar.²⁸ It was to be duly constituted if it consisted of an uneven number of judges, not less than three summoned in accordance with the directions given by the Chief Justice.²⁹ It is arguable, at least in theory, that the reconstitution of this Court, with the Chief Justice as a member, strengthened the right of appeal and enhanced the quality of military justice. It also enhanced civilian scrutiny of military justice, which is a critical element in checking excesses of military tribunals.

In spite of the safeguards for the protection of the right to a fair trial in the 1964 Armed Forces Act and the Constitution, Uganda's immediate

24 Sec 63.

25 Secs 69 & 74.

26 Sec 68.

27 Sec 89(1).

28 Sec 89(2) and Regulation 1 of the Armed Forces (Court-Martial Appeal Court) Regulations, SI 163/66.

29 Regulation 2(2) of the Armed Forces (Court-Martial Appeal Court) Regulations.

post-independence military courts, especially during President Idi Amin's era, often were convened and acted contrary to the law. Because of the profound effects of Amin's regime on the protection and enjoyment of right to a fair trial in the administration of justice through Uganda's military tribunals, the next section highlights some of issues that arose during this era.

4 Amin's military justice and the right to a fair trial (1971-1979)

President Idi Amin assumed power in January 1971 after a successful military *coup* against the Apollo Milton Obote-led government. Through Legal Notice 1 of 1971, Amin amended and suspended different provisions in the 1967 Constitution. The major provisions suspended were those related to the exercise of executive powers and the authority of parliament. He conferred upon himself both the executive powers and legislative authority. He became the President, the legislature and the law. He governed the country through decrees. It is worth noting though that Amin did not suspend the Bill of Rights that included the guarantees of the right to a fair trial. This notwithstanding, through different actions and inactions the human rights provisions in the 1967 Constitution, including those that related to fair trial rights, became dead-letter laws (Khiddu-Makubuya 1994; Mubangizi 2005).

In total disregard and violation of the Constitution and the provisions of the 1964 Armed Forces Act, Amin's military tribunals violated all the tenets of the right to a fair trial. First, the tribunals were composed of illiterate individuals who had no basic understanding of the law (Onoria 2003). Second, they were often staffed with serving military men whose only basis of appointment was loyalty to President Amin and the fact that they could be relied upon to convict whoever was deemed an opponent to the regime (International Commission of Jurists 1977). Third, Amin's military tribunals often proceeded on the premise that suspects were guilty of the offences with which they were charged. For instance, in one of the incidents a suspected rebel was sentenced to death by firing squad on the basis of 'curious entries' in his diary which he could not explain (International Commission for Jurists 1977). In the Amin era, the right to a fair trial within a reasonable time was understood to mean instant (in)justice and, on conviction, the tribunals normally had a standard sentence, which was death by firing squad (Onoria 2003). Accused persons were often denied their right to legal representation by counsel of their choice because the regime considered lawyers 'a nuisance not to be tolerated' (International Commission for Jurists 1977). As Amnesty International (1978) observed:

The military tribunals were a complete travesty of any accepted norms of justice. Their members had no legal training, the defendants were usually denied legal representation; a legally qualified 'court advisor' has no power to intervene where legal procedures are contravened, such as rules of evidence and other internationally accepted judicial norms; trials are often in closed court and proceedings are not published. Cases are known of trials which have been conducted in secret or even without the defendant's knowledge. There is no appeal from these tribunals to a non-military legal authority, only to the Defence Council (that is, to President Idi Amin).

In Decree 12 of 1973, President Amin substantially widened the jurisdiction of Uganda's military tribunals to include the trial of civilians accused of committing capital offences. For instance, under section 4 powers were given to the President to order trials of civilians by military tribunals where he was satisfied that their acts were calculated to intimidate or alarm members of the public or to bring the military government under contempt or disrepute.

In conclusion, it is a fallacy to talk about the enjoyment of the right to a fair trial in the administration of military justice during Amin's era. While the Constitution and military law provided for the right to a fair trial in good measure, it was never enjoyed in the administration of justice by military tribunals. This partly confirms the observation by Oloka-Onyango (2006) that 'the protection and enjoyment of fundamental human rights in Uganda's criminal justice system generally, is very much dependent on the prevailing system of governance in the country'. The period during which the enjoyment of the right to a fair trial in the administration of justice by Uganda's military tribunals was at its lowest is the time when the military was in absolute control of governance of the country, at least as far as being explicitly at the helm of state affairs with Amin the field marshal as President and his word constituting law. This possibly points to the fact that military governments are the worst guarantors of human rights and fundamental freedoms.

5 Museveni's NRA Codes of Conduct (1986-1992) and the right to a fair trial

President Museveni's National Resistance Movement (NRM) government was ushered into power in 1986 through Legal Notice 1 of 1986. As was the case with Legal Notice 1 of 1971 which ushered Amin into power, Legal Notice 1 of 1986 suspended certain provisions in the 1967 Constitution, especially those concerning executive power and legislative authority. However, Legal Notice 1 of 1986, in a similar fashion as Legal Notice 1 of 1971, did not suspend or amend the fair trial rights guarantees contained in section 15 of the 1967 Constitution. All organs exercising judicial power therefore were expected to respect and uphold these rights.

With respect to the administration of military justice, the NRM government introduced and maintained two rigid codes: the Code of Conduct for the National Resistance Army (NRA) and the NRA Operational Code of Conduct (together referred to as 'the NRA Codes of Conduct').³⁰ The NRA Codes of Conduct provided the main governance framework for Uganda's army. They were originally designed to regulate the behaviour and conduct of the NRA soldiers during its five-year bush war against the Obote government. They were subsequently appended as a schedule to Legal Notice 1 of 1986 which ushered the NRM into power. Legal Notice 1 of 1986 modified but did not repeal the 1964 Armed Forces

30 The Code of Conduct for the NRA applied in situations when the soldiers were not engaged in field operations. The NRA Operational Code of Conduct applied in situations when the soldiers were engaged in field operations.

Act. The Act continued in operation to the extent that it was not modified by the proclamation.³¹

The NRA Codes of Conduct had far-reaching consequences for the protection and enjoyment of the right to a fair trial in Uganda's military justice system. As compared to the provisions in the 1964 Armed Forces Act, the NRA Codes of Conduct were a big setback as regards the protection and enjoyment of the right to a fair trial in the administration of justice by Uganda's military courts. They abolished the Court-Martial Appeal Court and established the General Court-Martial as the supreme trial organ of the military justice system.³² As discussed earlier, the Court-Martial Appeal Court was an important area where critical reforms for the protection of the right to a fair trial had been made. By abolishing the Court-Martial Appeal Court, the NRA Codes of Conduct in effect negated the soldiers' rights of appeal and removed the country's military justice system from any scrutiny by civilian authority. This was a substantial setback. They also removed the power to appoint judge advocates from the Chief Justice and vested it in the Chairperson of the High Command.³³ The High Command was given power to appoint both the members of courts-martial and the prosecutors.³⁴ Inconsistent with the right to a fair trial, the High Command – a non-judicial body – was given the power to vary decisions of courts-martial.³⁵ The NRA Operational Code of Conduct required all minutes of the proceedings of the general court-martial and unit tribunals to be sent to the High Command for perusal³⁶ and it had the prerogative to revise, quash, or suspend any sentence of courts-martial.³⁷

Plausibly, the most draconian provisions in the NRA Codes of Conduct with respect to the protection and enjoyment of the right to a fair trial were sections 25(iv) and (vi) of the NRA Operational Code of Conduct. Section 25(iv) stipulated that where a unit tribunal or field court-martial was found to be guilty of a gross contravention of the provisions of the Code, either in substance or procedure, the High Command would suspend such court, set up a provisional court, and all members or any one of them would be charged. As punishment they could be dismissed or demoted from their substantive rank and could suffer any other punishments laid down in the Codes up to the maximum sentence of death. Section 25(vi) provided that where members of a Unit Tribunal or court martial failed to execute their duty under the Code, or in any other way neglected or favoured an accused, they would be charged of conspiracy and would be dismissed by the High Command and could suffer any additional punishment as the High Command would determine. Together, the above provisions constituted the most serious affront to the

31 In April 1987 Legal Notice 1 of 1986 was amended by Legal Notice 1 of 1986 (Amendment) Decree 1987 which substituted the schedule to Legal Notice 1 of 1986 with the one that was annexed to it. The NRA Codes as comprised in the substituted schedule are the focus of the discussion in this section.

32 Sec 10 of the Code of Conduct for NRA.

33 Sec 10(viii) of the Code of Conduct of NRA. The High Command was composed of the top military commanders of NRA. It was chaired by the Commander in Chief and President of the Republic of Uganda.

34 Secs 10(ii) & (vi) of the Code of Conduct of NRA.

35 According to Principle 4 of the Basic Principles on the Independence of the Judiciary, endorsed by UN General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

36 Sec 7(i) of the NRA Operational Code of Conduct.

37 Sec 9 of the NRA Operational Code of Conduct.

protection and enjoyment of the right to a fair trial in the administration of justice by Uganda's military courts. They directly impinged on the courts-martial's independence from the military hierarchy and the executive. They went far beyond what is acceptable for any tribunal that purports to exercise judicial power in a democratic society.

In summary, the NRA Codes of Conduct were a big setback as regards the protection and enjoyment of the right to a fair trial in Uganda's military justice. The question that should be asked at this point is: Given NRM's commitment to democracy and human rights in its Ten-Point Programme, why were the NRA Codes of Conduct inimical to the protection and enjoyment of the right to a fair trial in the administration of justice by military tribunals?³⁸ Two reasons could explain this. The first was the need to enforce strict military discipline in an army that had expanded so much to bring on board soldiers from former military regimes whose record concerning human rights was questionable (Naluwairo 2011). Second, perhaps NRM/A viewed judges at the time as part of the 'old order' that could not be trusted to exercise oversight over the revolutionary NRA. Whatever the reasons, what the NRA Codes of Conduct did was to take the country's military justice back to the pre-1958 traditions.

6 From the NRA Codes of Conduct to the NRA Statute 1992

In 1992 the NRA Statute 1992 (later renamed the UPDF Act 1992)³⁹ was enacted by the National Resistance Council (NRC)⁴⁰ to replace the NRA Codes of Conduct and the 1964 Armed Forces Act. As it is not intended to discuss the NRA Statute in any detail for the reasons given at the beginning of this article, only a few issues about this law are highlighted in this section as a precursor to the analysis in the section that follows.

The NRA Statute 1992 did not introduce any significant reforms in the area of military justice, especially as far as the protection of the right to a fair trial is concerned. It retained many aspects of the NRA Codes of Conduct the provisions of which, as discussed earlier, fell far below the acceptable minimum international human rights standards for the administration of justice. This, however, is not surprising. During the parliamentary debates leading to the enactment of this law, Major General David Tinyefuza, then Minister of State for Defence, pointed out that the NRA Bill was intended, among other things, to make 'provision for the maintenance of enhanced discipline in the armed forces by retaining the Code of Conduct and the Operational Code of Conduct' (Republic of Uganda 1991-1992). Mrs Gertrude Njuba, a historical member of the NRA, made the point even clearer when she informed members of the NRC that 'the origins of the NRA Bill were in the desire to legalise the two Codes of Conduct of NRA' (Republic of Uganda 1991-1992).

38 The Ten-Point Programme was NRM's plan of action for Uganda's social, political, economic and social development. The first point in this plan of action was democracy.

39 This change in title was as a result of the change in name of Uganda's military forces from the NRA to the UPDF.

40 NRC served as Uganda's Parliament in the first years of the NRM rule. It was initially comprised of 38 leading cadres of the NRM and NRA who became members by virtue of their service to NRM during the guerilla war against the government of President Apollo Milton Obote.

The NRA Statute 1992, like its predecessor, the NRA Codes of Conduct, was too harsh. In fact, during the parliamentary debates, many members of the NRC expressed concern over the harshness of the NRA Bill which unfortunately was passed into law without any significant changes. In particular, they were concerned about the death penalty which had been laid down as the sentence for a number of offences. Hon Karuhanga, a member of the NRC, for instance observed:

I randomly opened the Bill and on page 14 and 15, I found that at the conclusion of every section, suffering death is the punishment. Now, on just two pages, there are four times you can die in this Bill. To me, it seems that the Bill has been brought so that we finish our soldiers (Republic of Uganda 1991-1992).

Arguing that the Bill was ‘terribly harsh’, another member of the NRC, Hon Kisamba Mugerwa, observed that the Bill in total outlined 54 incidences where a soldier could die. He noted that at that rate the country could find itself without anybody in the army (Republic of Uganda 1991-1992). On the other hand, government and the military leadership justified the harshness of the NRA Bill and, indeed, the retention of the NRA Codes of Conduct on the ground that it was critical for the maintenance of military discipline. It was argued that since the harshness underlying the NRA Codes of Conduct had proved efficient in maintaining discipline during the NRA guerrilla war and the first five years of the NRM in power, there was no need to change the *status quo*.⁴¹ From this perspective, it is untenable to conclude that the NRA Statute of 1992 was nothing but ‘old wine in new bottles’, at least as far as the protection of the right to a fair trial is concerned.

In early 2000, the Ugandan legal fraternity under their umbrella organization – the Uganda Law Society (ULS) – started challenging the constitutionality of several provisions of the country’s military law, including those that had a direct bearing on the right to a fair trial. Two cases are worth mentioning here. In *Uganda Law Society v Attorney-General*⁴² the applicants (ULS) sought to challenge the constitutionality of the NRA Statute 1992 insofar as it provided for the passing of the death sentence without the right of appeal to the Supreme Court. The application sought an injunction to restrain the state from carrying out the death sentence passed by a field court-martial until the petition had been heard. The Attorney-General argued that article 22(1) of the Constitution⁴³ did not apply to decisions passed by the field court-martial as it was not a court of judicature and that, even if it was, by virtue of articles 137(5) and (12) of the Constitution, article 22(1) was never intended to apply to field courts-martial. The Constitutional Court in its ruling observed that the primary objective of field courts-martial was to administer instant justice and instil discipline among the men and women in the armed forces at the front line and that, to that extent; it could not be bogged down by appeal procedures. It further observed that the

41 See eg the submissions of Major General David Tinyefuza, Mrs Gertrude Njuba, Lt Col Jeje Odongo and Major General Elly Tumwine.

42 Constitutional Application 7/2003.

43 This provision states that no person shall be deprived of life intentionally except in execution of a sentence passed in a fair trial by a court of competent jurisdiction in respect of a criminal offence under the laws of Uganda and where the conviction and sentence have been confirmed by the highest appellate court.

Constitution regarded field courts-martial as special courts which were established to maintain law and order and military discipline in a field operation, where to employ the normal court structures would create problems for the field commander. It argued that although death was an end to everything, it had to be balanced with the higher objectives the punishment was intended to achieve. It argued that the necessity for the death sentence in a field operation could not be underestimated for in a field operation, tough decisions and actions are a *sine qua non*. It held that on a balance of convenience, it was not proper to suspend the operation of the provisions which permitted the field courts-martial to pass death sentences without the right of appeal to the Supreme Court.⁴⁴

For a court which is specifically charged with the duty of interpreting and upholding the Constitution to defend the military's objective in having the death sentence at the expense of the accused's constitutionally and internationally-guaranteed right of appeal, was shocking, to say the least. As guarantors and defenders of human rights and freedoms, courts are expected to interpret provisions that seek to curtail fundamental human rights very restrictively. On this occasion, the Constitutional Court failed in this noble duty.

In *Uganda Law Society & Another v Attorney-General*⁴⁵ the Constitutional Court departed from its decision summarised above. This case involved two soldiers of the UPDF who were indicted, tried by a field court-martial and executed on the same day for the murder of three civilians in Kotido district. The petitioners filed two applications seeking declarations that the entire process was unconstitutional. They asked the Court to, *inter alia*, revisit its decision in *Uganda Law Society v Attorney-General* discussed above. Delivering the unanimous decision of the Constitutional Court, Justice Twinomujuni held that the right of appeal applied even to the decisions of the field courts-martial. Citing Justice Mulenga's decision in the Supreme Court case of *Attorney-General v Tumushabe*,⁴⁶ Justice Twinomujuni rightly stated that except where the Constitution expressly exempts application of an article to any person or authority, the Constitution applies to all. He held that the denial of the right of appeal was clearly unconstitutional.

7 The 2005 UPDF Act and the right to a fair trial

In 1995, the Republic of Uganda adopted a new Constitution under which the 2005 UPDF Act was enacted. Before analysing the right to a fair trial in the context of the 2005 UPDF Act, it is necessary that a brief examination is done of the extent to which the 1995 Constitution protects the right to a fair trial. The 1995 Constitution repealed and replaced the 1967 Constitution and Legal Notice 1 of 1986.⁴⁷ Chapter 4 of the 1995 Constitution provides for the promotion of fundamental and other human rights and freedoms. The right to a fair trial is provided for in article 28. Article 28 provides for virtually all elements of the right to a fair trial as

44 For a further scholarly analysis of the Court's decision in this case, see Oloka-Onyango 2005.

45 Constitutional Petitions 2 & 8 of 2002.

46 *Attorney-General v Tumushabe*, Constitutional Appeal 3 of 2005.

47 Art 287 1995 Constitution.

stated in article 14 of ICCPR (summarised in section 1 of this article). Elements of the right to a fair trial not explicitly provided for in article 28 are also protected by virtue of article 45.⁴⁸ The right to a fair trial as provided for in article 28 of the 1995 Constitution is non-derogable.⁴⁹ In *Tumushabe*⁵⁰ the Supreme Court of Uganda emphasised the fact that the constitutional provisions concerning human rights apply to military courts as they do to ordinary courts except in circumstances where it is stated otherwise. In this case, the Attorney-General had argued that the Constitutional provisions on bail did not apply to military courts. Now that it is clear that the 1995 Constitution comprehensively protects the right to a fair and that this right applies to military courts in their administration of justice, the question is how progressive the 2005 UPDF Act is in ensuring that the right is enjoyed in the administration of military justice.

In 2005 the Ugandan Parliament enacted a 'new' UPDF Act which repealed and replaced the 1992 UPDF Act. This law does not provide any positive reforms in as far as the protection and enjoyment of the right to a fair trial in the administration of justice by Uganda's military courts is concerned. For the most part, the 2005 UPDF Act is a replica of the 1992 UPDF Act and the NRA Codes of Conduct. It is 'old wine in new bottles'. Akin to the UPDF Act 1992 and the NRA Codes of Conduct, the UPDF Act 2005 does not provide adequate guarantees to ensure the independence and impartiality of Uganda's military courts. Contrary to the right to an independent and impartial tribunal requirement that the tenure and financial security of people who serve as judicial officers should be secured by law, the UPDF Act 2005 is silent on the issue of security of tenure and financial security of the members of the UPDF who serve as judge advocates. The one-year tenure provided for the members of the military courts is also insufficient to guarantee their independence. In *Uganda Law Society and Jackson Karugaba v Attorney-General*, one of the major issues was whether the Kotido field court-martial accorded the accused persons a fair trial in accordance with the Constitution. The Constitutional Court concluded that given the current laws under which Uganda's military courts are constituted and operate, they cannot be independent and impartial as required by the Constitution. Although the major law governing military courts in issue then was the 1992 UPDF Act, its provisions on the composition and operations of military courts essentially are the same as those under the UPDF Act 2005. The 2005 UPDF Act like its predecessors – the UPDF Act 1992 and the NRA Codes of Conduct – does not adequately protect the institutional independence of military courts. According to sections 194, 197 and 202(c) of the Act, members of the military courts, chairpersons of the military courts, the prosecutors and the judge advocates are all appointed by the same authority, namely, the High Command. Moreover, under section 196(1), the High Command has the power to convene any military court at any time. This is also reminiscent of Uganda's military justice during the colonial times.⁵¹

48 Art 45 of the Constitution provides inter alia that the guarantees concerning the human rights and freedoms specifically provided for in Ch 4 'shall not be regarded as excluding others not specifically mentioned'.

49 See art 44 of the 1995 Constitution.

50 *Tumushabe* (n 46).

51 For a thorough analysis of the compliance of Uganda's current military justice with the right to an independent and impartial tribunal, see Naluwairo 2012.

As was the case with the UPDF Act 1992, the UPDF Act 2005 also does not provide adequate guarantees to ensure that Uganda's military courts comply with the right to a competent tribunal. Contrary to the right to a competent tribunal, which in the context of military justice dictates that the trial of civilians by military courts should be limited to exceptional cases where a state can show that resorting to such trials is necessary and justified by objective and serious reasons and where, with regard to the specific class of individuals and offences at issue, the regular civilian courts are unable to undertake the trials (HRC 2007), the 2005 UPDF Act subjects many categories of civilians to military law and military courts *in abstracto*. According to this law, the categories of civilians that are subject to the jurisdiction of military courts include civilians who voluntarily accompany any unit or other element of the defence forces that is on service in any place; civilians who serve in the defence forces under engagements by which they agree to be subject to military law; civilians who aid or abet a person subject to military law in the commission of a service offence; civilians who are found in unlawful possession of arms, ammunitions or equipment ordinarily being the monopoly of the defence forces or other classified stores as prescribed; and civilians who commit a service offence while subject to military law.⁵² Sections 119 and 179 of the 2005 UPDF Act that give military courts the jurisdiction over civilians and over civil offences are reminiscent of Amin's military justice.⁵³

As was the case with its predecessors – the 1964 Armed Forces Act and the UPDF Act 1992 – the 2005 UPDF Act maintained the Court-Martial Appeal Court as the last appellate court on issues of military justice. However, unlike the Court-Martial Appeal Court established under the Armed Forces Act 1964 which was composed of the Chief Justice and puisne judges of the High Court and whose registrar was to be the registrar of High Court,⁵⁴ the Court-Martial Appeal Court under the 2005 UPDF Act 2005 is composed of serving members of the Uganda Peoples Defence Forces. In comparison to the UPDF Act 1992, this is another case of 'old wine in new bottles'. In comparison to the Armed Forces Act 1964, it is a serious retrogression as far as the independence and impartiality of the Court-Martial Appeal Court is concerned. It is also a serious retrogression with respect to ensuring civilian control of the army and ensuring civilian scrutiny of the administration of military justice.

Regrettably, the UPDF Act 2005 also denies certain categories of persons subject to military law the right of appeal. This is unlike its predecessor, the UPDF Act 1992. Section 227(1) of the UPDF Act 2005 provides that 'any party to the proceedings of unit disciplinary committees or courts-martial other than a field court-martial who is not satisfied with its decision shall have a right of appeal to an appellate court'. This means that inconsistent with international human rights law and the Ugandan

52 Sec 119 2005 UPDF Act.

53 For an analysis of the constitutionality of trials of civilians in Uganda's military courts, see Naluwairo 2013.

54 See sec 89 (2) of the Armed Forces Act 1964 and R.1 of the Armed Forces (Court-Martial Appeal Court) Regulations SI 163/166.

Constitution, under the 2005 UPDF Act persons tried by the field courts-martial have no right of appeal.⁵⁵

With respect to the right to a public hearing, although section 212(1) of UPDF Act 2005 explicitly provides for it unlike its predecessors, some of the exceptions attached to its enjoyment are inconsistent with the right to a public hearing as understood in international human rights law. In particular, section 212(2) of the UPDF Act 2005 provides one of the exceptions to the right to a public hearing as 'public safety'. The allowable exception under article 14(1) of ICCPR and article 28(2) of Uganda's 1995 Constitution is that the public and the press may be excluded on grounds of maintaining 'public order' and not 'public safety'. While the two concepts may be closely related, they are not the same. By allowing military courts to exclude the public on grounds of ensuring 'public safety' and not 'public order', the UPDF Act 2005 gives more grounds for military courts to exclude the public than what is acceptable. The exclusion of the public from the proceedings of court on the ground of maintaining public order presupposes that courts must justify their decision to exclude the public on the basis of the circumstances that can objectively be said to be likely to cause public disorder in the courtroom. With the concept of public safety, it suffices that a military court is taking preventive measures to ensure public safety generally. Also, inconsistent with international human rights law and the Constitution, the UPDF Act 2005 does not qualify the exceptions to the right to a public hearing with the requirement that they must be justifiable or necessary in a democratic society. The requirement that the allowable exceptions to the right to a public hearing must be justifiable in a democratic society is a very important safeguard against the abuse of those exceptions under the guise of ensuring morals, public order and national security.

There is nothing significant in the 2005 UPDF Act to bolster the protection and enjoyment of the right to a fair trial. Many provisions contained therein retain the essence of the old military justice legal frameworks, especially the NRA Statute, the UPDF Act 1992 and the NRA Codes of Conduct.

8 Conclusion

This article is concerned with assessing the evolution of Uganda's military justice system with respect to the protection of the right to a fair trial. It is apparent that military justice legal reforms introduced over the years, especially after the 1964 Armed Forces Act, have been largely artificial, at least as far as the protection of the right to a fair trial is concerned. They are largely 'old wine in new bottles'. Like its predecessors in the early colonial times, the successive military justice legal frameworks have never provided adequate guarantees to ensure the competence, independence

55 Although art 28 of the Constitution, which provides for the right to a fair trial, does not explicitly provide for the right of appeal, art 45 of the Constitution states that '[t]he rights, duties, declarations and guarantees relating to the fundamental and other human rights and freedoms specifically mentioned in this Chapter shall not be regarded as excluding others not specifically mentioned'. In *Uganda Law Society & Another v Attorney-General*, the Constitutional Court invoked art 45 of the Constitution and art 7 of the African Charter on Human and Peoples' Rights to include the right of appeal as part and parcel of the rights guaranteed under art 28 of the Constitution.

and impartiality of the country's military courts. Reminiscent of the colonial times, the successive military justice systems also have never adequately protected other rights to a fair trial such as the right to a public hearing and the right of appeal. Although some scholars (Onoria 2003; Naluwairo 2011 & 2012), the Constitutional Court and the Supreme Court of Uganda have pronounced themselves on some of the critical measures that need to be undertaken to ensure that the administration of military justice in Uganda conforms to the constitutional and international standards, no visible steps have been taken to reform the country's military justice system and break it from its colonial vestiges.

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The forced displacement of indigenous peoples in Colombia

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Abstract: *The creation of more than seven million internally-displaced persons and the subsequent territorial expropriation in the context of the internal armed conflict in Colombia constitute both a humanitarian and a human rights tragedy. Indigenous peoples and Afro-descendants have especially been affected by forced displacement and loss of their ancestral territories. Some of these people are in a situation very close to extinction. International and domestic legal standards have progressively developed the rights of victims to truth, justice, reparation and guarantees of non-repetition. Restitutive justice, a human rights approach, and differential attention are essential ingredients for a consistent public policy to adequately deal with IDPs, especially those of indigenous origin, given their special relationship with their lands and territories. The General Agreement for the Termination of the Conflict and the Construction of Stable and Lasting Peace is to be regarded as a window of opportunity for the protection of the rights of IDPs and for the protection of the rights of indigenous peoples in Colombia.*

Key words: *Colombia; internally-displaced persons; indigenous peoples; Peace Agreement*

Losing our land is losing ourselves.

Testimony of a member of the displaced indigenous Siona people, UNHCR

1 Introduction

The fact that there are more than seven million internally-displaced persons (Registro Único de Víctimas 2018) is one of the most dramatic consequences of the armed conflict in Colombia, both from a humanitarian standpoint and from the perspective of the protection of their rights (Acción Social 2010). This has particularly affected the indigenous peoples living in Colombia. As noted by the United Nations (UN) Special Rapporteur on Indigenous Rights, 'the forced displacement of indigenous peoples threatens their cultural and physical survival', since 34 peoples are in grave danger of being either culturally or physically

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exterminated (Anaya 2010: 10). Often, the ultimate reasons for forced displacement rest on a perverse dynamics of territorial appropriation and control for strategic, military and purely economic purposes. Both domestic and international legal standards establish the right of victims to the restitution of their land and their homes as the 'preferred means' of redress in cases of displacement, considered essential to ensure the return of the displaced population. Unfortunately, restorative justice and the human rights approach are not at the core of public policies related to displacement, either by the Colombian government or the various international institutions working in Colombia, that continue to favour a welfare approach and to treat the situation as merely a humanitarian emergency. The purpose of this article is to analyse the applicable legal standards to ensure that the rights of the displaced, both to the restitution of their lands and territories and to return to their places of origin, are fully and effectively enforced, particularly in the case of indigenous peoples. After discussing the main developments in applicable laws and regulations and case law, a proposal will be made for overcoming dispossession and establishing assurances that it will not be repeated. Any comprehensive policy on reparations for victims must contemplate reversing land dispossession in Colombia that took place during the internal armed conflict. Voluntary property restitution and safe return, ensuring the dignity of the displaced population, thus would become one of the most powerful instruments in the prevention of forced displacement.

2 Land, territory and property dispossession in Colombia

2.1 The reality of dispossession

Territory appropriation and control is undeniably part of the armed conflict in Colombia, with a widespread and systematic strategy being applied by the various armed groups involved, including the powerful drug traffickers, whereby the forced displacement of the population is used to complete processes of 'territorial cleansing' (Moncayo 2006: 43). This has led to people being forcibly displaced and having to leave their land and property and, in many instances, this has resulted in processes of appropriation and dispossession of property belonging to thousands of farmers and indigenous and Afro-descendant communities, in what may be termed a true 'de-territorialisation process, not only geographically but also in cultural, political, and especially, legal terms' (Andrade 2006: 73).

Although there is no completely reliable and definitive data about the actual extent of land dispossession, it seems to range from the 4 million hectares identified by the UN World Food Programme (WFP 2001) to the 5,5 million hectares estimated by the Monitoring Committee of Public Policy on Displacement (Comisión de Seguimiento a la Política Pública sobre Desplazamiento 2009), to the 6,8 million hectares acknowledged by the governmental agency Social Action (Proyecto de Protección de Tierras y Patrimonio de la Población Desplazada 2005), and the 10 million hectares claimed by the National Movement of Victims of State Crimes in Colombia (*Movimiento Nacional de Víctimas de Crímenes de Estado en*

Colombia (MOVICE 2007)).¹ The figure therefore has reached very high levels, suggesting that there was a war for control of the territory that has led to genuine land counter-reform in the country (Comisión Internacional de Juristas 2005: 23).

2.2 Causes of dispossession

The dispossession of territory in Colombia reveals a complicated combination of motives and types of exploitation of misappropriated property that require a discussion of the political perspective of dispossession.

The basic reasons for displacement and dispossession have to do, first, with the military strategy needs associated with the armed conflict. The different armed actors seek to control territorial spaces to develop military strategies and secure mobility corridors for provisioning and for controlling the transit along these routes.

Drug-trafficking today is a real form of economic support for armed actors, and another important reason that could explain the dynamics of population expulsion and land control (Kálin 2007: 6). Both paramilitary groups and guerrillas seek to control various territorial areas in order to establish processing and marketing centres, as well as to secure strategic corridors for drug-trafficking routes. Different armed actors also use drug trafficking to fund an important part of their activities in a context in which the alliances and dynamics of war increasingly depend on the geography of drug trafficking.

Another fundamental aspect that helps to understand certain displacement instances and the resulting land dispossession has to do with projects that are clearly driven by economic reasons in the context of a profound structural transformation of the Colombian economy (Moncayo 2006: 40). Population displacement and the misappropriation of property have served as a means of acquiring land for the benefit of large landowners and their extensive livestock projects; of drug traffickers; and of private enterprises that undertake large-scale projects for the exploitation of natural resources (Deng 2000: 23). The processes of displacement and misappropriation of land have opened the doors to help establish industrial and agro-industrial processes aimed at the food and agro-fuel industries,² as well as the exploitation of raw materials in the mining and energy sectors. In addition, certain mega-projects linked to transnational corporations in industry, services and the construction of infrastructure networks in the field of transport and communications have instigated and benefited from the expulsion of the population and territory control (Área de Memoria Histórica 2009: 72; Martín-Ortega 2008).

1 This initiative was driven by the victims themselves as a strategy to record dispossessed property, land and territories. For the relevance of this initiative for the reparation to victims and the establishment of assurances that it will not happen again, see CEPEDA 2006: 149.

2 The case of the expropriation of collective titles from the Afro-Colombian communities in Curvaradó and Jiguamiandó for agro-industrial projects related to African palm is emblematic of this type of the economic uses of displacement and dispossession (Orejuela 2006: 53-59; Comisión Intereclesial de Justicia y Paz y Banco de Datos del CINEP 2005).

3 Legal standards for land restitution

This section discusses the legal instruments that recognise restitution as one of the essential ingredients of the victims' rights to reparation. Since this issue has considerably changed in recent years (Gómez Isa 2006), there are now fairly advanced standards that provide a clear roadmap for reparations to be awarded to the victims that have suffered serious and systematic violations of their human rights, as in the case of the vast number of displaced persons in Colombia who have been stripped of their land and property.

3.1 International standards

An important milestone in the progressive recognition of the victims' right to reparation has come from the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law³ adopted by the UN General Assembly in December 2005 after several years of intense negotiations (Shelton 2005). As the Principles explicitly point out, they did not seek to establish 'new international or domestic legal obligations but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law'.⁴ That is to say, they did not involve new obligations, but were rather a mere clarification of the scope and content of the obligations to make reparations to victims of human rights violations and of international humanitarian law. These Principles established the five basic forms of reparation, starting with restitution, and following with compensation,⁵ rehabilitation,⁶ satisfaction⁷ and guarantees of non-repetition.⁸

3 Resolution 60/147 of 16 December 2005.

4 Para 7 Preamble to the Principles and Guidelines.

5 Principle 20. Compensation is one of the classic and most frequent forms of reparation. Compensation, as stated in this principle, should be provided 'as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law'. The damages considered by the Principles as eligible for compensation include 'physical or mental harm; lost opportunities, including employment, education and social benefits; material damages and loss of earnings, including loss of earning potential; moral damage; costs required for legal or expert assistance; medicine and medical services; and psychological and social services'.

6 Principle 21. Rehabilitation includes 'medical and psychological care as well as legal and social services'. Rehabilitation is particularly appropriate where human rights violations have had significant physical and psychological consequences (cases of torture, people who disappeared, or cases of forced displacement through violence).

7 Principle 22. Satisfaction is one of the most important elements in any reparation process, since it addresses the symbolic issues that have to do with social imaginary and memory. The measures that claim to deliver satisfaction include 'the full and public disclosure of the truth ... the search for the whereabouts of the disappeared ... an official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim ... a public apology ... memorials and tributes to the victims ...' These are ultimately a catalogue of measures to be used to develop a suitable policy of memory as an integral part of the reparations programme.

8 Principle 23. The guarantees of non-repetition refer to all those measures aimed at preventing any human rights violations that have taken place from recurring in the future. The preventive measures that states can implement include 'ensuring effective civilian control of military and security forces; strengthening the independence of the judiciary; providing, on a priority and continued basis, human rights and international

3.1.1 *The right to restitution: Towards restorative justice*

Restitution 'should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred'.⁹ Among the restitution measures, the Principles and Guidelines on the Right to Reparation refer to the 'restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property'.¹⁰ As will be seen, this type of reparation has to be the preferred approach in the case of displaced persons in Colombia who have had their possessions and property misappropriated. The right to restitution and return must become the primary objective of any public policy on displacement and dispossession (Leckie 2003). Only then will such public policy be preventive and lay the foundations for the non-repetition of dispossession in the future.

The Guiding Principles on Internal Displacement¹¹ adopted in 1998 clearly opted for this restorative approach to reparation measures for victims of forced displacement. First, it is expressly stated that 'no one shall be arbitrarily deprived of property and possessions',¹² and the Principles go on to establish an obligation that 'the property and possessions of internally displaced persons shall in all circumstances be protected'.¹³ The Principles also impose on the competent authorities 'the *primary* duty and responsibility to establish conditions, as well as provide the means, which allow internally displaced persons to return voluntarily, in safety and with dignity, to their homes or places of habitual residence, or to resettle voluntarily in another part of the country'.¹⁴ In order to further reinforce the restorative approach promoted in the Guiding Principles on Internal Displacement, it is established that the competent authorities have the duty and responsibility 'to assist returned and/or resettled internally-displaced persons to recover, to the extent possible, their property and possessions which they left behind or were dispossessed of upon their displacement'.¹⁵ Only when recovery is impossible the 'competent authorities [shall] provide or assist these persons in obtaining appropriate compensation or another form of just reparation'.¹⁶ Therefore, the priority must be the restitution of property and the return to the place of origin, unless the displaced persons voluntarily opt for another place of resettlement. Compensation or other forms of reparation take a secondary place, since they are to be implemented only when possessions cannot be recovered.

humanitarian law education to all sectors of society and training for law enforcement officials as well as military and security forces; reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law'.

9 Principle 19.

10 As above.

11 E/CN.4/1998/53/Add.2, 11 February, 1998. These Principles, also known as the Deng Principles as they were developed under the mandate of Francis M Deng as Representative of the Secretary-General on the issue of internally-displaced persons, are intended 'to address the specific needs of internally displaced persons worldwide by identifying rights and guarantees relevant to their protection'.

12 Principle 21.1.

13 Principle 21.2.

14 Principle 28.1 (my emphasis).

15 Principle 29.2.

16 As above.

These Principles on Displacement were supplemented in 2005 by the Principles on Housing and Property Restitution for Refugees and Displaced Persons,¹⁷ also known as the Pinheiro Principles.¹⁸ As the title suggests, these Principles are specifically devoted to the restitution of property and possessions of persons who have been displaced or have become refugees. The Principles are based on a clear recognition of the right to restitution of all property (Paglione 2008; COHRE 2005). It is stated that ‘all refugees and displaced persons have the right to have restored to them any housing, land and/or property of which they were arbitrarily or unlawfully deprived, or to be compensated for any housing, land and/or property that is factually impossible to restore as determined by an independent, impartial tribunal’.¹⁹ In addition, the Principles firmly state the absolute priority that the right to restitution must have in relation to any other form of reparation (Gould 2009: 181). Fundamentally, the Principles enshrine a clear commitment to what they call *restorative justice* (Gómez Isa 2017). As stated in the Principles, ‘states shall demonstrably *prioritise* the right to restitution as the *preferred remedy* for displacement and as a key element of *restorative justice*’.²⁰ Finally, the Principles envisage the right to restitution of housing, land and property as ‘a distinct right, and is prejudiced neither by the actual return nor non-return of refugees and displaced persons’. This consideration of the right to restitution as *a right in itself* has very important implications for any public policies for assisting the displaced population. The right to restitution of possessions and property must be guaranteed in all cases, regardless of whether the displaced population returns or not. Even in those situations when the conditions for return are not met, or when people voluntarily do not wish to return, every attempt should be made to guarantee the restitution of possessions and property. This aspect is extremely important since, if restitution is not prioritised and alternative forms of reparation are sought (such as compensation²¹ or resettlement elsewhere), this might be seen as an attempt to ‘legitimise the processes of land encroachment and territory appropriation and the displaced population being condemned to the urban margins after a short period of ‘public welfare’ (Romero 2006: 103), something that, in the opinion of many, is what seems to be happening in Colombia. Obviously, these considerations also have repercussions for the prevention of forced displacement and the establishment of guarantees that it will not happen again. Unless restitution and return are firmly committed to, this would be tantamount to giving *carte blanche* to new processes of displacement and dispossession.

3.1.2 *The right to voluntary return in safety and dignity*

The right to restitution and the right to return are two autonomous and independent rights that should give rise to different, but related and

17 E/CN.4/Sub.2/2005/17, 28 June 2005.

18 This name emanates from the fact that these Principles were formally approved under the mandate of Paulo Sergio Pinheiro. As noted in the Preamble to these Principles, they ‘reflect widely accepted principles of international human rights, refugee and humanitarian law and related standards’.

19 Principle 2.1.

20 Principle 2.2 (my emphasis).

21 Principle 21, fully devoted to compensation, reiterates that ‘states shall, in order to comply with the principle of restorative justice, ensure that the remedy of compensation is only used when the remedy of restitution is not factually possible’.

complementary, policies in each case. The restitution of possessions and property to the population displaced by violence must occur whatever else happens, while the right of return must be governed by the principles of *voluntariness, security and dignity*. As the Pinheiro Principles point out in this regard, '[a]ll refugees and displaced persons have the right to return voluntarily to their former homes, lands or places of habitual residence, in safety and dignity'.²² Voluntariness implies that the return is merged into 'based on a free, informed, individual choice', with the displaced being provided with 'complete, objective, up-to-date, and accurate information, including on physical, material and legal safety issues in countries or places of origin'.²³

Physical safety is a crucial element in the return of the displaced population in Colombia since, in most cases, the coercion and violence that caused their displacement remain in place.²⁴ According to the data provided by the First National Survey for the Verification of the Situation of the Displaced Population carried out in 2007, only 3,1 per cent of the displaced family groups wished to return to their place of origin, an extraordinarily low figure. The lack of willingness to return is justified 'in 69,2% of the cases, by the belief or conviction that the causes that originated their displacement still apply' (Comisión de Seguimiento a la Política Pública sobre Desplazamiento 2009: 106). This data is not surprising, as it raises the major limitations of policies put in place for the restitution of property and return of the displaced population. Until the underlying problems that caused displacement and dispossession in the first place have been resolved, public policies for the displaced population will be doomed to fail or, at best, to be relegated to a purely humanitarian and care-oriented approach.

Similarly, the informal nature of land tenure and the fraudulent legalisation of seized property is another key obstacle for restitution and return policies to be effective. At this point, firm steps must be taken to ensure that the properties will be restored with at least a measure of legal safety. Some proposals to that effect will be analysed later. The legal safety demanded by the Pinheiro Principles is one of the fundamental elements in order to guarantee the return of the displaced population. As provided by these Principles, 'states should establish or re-establish national multipurpose cadastral or other appropriate systems for the registration of housing, land and property rights as an integral component of any restitution programme, respecting the rights of refugees and displaced persons when doing so'.²⁵

In the same vein, in order to make the return possible with at least a measure of success, an attempt should be made to meet the psychosocial needs of the displaced population. Psychosocial care is needed 'in a structured and systematic way, so as to overcome the emotional states

22 Principle 10.1.

23 As above.

24 On 18 May 2010, peasant leader Rogelio Martínez, who had led the return of 52 families displaced by paramilitaries from the Bloque de Héroes de los Montes de María to 'La Alemania' farm in San Onofre, Sucre, was killed. To date, 12 people have been killed in the process of reclaiming of this property, which clearly demonstrates the absence of the necessary conditions to guarantee a safe return, in 'La finca en Sucre que le ha costado la vida a 12 personas por intentar reclamarla', *El Tiempo* 24 May 2010.

25 Principle 15.1.

generated by displacement, to recover morale and self-esteem, to allow the many families who have not said goodbye to their dead to mourn, new levels of socialisation are achieved and the hope of living is restored' (ILSA 2006: 112).

Finally, the socio-economic conditions that underlie the principle of a dignified return call for economic support policies to assist the people and communities that decide to return (Barnés 2005: 36). Only if strong support is given to the economic initiatives of the displaced population that chooses to return will they be able to lay the foundations for the necessary sustainability of this return to take place.

If all the requirements established by the Pinheiro Principles to guarantee a return that is voluntary and in safety and with dignity are compared to the priorities and the data from the public policies aimed at the displaced population in Colombia, it is difficult to escape the conclusion that these public policies have not prioritised the restitution of misappropriated properties and the return of the displaced population to their places of origin. In addition, some of the experiences of early restitution and return have not been as satisfactory as they should have been, and have led to a high level of frustration and mistrust among the displaced population. Therefore, the incentive to return has become even more blurred (ILSA 2006).

3.2 National standards

As will be seen, Colombia has approved a wide range of laws and decrees in an attempt to deal with the phenomenon of forced displacement and the resulting land dispossession. As in other areas, regulations exist that are relatively advanced from the formal point of view, but that face numerous obstacles in terms of their implementation. This has come to be described as an actual *simulation* process.²⁶ Under very progressive statements and formal principles, there is a clear lack of political will to take significant steps to provide redress for the victims, reverse the territorial encroachment and effectively prevent the forced displacement of the population.

3.2.1 Main internal regulations

Law 387²⁷ on forced displacement, approved in July 1997, established a framework to take action for attending to the displaced population. From the outset, this Law was made in full awareness of the need to enhance the protection of the property of the displaced population in order to prevent displacement, to try to avoid dispossession and, eventually, to allow for the restitution of encroached property and for the displaced population to return. Article 19(1) orders the Colombian Institute for Agrarian Reform (INCORA, currently INCODER, Colombian Institute of Rural Development) to keep 'a record of rural land abandoned by those

26 Hernando Valencia Villa discussed this simulation process in the context of the 2005 Justice and Peace Act (Ley de Justicia y Paz de 2005). This law, under the guise of an apparent commitment to human rights and reparation to victims, ultimately seeks to maintain a high level of impunity (Valencia Villa 2005: 9).

27 Law 387 of 18 July 1997 adopted measures for the prevention of forced displacement; the attention, protection, consolidation and socio-economic stabilisation of persons who have been internally displaced by violence in the Republic of Colombia.

displaced by violence' and to inform 'the relevant authorities in order to prevent any alienation or transfer of titles of property of these possessions, when such action is taken against the will of the holders of the respective rights'. This crucial aspect of the law was partially developed by Decree 2007 (2001), which established specific measures to protect the possessions of the population that was at imminent risk of displacement or actually displaced (Osorio Pérez 2006). Once the Municipal, District or Departmental Committee for Comprehensive Care of the Population Displaced by Violence declares the imminence of risk of displacement, or that the displacement has occurred, several measures are implemented to protect the land and the property of the displaced population. First, based on the information contained in the existing registries and the *Oficinas de Catastro y de Registro de Instrumentos Públicos* (Land Registry Offices and Registry of Public Instruments), the relevant institutions must submit to the Committee 'a report on the rural estates that existed when imminent risk was declared, or when the initial actions that caused the displacement took place, specifying the title to the established rights'²⁸ within a period not exceeding eight days. Most importantly, once this report has been endorsed by the Committee, it 'constitutes sufficient evidence to prove the status of the possessor, holder or occupier of the displaced persons'.²⁹ In the same vein, the *Comités de Atención Integral a la Población Desplazada* (Committees for Comprehensive Care of the Displaced Population) must inform the appropriate *Oficina de Registro de Instrumentos Públicos* (Public Instrument Registry Office) that a certain area has been declared to be at imminent risk of displacement or forced displacement, 'providing the names of the owners or holders of rural estates who may be affected by such situations, and requesting them to refrain from registering any transfers under any title of said rural property, as long as the declaration remains in force'.³⁰ Finally, the Committee for Care to the Displaced Population must request that INCODER refrain from granting any titles to property in the area of imminent risk of displacement or forced displacement at the request of individuals other than those listed as occupants in the report endorsed by the Committee'.³¹

An attempt to complete this battery of measures intended to protect the land and the property of the displaced population, very much in line with the Pinheiro Principles,³² was made within the *Proyecto de Protección de Tierras y Territorios de la Población Desplazada por la Violencia* (Project for the Protection of Land and Territories of the Population Displaced by Violence), developed in 2003 by the *Agencia Presidencial para la Acción Social* (Presidential Agency for Social Action) using international aid

28 Art 1(1) of Decree 2007 of 24 September 2001.

29 As above.

30 Art 1(2) of Decree 2007 of 24 September 2001.

31 Art 1(3) of Decree 2007 of 24 September 2001.

32 Principle 5.3 directs states to prohibit 'forced eviction ... and the arbitrary seizure or expropriation of land as a punitive measure or as a means or method of war'. Principle 15.6 also provides that 'states and other responsible authorities or institutions conducting the registration of ... displaced persons should endeavour to collect information relevant to facilitating the restitution process, for example by including in the registration form questions regarding the location and status of the individual refugee's or displaced person's former home, land, property'. Finally, as stated in Principle 12.1 of the Pinheiro Principles, 'states should establish and support equitable, timely, independent, transparent and non-discriminatory procedures, institutions and mechanisms to assess and enforce housing, land and property restitution claims'.

funding (Escobar 2006). The main objective of this project was to protect the victims' rights to their land and territories when they are at risk of displacement and abandonment or dispossession of their property, or when displacement has already occurred, so that such properties are not unlawfully appropriated by the persons responsible for the displacement or by a third party.³³

Unfortunately, little progress has been made with an essential task, that is, coordinating the policy for the protection of land and territories of the displaced population carried out within this project with the institutions responsible for the comprehensive treatment of the displaced population, such as the *Comités de Atención a la Población Desplazada*, as necessary. In addition, the activities carried out within this project need to be coordinated with the institutions responsible for transfers of title, such as the *Superintendencia de Notariado y Registro* (Department of Notaries Public and Registry) (SNR), the *Oficinas de Registro de Instrumentos Públicos* (ORIP), Notaries Public's offices, the *Instituto Colombiano de Desarrollo Rural* (Colombian Institute for Rural Development) (INCODER), the *Instituto Geográfico Agustín Codazzi* (Agustín Codazzi Geographic Institute) (IGAC), and the *Oficinas de los Catastros*. A successful coordination of the above bodies will to a large extent depend on the effectiveness of all the legal and institutional measures that seek to protect the property of people displaced by violence. There is full awareness of this within the project.³⁴ Ultimately, all these institutions will need profound changes if priority is to be given to the effective execution of the right to restitution of the property unlawfully seized from the displaced population. This is a task of vast proportions that requires an institutional framework that lives up to the challenge of reversing the land dispossession processes.

One of the most important measures that took place in this area during the presidency of Juan Manuel Santos was the adoption of the so-called *Ley de Víctimas y Restitución de Tierras* (Law on Victims and Land Restitution) in 2011.³⁵ This Law, based on the international principles and standards analysed above, established an ambitious programme for the recognition of and guarantee to the victims of the Colombian armed conflict of the right to truth, justice and reparation, with a significant focus on the restitution of territory. Although article 13 of the Law recognised the principle of a *differential approach*, it did not establish specific measures for indigenous peoples, giving the President of the Republic a period of six months in which to adopt measures in favour of the indigenous peoples and Afro-descendant communities. In compliance with this legal mandate, in December 2011 the President approved Decree

33 This protection is specified in property protection mechanisms that operate through three routes, namely, the Collective Route, which is intended to protect the territorial rights of a community that is at risk of displacement or has already been displaced; the Individual Route, which seeks to protect the rights of a person or a family nucleus to a property that they have been forced to abandon; and the Ethnic Route, which aims at the protection of collective territorial rights of the ethnic groups when they have been displaced or are at risk of being displaced (Proyecto de Protección de Tierras y Territorios de la Población Desplazada por la Violencia 2009).

34 For more information, see the interesting document prepared within the project, which contains very precise recommendations for the different institutions involved in the processes of protection of the possessions of the displaced population (Proyecto de Protección de Tierras y Patrimonio de la Población Desplazada 2008).

35 Law 1448 of 10 June 2011, on measures for the comprehensive care of, assistance and reparation to victims of the internal armed conflict and other provisions.

4633,³⁶ which established a set of highly-progressive measures intended to ensure comprehensive reparation to the victims belonging to indigenous peoples. Once again, as in so many other areas in Colombia, regulations and institutional frameworks are not the problem; instead, the issue concerns the political will and ability to ensure compliance. Such compliance will to a large extent depend on the progress of the implementation of the Peace Agreement between the FARC and the government adopted in 2016 (*Acuerdo Final para la Terminación del Conflicto y la Construcción de una Paz estable y duradera 2016*). The successful conclusion of the peace process would be a huge step towards the recognition and guarantee of indigenous peoples' rights to reparation and land restitution.

3.2.2 *Case law from the Colombian Constitutional Court on restitution*

The Colombian Constitutional Court has also placed a special emphasis on the right to the comprehensive reparation of victims of displacement and territorial and property dispossession, by making pronouncements that are in line with international law principles that impose very specific obligations on the Colombian state.

The Constitutional Court has firmly stated that the rights of the displaced population to property of which they have been dispossessed deserve special attention by the state. In the words of the Court,

persons who have been forcefully displaced and violently dispossessed of their land (of the land they own) have a fundamental right to having their rights to property or possession preserved by the state, and the use, enjoyment and free disposal thereof reinstated under the conditions established by applicable international law.³⁷

For this reason the Court considers that 'in these cases the right to property or possession *is particularly strengthened*, and deserves *special attention from the state*'.³⁸ This line of case law has led the Court to stress that the policy of comprehensive attention to the displaced population 'must have a *restorative approach* that is clearly differentiated from the policy of humanitarian assistance and socio-economic stabilisation'.³⁹

Furthermore, as the Pinheiro Principles demonstrated, the Court made it clear that 'the right to restitution and/or compensation is independent from return and restoration'.⁴⁰ In this sense, the Court envisaged restitution as being 'not only a measure of reparation but a measure for the non-repetition of the criminal acts that sought dispossession'.⁴¹ Therefore, the Court concluded that 'full assurances must be given to the displaced

36 Decree Law No 4633 of 9 December 2011, which provides measures of assistance, care, comprehensive reparation and restitution of territorial rights to victims belonging to indigenous peoples and communities. The President also on the same day approved Decree Law No 4633 of 9 December 2011, which provides measures of assistance, care, comprehensive reparation and restitution of territorial rights to victims belonging to black, Afro-Colombian, Raizales and Palenqueras communities.

37 Corte Constitucional, Sentencia T-821 (Constitutional Court Judgment T-821), 5 October 2007 para 60.

38 As above (my emphasis).

39 Corte Constitucional (n 37) para 68 (my emphasis).

40 As above.

41 As above.

population that they will recover their property, regardless of whether or not the affected person wishes to reside there'.⁴²

To reinforce the special protection of the right to property or possession, the Constitutional Court has further proclaimed that article 17 of the Protocol Additional to the Geneva Conventions Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II),⁴³ the Guiding Principles on Internal Displacement and the Principles on the Restitution of Housing and Property of Refugees and Displaced Persons 'are part of the constitutional block in the broadest sense, since they are developments of the fundamental right to integral reparation for the damage caused adopted by international doctrine'.⁴⁴ Both the Deng Principles and the Pinheiro Principles are considered to be an integral part of the constitutional block. This domestic inclusion of these Principles is unprecedented in the world (Duque 2006: 108), and should serve as a basis for the design and implementation of much firmer public policies to guarantee the restitution of the misappropriated possessions to the displaced population and the return to their places of origin if they so wish.

Finally, given the gaps and deficiencies in the legal and institutional system for the protection of the displaced population's possessions and property, the Constitutional Court has ordered the government agency Acción Social that

if it does not have it yet, it should consider the feasibility of establishing a *special register* for displaced persons who abandoned rural and urban property in order to identify the victims who ... are entitled to reparation, via restitution of their property, or compensation.⁴⁵

The objective of this special register would be 'to establish mechanisms to promote the right to property and possession of the displaced population and demand a differential policy on reparation for those who were forced to abandon or were dispossessed of their property'.⁴⁶

Despite all these developments and, particularly, despite the enormous institutional and regulatory arsenal in the area of care for forcefully-displaced persons, and of their right to restitution and return, the Constitutional Court concluded that the situation faced by displaced persons reveals an 'unconstitutional state of affairs',⁴⁷ that is, a general

42 As above.

43 Para 1 of this provision states that 'the displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand. Should such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition.' The second paragraph goes on to state that 'civilians shall not be compelled to leave their own territory for reasons connected with the conflict'.

44 Corte Constitucional (n 37) para 60. The Court makes explicit reference to art 93 of the 1991 Political Constitution of the Republic of Colombia, which provides that 'international treaties and conventions ratified by Congress which recognise human rights and prohibit their limitation in states of exception, prevail domestically. The rights and duties enshrined in this Charter shall be interpreted in accordance with the international treaties on human rights ratified by Colombia.'

45 Corte Constitucional (n 37) para 72.3 (my emphasis).

46 As above.

47 Corte Constitucional, Sentencia T-025 (Constitutional Court, Judgment T-025) 22 January 2004, Chapter IV, First Decision.

violation of the obligation to protect people from forced displacement, the obligation to assist them once such displacement has taken place, and the duty to design effective reparation policies, which must include restitution and return. The Court has also pointed out that the violation of basic rights, such as the right to live in dignity, the right to personal integrity, equality, work, health, social security, and education,

has been occurring on a massive scale, on a continuous, long-term basis, and is not attributable to a single authority, but rather due to a *structural problem* that affects the entire policy designed by the state on this matter and its different components, as a result of the insufficient funding made available for this policy and the precarious institutional capacity to implement it.⁴⁸

Recently, the Constitutional Court has again carefully considered the government's response to the extreme vulnerability affecting the displaced population, and reached a conclusion that again caused confusion, hopelessness and frustration. The Court 'finds that the unconstitutional state of affairs persists'.⁴⁹ In its qualified opinion, 'despite the achievements regarding some rights, systematic and comprehensive progress has not been made to ensure the effective enjoyment of all the rights of the population who have been victims of forced displacement'.⁵⁰ In addition, as the Court remarked, one of the most precarious policies is the land policy in place, 'both with regard to the protection and restitution of land abandoned by the displaced population, and to land delivered for relocation and for conducting production projects'.⁵¹ This opinion is shared by the Division for Preventive Action on Human Rights and Ethnic Affairs. This body has stated that we are witnessing a 'repeated failure on the part of the state authorities to fulfil their duties to protect, guarantee and ensure the conditions for the effective implementation of the right of the displaced population to their property and possessions' (Procuraduría Delegada para la Prevención en Materia de Derechos Humanos y Asuntos Étnicos 2008: 57). In addition, the Division for Preventive Action went one step further, in an extremely important qualitative leap in the treatment of displacement and dispossession, as will be seen later. In its view, the right to reparation in respect of property rights

cannot be reduced to the restitution of property without the creation or reestablishment of the right, or to mere economic compensation, without recognising the violation and the damages caused, and without investigating and punishing those responsible, and clarifying the causes of the dispossession.⁵²

4 Some proposals for guaranteeing the right to restitution

I will provide a brief analysis of some of the proposals that are being considered to implement the right of the displaced population to the restitution of their lands and territories, which can open the door to their voluntary return, in safety and dignity.

48 Corte Constitucional (n 47) sec 6.3 (my emphasis).

49 Corte Constitucional, Auto No 008 (Constitutional Court, Resolution No 008) 26 January 2009, ch IX, First Decision.

50 As above.

51 Corte Constitucional (n 49) sec III, 4.2, para 70.

52 As above.

4.1 Towards a comprehensive and differentiated reparation policy

It has been shown how the victims' rights to reparation have been articulated in contemporary international law through an entire set of measures ranging from restitution to compensation, including measures in the field of rehabilitation, satisfaction, memory, and guarantees of non-repetition. A comprehensive reparation policy for victims of forced displacement and territorial dispossession in Colombia must adequately combine these different forms of reparation, while relying on the participation and qualified opinions of the victims. Restitution and return must be accompanied by a process of memory about displacement and dispossession, about its meaning, its dynamics, its perpetrators and beneficiaries. Both victims and society as a whole have the right to know all the aspects of one of the most serious and dramatic human rights violations committed in the context of the armed conflict in Colombia. The gap in collective memory regarding the meaning of the process of dispossession 'leads public policies ... to be confined to a formal and restricted recognition of the rights of the displaced population to the abandoned land, without proposing any strategies to reverse and prevent the effects of such dispossession' (Área de Memoria Histórica 2009: 13).

A *differential approach* to the reparations for the victims of displacement and dispossession⁵³ is also necessary. This differential policy on reparation must begin with an analysis of the impact of displacement and dispossession on the different affected groups. The impact on particularly vulnerable groups, such as women, indigenous peoples, Afro-descendant communities and people with disabilities, needs to be dealt with. Only if the different impacts are taken into account, depending on the conditions and circumstances of each social group, can adequate compensation measures be taken that include these differential elements. Otherwise, if global and indiscriminate policies are established for the displaced population as a whole, 'vulnerable situations tend to be aggravated' (Área de Memoria Histórica 2009: 55).

In the case of women, for example, the Constitutional Court has identified ten gender-related risks, namely, 'ten specific vulnerability factors to which women are exposed because of their female status in the context of armed confrontation in Colombia, which are not shared by men and thoroughly explain the disproportionate impact of forced displacement on women'.⁵⁴ One of these gender-related risks is 'the risk of being dispossessed of their land and property more easily by illegal armed actors given their historical position on property, especially rural real estate'.⁵⁵ In view of this, the Court ordered a differentiated policy to try and prevent gender-based risks that caused women to suffer a disproportionate impact by being displaced. The Pinheiro Principles established an obligation to ensure that 'a gender perspective is

53 Corte Constitucional, Sentencia T-821 (Constitutional Court, Judgment T-821) (n 37) para 69.

54 Corte Constitucional, Auto N° 092, 14 April, 2008.

55 Corte Constitucional, Auto N° 092 (Constitutional Court, Resolution No 092) V.B.1. In spite of the traditional invisibility of women's formal relationships with the land, their 'identification with the land, just like the life-giving mother earth, must be emphasised' (Puerto 2006: 60).

incorporated into programmes, policies and practices for the restitution of housing, land and property'.⁵⁶

The internal armed conflict has also had a significant impact on indigenous peoples living in Colombia. Indigenous peoples have been exposed to severe processes of forced displacement and land dispossession that have seriously threatened their own physical and cultural survival. As the Constitutional Court has pointed out in a resolution specifically aimed at addressing the situation of the rights of indigenous peoples displaced by the conflict, 'because of its destructive consequences on the ethnic and cultural fabric of these groups, forced displacement generates a clear risk of extinction, cultural or physical, of indigenous peoples'.⁵⁷ These specific circumstances faced by indigenous peoples, together with their historically-vulnerable situation, demands a differentiated treatment in which the territorial element becomes fundamental. Given the special relevance of the land and territories⁵⁸ for indigenous peoples, the right to restitution and land demarcation must become an essential ingredient of any reparation policy. Only in this way will the foundations be laid for the prevention of future territorial harassment and the forced displacement of indigenous peoples. Luis Evelyn Andrade, leader of the *Organización Nacional Indígena de Colombia* (ONIC), has demanded 'actions aimed at securing the affected property, developing programmes that guarantee access to land and strengthening the community social fabric, emphasising the importance of identifying legal, institutional and community-based mechanisms for the protection of ethnic territories' (Andrade 2006: 76).

5 Conclusion

The dynamics of land appropriation and dispossession is one of the elements that characterise the forced displacement of people and communities in the context of the internal armed conflict that has for several decades ravaged Colombia. Both domestic and international legal standards have gradually shaped the rights of victims to truth, justice, reparation and the establishment of guarantees of non-repetition of the violations committed. The rights of the victims of displacement and dispossession to comprehensive reparation include as a preferred means the restitution of their property and the voluntary return to their places of origin with the assurance of safety, dignity and sustainability. The reversal of a process of territorial encroachment that has reached proportions that lead to the need for a genuine agrarian counter-reform is one of the basic conditions for preventing forced displacement and establishing guarantees of non-repetition. Restorative justice, a rights-based approach and a differential focus should provide an outline for the roadmap for designing the public policies aimed at the displaced population, in particular

56 Principle 4.2.

57 Corte Constitucional, Auto No 004 (Constitutional Court, Resolution No 004) 26 January 2009 11.

58 In the indigenous worldview, this distinction between land and territory is important. The territory goes far beyond the pure physical element, pointing to 'a vital relationship between community and the lived-in, appropriated, and represented space'. From this perspective, the territory 'is a social product derived from the population dynamics, the symbolic and material appropriation of space and the representations constructed by a society through history and its experiences' (Área de Memoria Histórica 2009: 93).

indigenous people, due to their special link with the land and the territory. Unfortunately, as the Colombian Constitutional Court has repeatedly pointed out, a humanitarian approach to care for the displaced population has not yet placed sufficient emphasis on the right to restitution and return, constituting a structural violation of their rights and an 'unconstitutional state of affairs'. If this situation persists, a process of perpetuation of displacement and territorial dispossession will ensue, since policies on restitution and the conditions associated with the armed conflict do not generate sufficient incentives to encourage the displaced to enable their return. In order to reverse this situation, it has been proposed that specific institutions be created that can guarantee the right to the truth and the right to restitution of the victims of forced displacement. From my point of view, these proposals deserve to be seriously considered if there is a true intent to pay off the historical debt that the Colombian society and state have contracted with the victims of displacement and land dispossession.

The fact that the General Agreement for the Termination of the Conflict and the Construction of a Stable and Lasting Peace (*Acuerdo General para la terminación del conflicto y la construcción de una paz estable y duradera 2016*) between the Colombian government and the FARC explicitly mentions 'the human rights of the victims' provides a window of opportunity for guaranteeing the rights of the victims, in particular their rights to truth, justice, reparation and land restitution of the indigenous peoples of Colombia, who have experienced with special intensity the collateral damages of the Colombian armed conflict.

The General Agreement has explicitly recognised the 'historical conditions of injustice' suffered by indigenous peoples, something that has to be taken into consideration in the process of implementation of the peace agreement. At the same time, the agreement mentions some rights that are of utmost importance to the indigenous peoples in Colombia, namely, the right to self-determination and autonomy; the right to participation in decisions that affect their lives; free, prior and informed consent; and last but not least, the right of indigenous peoples to their lands, territories and natural resources.

From the procedural point of view, a specific body has been created to effect the follow-up of the implementation of the agreement as far as indigenous peoples are concerned, namely, the High-Level Instance with Indigenous Peoples for the Follow-Up of the Agreement.

If adequately implemented, the peace agreement in Colombia can mark a turning point for indigenous peoples in the Andean country. On the other hand, one must be aware of the huge distance between rhetoric proclamations and the harsh reality that indigenous peoples face in their daily lives.

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Human rights and democracy in the Arab World in 2017: Hopeless within, doomed abroad

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Abstract: *This article, which gives an overview of the situation pertaining to human rights and democracy in the Arab world during 2017, deals with the situation in nine countries. These countries represent a varied picture, in that occupied territories (Palestine); fledgling democracies (Lebanon and Tunisia); authoritarian regimes (Saudi Arabia, Morocco and Egypt); and unstable countries where war and terror prevailed (Libya, Iraq and Syria) are included. Stated in general terms, the Arab world was subjected to pressure, from below, to liberalise, which was met by resistance and conservatism, from above. In Palestine, local authorities quashed protests for equality, dignity and freedom of speech, while Israeli expropriation, violence, arbitrary arrests and detentions caused thousands of injuries and deaths. In Lebanon and Tunisia, some advances were made with regard to women's rights, drugs and 'rape-marriage' laws, but progress was hampered by measures consolidating corruption and impunity. The situation in three authoritarian regimes, Saudi Arabia, Morocco and Egypt, remained of grave concern. Saudi Arabia showed some signs of opening which may remain a cosmetic campaign aimed at legitimising the leadership of Mohammad Ben Salman and merely appeasing international pressure. Egypt and Morocco have shut down dissent and protest, while still trying to show some willingness to liberalise. Dire situations prevailed in Libya, Iraq and Syria, with terrorism, kidnappings, deprivation of liberty of children, and the prohibited chemical weapons being used. When individuals tried to escape the hardship in their countries, they often faced violations of human rights in Europe, by the countries that themselves are trying to promote change in the region.*

Key words: *human rights; democracy; Arab world; 2017; occupied territories; fledgling democracies; authoritarian regimes; war; terror; refugees*

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1 Introduction

In 2017 the Arab world was subjected to pressure for liberalisation from below countered by conservatism and resistance from above, whether in occupied or non-occupied territories, in democracies or authoritarian regimes, stable or war-torn countries, and among those stuck in their countries as well as those fleeing their land in search of safety and better conditions. In Palestine, local authorities were pushing against civil and political rights, smashing protests for equality, dignity and freedom of speech, while Israeli expropriation, violence, arbitrary arrests and detentions were causing thousands of injuries and deaths. In neighbouring Lebanon and Tunisia, the two countries that would set the example with regard to democracy and human rights, some advances were made with regard to women's rights, drugs and 'rape-marriage' laws. However, this progress was combined with measures consolidating corruption and impunity, with an administrative amnesty benefiting corrupt civil servants under Ben Ali in Tunisia, and an electoral law tailor-made to reinforce the corrupt establishment in Lebanon. In the meantime, Saudis have shown some signs of opening which may remain a cosmetic campaign aimed at legitimising the leadership of Mohammad Ben Salman and appeasing international pressure. Egypt and Morocco have shut down dissent and protest, while still trying to show some willingness to liberalise. Meanwhile, Libya, Iraq and Syria were very far behind, with terrorism, kidnappings, deprivation of liberty of children, and the use of prohibited chemical weapons. Alarming, when individuals from the Arab world tried to escape the horrors in their countries, they often faced violations of human rights by the countries that themselves were trying to promote change in the region.

2 Palestine: The land of tragic anniversaries and failing local authorities

The year 2017 was a year with many anniversaries for Palestinians, as it marked the hundredth year since the Balfour Declaration paved the way to the expulsion of more than 750 000 Palestinians and led to the establishment of the Israeli state in the land of historical Palestine in 1948. Moreover, it marked the seventieth anniversary since United Nations (UN) Resolution 181 adopted the partition plan of Palestine. Furthermore, the year 2017 marked the fiftieth anniversary since the Israeli military occupation of the Gaza Strip, the West Bank and the Golan Heights; the thirtieth anniversary since the eruption of the first *intifada*; and, finally, the tenth year since the political division between Fatah and Hamas.

The year 2017 in Palestine was marked by the hegemony of the Palestinian authority over the legislative and judiciary sectors. For instance, civil society organisations opposed the Palestinian Authority Decree-Law that established the High Criminal Court for being in contradiction with constitutional principles and threatening the basic rights and freedoms of citizens (Musawa 2017).

In Gaza, a public sector employee crisis started in April 2017, causing demonstrations by political and civil movements which turned violent as the Palestinian national security forces claimed that they had no permits.

The demonstrators were protesting against the punitive measures adopted by the Palestinian authority which suspended the payment of salaries and enacted deduction policies against public-sector employees in the Gaza Strip. These measures were adopted in order to exert pressure on Hamas, and were maintained despite the fact that Hamas dissolved its administrative committee in October 2017 in response to demands for reconciliation. The Palestinian Independent Commission of Human Rights (ICHR) stated that the Palestinian authority's measures were a serious breach of the fundamental rights of employees, including their rights to a decent life, and an act of discrimination between public sector employees which violated the principle of equality and dignity (ICHR 2018a). The high level of poverty and the deteriorating economic and social situation in Gaza require the implementation of a national support strategy rather than the imposition of alienating punitive measures.

In July 2017 the Palestinian authority enacted the law on electronic crimes through a decree issued by President Mahmoud Abbas. While the law was welcomed by the ICHR (ICHR 2018b) and Human Rights Watch (HRW) with several reservations over provisions that failed to meet international standards (HRW 2017), the Palestinian civil society strongly opposed the law regarding it as an effective tool to criminalise 'any form of digital dissent' (MAAN 2017) which reinforces authoritarianism. Meanwhile, the enactment of the law was followed by charges against several journalists and human rights defenders. The director of the Palestinian and Arab digital advocacy group Hamleh stated that the law 'is the worst law in the Palestinian Authority's history' and 'allows the Palestinian authority to arrest anyone under unclear circumstances'. Civil society organisations called for amendments with regard to prison sentences and heavy fines for peaceful online criticism of authorities. They further called the Palestinian authorities to meet their legal obligations provided for by the International Covenant on Civil and Political Rights (ICCPR) ratified in 2014 (HRW 2017).

On 8 November 2017, a lawyer was treated violently and arrested by security officers in civilian clothes in the middle of the magistrate's court in the city of Nablus (Marsad 2017). Security officers were affiliated with a special security committee that had been set up in 2015 and included a prison that operated outside the judiciary's rule. Palestinian jurists and civil society called for the disbanding of the committee that impedes the independence of the judiciary and allows the creation of unlawful detention centres.

Currently two systems exist in the West Bank. On the one hand, the Israeli settlers' colonial system is built on well-developed public infrastructures, public services, facilities and security protection, with a strong economy of the colonies supported by industrial zones, land confiscation and domination of natural and water resources. On the other hand, the military rule over Palestinians includes a segregated transportation system, a fragmented territory, a distorted economy, a lack of basic rights as well as poor public facilities and a fragile infrastructure.

The annual report of the Palestinian Centre for Human Rights documented 94 Palestinians killed by Israeli occupation forces only in 2017, including 16 children and two women, while until January 2018, Israeli forces were still holding 15 bodies of slain Palestinians in flagrant violation to international humanitarian law. Moreover, approximately

8 300 Palestinians were injured by Israeli occupation forces. In addition, Israeli forces arrested 6 742 Palestinians, including 1 467 children, 530 administrative detainees, 22 journalists and 10 Members of Parliament (PCHR 2018). In Gaza, 38 Palestinians were killed and 1 310 injured in 2017; 63 air strikes targeted the different cities in Gaza; and 265 firing attacks on fishermen were documented, resulting in the death of two fishermen and the sinking of two ships. Moreover, approximately 10 000 people remain unable to access health care outside the Gaza Strip, resulting in the death of 20 people (PCHR 2018).

The increased expansion of Israeli settlements in 2017 was facilitated by several decisions and by legislation. For instance, the Israeli government decided to build approximately 168 000 new entities in the settlements of the West Bank and Jerusalem. Moreover, the Israeli civil administration approved a decision to build a new settlement in the southern district of Nablus. Furthermore, around 2 100 *dunums* of land were confiscated in the occupied village of Sur Baher near Jerusalem. To make things worse, the Israeli forces and settlers' attacks uprooted and burnt approximately 10 000 trees in the West Bank and Jerusalem. The Israeli authorities also ordered the demolition of 170 houses and 263 structures in different parts of the West Bank and Jerusalem, leaving around 128 Palestinian families comprising 700 individuals homeless.

3 Tunisian and Lebanese democracies: Liberalisation or cooptation?

While 2017 was characterised by continued violence, expanded occupation and further degradation of human rights in Palestine, developments in the nearby states of Tunisia and Lebanon were less gloomy and saw certain promising advances unfold.

3.1 Tunisia

The year 2017 was indeed a remarkable year for the Tunisian democratic progress. Many legal and political human rights achievements were attained in 2017, thanks to the conscious well-organised advocacy work done by Tunisian civil society organisations (CSOs). However, 2017 also witnessed many political setbacks that put the process of transitional justice at stake and questioned the commitment of the ruling class to democracy and human rights.

The UN Human Rights Council, to which Tunisia has submitted its national report, held its 27th session between 1 and 12 May 2017. Among the shadow reports submitted by more than 23 Tunisian CSOs, a special shadow report made by the LGBTIQI+ organisations focused on all economic, social, and cultural violations and discriminations this community is facing in Tunisia. This report forced the Tunisian officials at the UN Human Rights Council to accept the recommendation made by Luxembourg regarding the ban of anal testing. However, Mahdi Ben Gharbia, the Tunisian Minister of Relations with Constitutional Bodies, Civil Society and Human Rights, afterwards stated that this ban would take five years to effectively materialise. This statement has been a great disappointment to all activists who for years lobbied for the ban of anal testing and the repeal of article 230 which criminalises homosexuality. The

National Council of the Medical Order in Tunisia has revived hopes by responding to Ben Gharbia's statement and issuing a statement on 3 April 2017 urging all doctors to abstain from conducting anal tests (HRW 2017).

Another significant event has put the whole transition process in Tunisia at risk. This occurred on 13 September 2017 with the approval by the Tunisian Parliament of the 'administrative reconciliation law'. This law grants impunity to civil servants who were accused of corruption under former dictator Zine El Abidine Ben Ali (Guellali (2017a)). The Tunisian civil society played a crucial role in the fight against this law since 2015, when it was first proposed as a draft law, including both administrative and economic reconciliation. The civil demonstrations, which never ceased since 2015 under the campaign called *Manish Msameh* ('I'm not forgiving'), forced the ruling class to take a step backwards by giving up the economic reconciliation and only approve the administrative one (Hajar 2017). In any event, the approval of this law tremendously shook the Tunisians' trust in the democratic system in place and faith in the ruling class.

As far as women's rights are concerned, two crucial steps were taken in 2017. First, a law criminalising all kinds of violence against women was adopted (HRW 2017c). This law is the most progressive among all similar laws in Arab countries, as it has inclusive definitions of different types of violence, among them political violence. This law also criminalises marital rape. Second, the President of the Tunisian Republic, Beji Caiid Essibssi, made a historic speech on 13 August 2017, on Tunisia's Women's Day (BBC News 2017). In this speech the President lifted a conservative decree, allowing Tunisian Muslim women to marry non-Muslims. Essibssi also revealed his serious intention of moving forward towards changing the inheritance law to provide for equality between both sexes, going against the Islamic inheritance law which divides the inheritance unequally between men and women. For this purpose, he created the Individual Freedoms and Equality Committee (COLIBE), which was given the task to revise all laws that impede equality or individual freedom within a period of five months.¹

Furthermore, the 52-Drug law which 'imposes a minimum mandatory sentence of one year in prison for anyone who uses or possesses even a small quantity of an illegal drug, including cannabis' (HRW 2017a), was amended by the Tunisian Parliament on 8 May 2017, giving the judge the flexibility to decide the extent of the punishment. However, this is only a partial amendment, in that CSOs for years have been lobbying for the repeal of the entire law. The ruling class has been very rigid in responding, demonstrating the reluctant attitude of the government towards protecting and empowering rights.

In fact, the work done and the progress attained on the political and legal levels by Tunisian CSOs are not as important as those made on the social level. Unfortunately, the legal developments in Tunisia do not reflect real progress in people's social attitudes. For instance, many laws tackling individual rights have been strongly resisted, not only by the ruling class but also by the Tunisian people themselves.

1 The committee's report has already been submitted to the President on 12 June 2018.

3.2 Lebanon

Meanwhile, 2017 was an important year in Lebanon for democracy and human rights, particularly regarding legislative changes on elections and representation. However, these changes were formal and maintained limited access to parliament to the five biggest ruling parties and the very wealthy candidates. Some progress was nevertheless made with regard to women's rights and torture prevention as a result of efforts by civil society.

3.2.1 *New electoral law*

In June 2017 the Lebanese cabinet ratified the long-awaited new electoral law, paving the way for the first parliamentary election in nearly a decade (HRW 2018). This marked an end to Lebanon's political and constitutional crisis after disagreements between the political parties on the characteristics of the new electoral law threatened to leave the country without a parliament (Alami 2018). In fact, these disputes resulted in extending the parliamentary mandate three times since 2013 (El-Helou & Atallah 2017). The 2017 electoral law introduced a proportional representation system and preferential voting in a reduced number of multi-member districts and prospects for diaspora voting (Elghossain 2017). For the first time since 1943, proportional representation will replace Lebanon's winner-takes-all majoritarian system.

While this is a step in the right direction, the new electoral law suffers from inconsistencies that undermine its potential to enhance representation. Most notably, despite sustained pressure from civil society, the new proportional representation system did not adopt a female electoral quota of 30 per cent to increase women's political participation (Democracy Reporting International 2018). Although Lebanese women were granted the right to vote in 1952, they continue to be marginalised in politics. The country has among the lowest representation of women in government in the world: The 128-seat Parliament currently has only four women (Kanso 2018). Moreover, the elections are still overseen by the Interior Ministry, instead of an independent electoral commission, and the voting age remains at 21 years (Democracy Reporting International 2018).

The sensitive issue of electoral district size also remains a concern. Civil society actors argue that while the new law encompasses elements of a proportional representation system, districts continued to be drawn along communal lines and a sectarian calculus (El-Helou & Atallah 2017). As such, through manipulation of the district sizes, the new electoral law is designed to endure the power of the fixed set of confessional elites. In addition, the law had a high ceiling for campaign expenditures, allowing money to play a huge role at the expense of electoral programmes and substantive debates. The cartelisation and high pricing of media further reduced the chances of new entrants, small parties or technocrats to emerge.

3.2.2 *Hariri's shock resignation*

In November 2017 an unexpected move plunged Lebanon into a political crisis and regional tension. During a visit to Saudi Arabia, Lebanon's Prime Minister, Saad Hariri, announced his resignation on television from Riyadh, the Saudi capital. Hariri blamed his resignation on Iran, as he

accused it for meddling in Lebanese and Arab affairs through its Lebanese ally, Hizbollah (McDowall, Perry & Dadouch 2017).

Lebanese officials stated that Hariri – a long-standing Saudi ally – was coerced into resigning under Saudi pressure, and he was placed under house arrest. Hariri and Saudi Arabia denied this. After diplomatic talks and interference by France and other powers, Hariri returned to Lebanon and withdrew his resignation in December (Freedom House 2017).

Hariri's resignation pushed Lebanon to the foreground of the proxy wars between Iran and Saudi Arabia and their confrontations that are shaping the region in Syria, Yemen, Iraq and Bahrain. The move also underlined the significant influence foreign governments still have in Lebanon's regional and domestic politics.

3.2.3 *Repeal of article 522 of the Penal Code*

In August 2017 Lebanon followed Tunisia and Jordan to repeal article 522 of the Penal Code, or the 'rape-marriage laws', which enabled rapists to escape prosecution when marrying the victim (UN Women 2017). This positive development was pushed by various national initiatives and attempts. For instance, Aba'ad, a Lebanese non-governmental organisation (NGO), campaigned against article 522 for over a year, in a campaign that involved staged protests, billboards and social media. In protest of the law, more than 30 wedding dresses were hung from nooses on a beach in Beirut in April 2017 (BBC 2017).

The decision to repeal article 522 was celebrated by civil society actors, although they warned that the rape-marriage law is maintained under articles 505 and 518. Article 505 concerns sex with a 15 year-old minor, while article 518 allows marriage with minors aged between 15 and 18 years as a way of escaping punishment (BBC 2017). Rape-marriage laws remain prevalent in many other countries in the Arab region, including Kuwait, Bahrain, Iraq, Palestine, Syria and Libya (UN Women 2017).

3.2.4 *Refugee rights*

In 2017 more than one million Syrian refugees were registered with the UN High Commissioner for Refugees (UNHCR) in Lebanon, the highest per capita population of refugees in the world (HRW 2018).

Following seven years of the Syrian crisis, Syrian refugees in Lebanon have been reported to be 'more vulnerable than ever', according to a survey by UNHCR, the United Nations Children's Fund (UNICEF) and the World Food Programme (WFP) (WFP 2017). The Vulnerability Assessment of Syrian Refugees reveals that more than half the Syrian refugees in Lebanon live in extreme poverty and over three-quarters live below the poverty line.

The Lebanese government continued its decision of May 2015 to block UNHCR from registering newly-arrived refugees (Amnesty 2017). Obtaining or renewing residence permits remains a key financial and administrative challenge for Syrian refugees in Lebanon. This led to a persistent risk of arbitrary detention, imprisonment and forcible return to Syria (Amnesty 2017), coupled with restrictions on access to work, education and health care. In 2017, approximately 80 per cent of Syrian refugees in Lebanon lacked legal residence (HRW 2017).

On a positive note, the Lebanese authority waived the heavy residence fee of US \$200 for Syrian refugees registered with UNHCR. However, the policy was criticised for failing to include Syrians that are not registered with UNHCR, those who had arrived in Lebanon after January 2015 or who had renewed their residence through work or a private sponsor, along with Palestinian refugees from Syria (HRW 2017a).

3.2.5 *Law against torture and other inhuman and degrading treatment or punishment*

After years of working alongside civil society actors in September 2017, the Lebanese Parliament amended its penal law to criminalise torture and enshrine its commitment to the UN treaties. Although Lebanon ratified the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) in 2000, the state did not adapt its laws to forbid the use of torture (HRW 2017b). Article 401 of the Lebanese Penal Code excluded conditions where torture is used other than for extracting confession of a crime or information related to it. It also did not criminalise non-physical torture, such as psychological torture (HRW, 2017b).

The new anti-torture law undoubtedly is a positive development that aligned Lebanon with its international obligations. However, the law suffers a number of shortcomings. Most notably, it did not incorporate the CAT Committee's comments in 2017 on the statute of limitations and penalties for acts of torture, and it failed to require military officers accused of torture to be tried before civilian courts (Amnesty 2017). It is also worth noting that torture continues to be used in Lebanon. Minority and vulnerable groups, including refugees, trafficked individuals and the LGBTQ+ community, continue to be at a higher risk of cruel, inhuman and degrading treatment (ALEF Act for Human Rights 2017).

4 Authoritarian regimes: Can repression and reform coexist?

The year 2017 saw certain promising, albeit limited, manifestations of democratic and legal reform in countries such as Tunisia and Lebanon. Perhaps more unexpectedly, the year witnessed certain pivotal reforms in the authoritarian regime of Saudi Arabia, alongside the manifestation by Egypt and Morocco of a certain willingness to liberalise. Whether such developments are a sign of progress, or merely constitute strategic measures to legitimise the current leadership in each country, is yet to be determined.

4.1 Saudi Arabia

As far as Saudi Arabia is concerned, the international community has indeed been praising and welcoming the September 2017 decree allowing women to drive in Saudi Arabia after a long-standing ban. This came alongside various other promises by the Crown Prince, Mohammed Bin Salman, to uplift women's rights, as well as other reforms, making 2017 a historic and pivotal year in Saudi Arabia. This wave of reforms affected several levels of the Kingdom's life both internally and externally.

4.1.1 *A new era in Saudi Arabia: Defying the conservative reputation*

One of the most striking changes in the Kingdom occurred in June 2017, when the Crown Prince and Minister of Interior, Mohammed Ben Nayef Al Saud, was unseated. Mr Al Saud was replaced by the son of King Salman, who became the new Crown Prince and was also appointed Minister of Defence. With his newly strong visibility on the political scene, Mohammed Ben Salman has since then widely pushed for the 'modernisation' of the Saudi society, defying its conservative reputation in the eyes of the international community.

This wave of reforms were initiated with the Vision 2030 plan, which aims at lowering the country's dependency on oil by reshaping both the economy and society to fit into a scheme adapted to the twenty-first century. This economic reform, along with a shorter-term plan, the National Transformation Programme 2020 and the Fiscal Balance Programme, includes projects of building resorts with 'international standards' where mixed gender, bikinis and alcohol would be permitted (Henderson 2017). These changes are perceived as driving the cultural changes needed to enable women to become both more economically productive and more independent (Alston 2017).

In fact, women have been a key target of these reforms. Starting with the decree allowing them to drive starting in June 2018, the Crown Prince also promised to allow women to attend soccer games at public stadiums. As a first concrete step, authorities have allowed women to attend Saudi Arabia's Independence Day in September 2017, and some women have been appointed in prominent positions, such as Fatimah Baeshen, spokesperson of the Saudi Embassy in Washington.

In November an anti-corruption purge led by Mohammed Ben Salman marked the strong willingness to abolish barriers between different classes of Saudi society by arresting several Saudi princes and businessmen for corruption.

The reigning family's efforts to reshape various aspects of Saudi's lives also influenced the Kingdom's external relations. Two key events marked the year 2017. On the one hand, Saudi Arabia and some of its allies cut their diplomatic relations with Qatar. On the other hand, President Trump visited the Kingdom, strengthening US-Saudi ties. This unprecedented openness to the US was complemented by other visits by numerous celebrities, such as John Travolta, and by promises to issue tourist visas and to bring back movie theatres and the opera.

In reflecting on this new era of reforms affecting Saudi Arabia under Mohammed Ben Salman, one can see only positive changes introduced to modernise society and pave the way for some rights that had been in the shadow for decades. However, while these changes would deeply alter the economic and social agenda, 'the place of the human rights discourse in Saudi Arabia remains somewhat ambivalent' (Alston 2017).

4.1.2 *Modernisation? At what price?*

Several organisations have expressed deep concern about the human rights situation in Saudi Arabia, such as Amnesty International (AI) and Human Rights Watch (HRW) in their respective annual reports for the year 2017. Both reports flagged several human rights violations in the country during

2017. Starting with attacks on freedom of expression, association and assembly with a government very closely monitoring social media, manifestations of opinion have been brutally repressed, with an almost non-existent political participation. In a press release of 5 May 2017, the UN Special Rapporteur on Counter-Terrorism urged Saudi Arabia to reform its law on counter-terrorism, as it does not comply with international standards and gives a very broad definition of terrorism. He also halted Saudi authorities from using it against people peacefully exercising their freedom of expression, assembly or association, underlining the ill-treatment of human rights defenders, writers and bloggers who remain under threat and are subjected to arrests and torture.

HRW and AI have also noted various targets of discrimination throughout the Kingdom: Shia activists have been executed facing unfair trials, while migrant workers, who are among the poorest segment of society, were being arrested, detained and deported. Finally, despite positive changes, women still are not protected against sexual and other forms of violence and have to rely on male guardianship to travel, obtain a passport or even undergo medical surgery.

In the course of 2017, two major events alarmed the international community. In May, the destruction of the Al-Masora neighbourhood resulted in massive relocation and displacement of residents who lost their homes and personal possessions (Alston, Bennoun & Farha 2017). Schools, institutions and health centres were shut down with additional power cuts. The Special Rapporteur in the Field of Cultural Rights stressed that 'these destructions erase the traces of this historic and lived cultural heritage and are clear violations of Saudi Arabia's obligations under international human rights law' (Alston, Bennoun & Farha 2017).

In its external relations, the Kingdom led the blockade imposed in Yemen, preventing humanitarian aid to reach civilians, leaving people in situations of hunger. In a joint statement on 16 November, UN leaders from WFP, UNICEF and the World Health Organisation (WHO) stated that 'even with a partial lift of the blockade, an additional 3,2 million people would be pushed into hunger and 150 000 malnourished children could die in the coming months'. A few weeks later, the heads of seven humanitarian agencies expressed the urgency of lifting the restrictions.

4.1.3 A hidden strategy to apply a controversial agenda?

It is clear that under the umbrella of reforms lies a strategy to appear more attractive to the international community and challenge the way Saudi Arabia has for decades been perceived. With an overview of the events that occurred in 2017, alternating between the demonstration of a strong will to open up to the West and a series of serious violations of human rights, one can sense the controversial agenda being put in place implicitly by the reigning family.

4.2 Morocco

Since the enthronement of King Mohamed VI in 1999, the Moroccan government has launched a series of legislative reforms affecting the human rights situation. However, the year 2017 was marked by human rights violations at many levels, ranging from arbitrary arrests, the arbitrary expulsion of international journalists, and the assault on pacific

demonstrators to a limitation on freedom of expression and allegations of torture.

4.2.1 *Repression of social protests*

The death of a fish vendor, Mouhcine Fikri, in Al Hoceima, a city in the forsaken region of the Rif, initiated popular protests and strikes that spread nationwide. However, after a few weeks and a number of arrests, the demonstrations ceased in the major cities, Rabat and Casablanca, leaving demonstrators with a great deal of disappointment and disillusion.

However, large-scale protests continued in the cities of the Rif in favour of social justice and accountability, but these were met with violent repression by the Moroccan regime (Amnesty International 2017). During the nine months of protests, hundreds of young protestors were arrested and some were taken to courts in Casablanca (500 kilometres away from their cities) to be judged for partaking in unauthorised protests and destabilising the national security. The authorities arrested many children (the youngest was six years old) for participating in the protests and giving statements to the media (Le Desk 2017).

What began as spontaneous demonstrations became an organised movement when Nasser Zefzafi, a local unemployed man, emerged as a leader. He led the movement from October 2016 to May 2017, when he was violently abducted by the police force. In fact, the authorities arrested him after he had interrupted a Friday sermon and insulted the *imam* who accused the protestors of dividing the nation (Jeune Afrique 2017).

Following his arrest, eight journalists and bloggers that published articles or commented on the events in the Rif were arrested between May and August for 'undermining state security'. During the same period, journalists and academics, including the historian Maati Monjib, were already on trial because they promoted a mobile application for citizen journalism.

4.2.2 *Steps forward in the fight against torture and ill-treatment?*

Since 2014, Morocco has been a state party to the Optional Protocol to the Convention against Torture (OPCAT). The Protocol's main obligation is to establish a National Mechanism of Prevention of Torture (NPM) that will be responsible for monitoring all places of deprivation of liberty, including police stations, prisons, psychiatric hospitals and retirement houses. According to the UN Human Rights Committee, the Moroccan government has taken significant steps in the fight against torture and ill-treatment and the Committee reported that there was a 'marked reduction' in such practices (US Department of State 2017). However, even if those acts were not systematic and remain isolated cases, many detainees have declared that they were beaten by police during their arrest. In fact, 32 individuals detained during the Rif protests have claimed that they were beaten by the police, but the judges refused to investigate those allegations or to request the medical examinations that were demanded by the detainees' lawyers. The court convicted the 32 individuals on charges related to violence during the protests.

On a positive note, according to the US Department of State, government statistics indicate that courts referred 36 cases involving 45

detainees and 53 police officers to the police's internal mechanism for investigating possible acts of torture and ill-treatment. However, the results of the investigation were not available (US Department of State 2017).

4.3 Egypt

Despite all efforts exerted to eradicate terrorism, Egypt has suffered the devastating aftermath of a number of deadly terrorist attacks that occurred in 2017, one of which was described as 'the deadliest such incident in Egypt's modern history' (Salem & Ghany 2017). On 9 April two attacks targeted Coptic Christian churches in the cities of Alexandria and Tanta. The Islamic State (ISIS) later claimed responsibility for the Palm Sunday attacks, which resulted in at least 49 deaths and many more injuries (Sterling et al 2017). Consequently, President Abdel Fattah el-Sisi declared a state of emergency covering the entire country for three months, which was later renewed and re-declared until the end of the year, in accordance with regulations under the Constitution. The Egyptian Parliament amended the law governing the state of emergency days after it was first declared in April. Some criticised both the amendment and the extended state of emergency, fearing the risks that might threaten freedoms and human rights as well as the constitutional consequences (Gamal el-Din 2017).

Following the Central Bank of Egypt's decision in 2016 by which the currency was floated, the executive board of the International Monetary Fund (IMF) during 2017 concluded a number of reviews of Egypt's economic reform programme as part of the three-year Extended Fund Facility (EFF) arrangement with the Egyptian government. Based on statements made by different IMF representatives, in adopting such programme while implementing certain measures, the Egyptian officials succeeded in achieving a number of goals, including reaching the highest level for international reserves since 2011, and the economy is showing signs of improvement (IMF 2017). Subsequently, Egypt's sovereign credit rating rose from stable to positive for the first time since 2011 (Egyptian Streets 2017). Still, the accumulated pressure upon the citizens, especially those from the middle-lower class, who bear the burden and consequences of such economic reform measures, is evidenced in new forms of protesting, which induces more forms of oppression.

In the meantime, pressure from below faced many obstacles. In early 2017 an Egyptian court upheld the decision to freeze the assets of activists involved in what has been known in the media as the 'foreign funding case' (Ford and Associated Press 2017). This decision came after other verdicts were issued during the previous year concerning other activists. Since late 2011 several activists affiliated to domestic and international organisations faced accusations of allegedly obtaining foreign funds aimed to be used for destabilising the country. Mohamed Zaree, the country director of the Cairo Institute for Human Rights Studies (CIHRS) and one of these activists, was awarded the 2017 Martin Ennals Award for Human Rights Defenders, but could not personally receive the award due to the travel ban he has been under since 2016 (Martin Ennals Award 2017). This reflects the status of the almost non-existent strong and influential civil society that used to exist during and after the 25 January revolution. Consequently, at that point it was not surprising when, later during the

year, the Egyptian government passed NGO Law 70 of 2017, which was described as a 'catastrophic blow for human rights groups working in Egypt' (Amnesty International 2017). The law restricts NGO activities to development and charity work, while excluding any politically-related activities. Restrictions still exist even in the case of the developmental and charitable activities that are authorised under the law, making it onerous for organisations to carry out their work (Aboulenein 2017).

Late in 2017 and upon waving rainbow flags during a performance by the Lebanese band Mashrou' Leila, a 'witch hunt' ensued of targeting the LGBT+ community. Different media outlets led an aggressive, vicious and hateful homophobic campaign attacking the LGBT+ community and inciting dozens of arrests by security forces soon after pictures of a number of fans raising the rainbow flag during the concert, which took place in September, started circulating. The arrests targeted people who attended the concert, as well as other members of the community. Some were later convicted while others were released. The defendants were mainly charged with debauchery, amongst other accusations, due to the absence of a specific anti-LGBT+ law in Egypt. Consequently, some Members of Parliament decided to propose a draft Bill criminalising homosexuality (Amnesty International 2017). The homophobic surge triggered serious concerns among a number of local and international human rights organisations and entities, including the UN (United Nations 2017). Notwithstanding the arrests and accusations, the Syndicate of Musicians also banned the band from ever again performing in Egypt, constituting a violation of freedom of expression. It is hard to envision any improvement as regards the right to sexuality in Egypt in the near future.

Towards the end of the year, preparations began for the 2018 presidential elections. However, it was only Ahmed Shafiq, former Prime Minister and 2012 presidential candidate, Khaled Ali, attorney and 2012 presidential candidate, and Ahmed Konsowa, an army officer, who announced their intention to run for candidacy during 2017, while others followed during 2018 (Aboulenein and Associated Press 2017). Both Shafiq and Ali later announced that they were withdrawing from the race, while Konsowa was indicted for expressing political opinions while serving as a military officer (Reuters Staff 2017). In spite of attempts by a number of people to run for the presidency, the elections took place early in 2018 with only two candidates, President el-Sisi and Moussa Mostafa Moussa, who himself is a Sisi supporter. These elections faced calls for a boycott by the opposition and criticism for a lack of democracy, which was explicitly mentioned by Mr Ali when announcing his withdrawal from the race, since all the opposing candidates, except Mr Moussa, were not able to or chose not to go through with their candidacy in one way or another (Egyptian Street 2018).

5 Libya, Iraq, and Syria: When war and terror prevail

Alongside the varied developments witnessed across the Arab region in 2017, the situation in Libya, Iraq and Syria was overwhelmingly dire, characterised by war and conflict, and repeated instances of terrorism, kidnappings, and the use of prohibited chemical weapons.

5.1 Libya

Libya has been profoundly damaged by a political, security and economic crisis. The UN-brokered deal designed to bring rival administrations together in a unity government has failed to come to fruition. Furthermore, the Government of National Accord (GNA), which in 2016 struggled to assert itself in Tripoli, continued to compete for legitimacy with the other two authorities, the Tubruk-based House of Representatives (HoR), which enjoyed widespread international recognition, and the Tripoli-based General National Congress (GNC). Amid the security vacuum and a breakdown in law and order, the Islamic State (ISIS), established in the coastal city of Sirte, was mostly removed by year end, by local armed groups assisted by US air strikes (Freedom in the World 2017). As of May 2017, ISIS had lost territory and men. However, it has maintained an underground network of cells in some of the most populous parts of the country, including around Benghazi and Derna (CNN 2017). ISIS has been reported as having killed civilians, often carrying out public executions. Victims' corpses were displayed in public spaces and some crimes were also advertised on social media (Amnesty International 2017).

Fighting and clashes have displaced hundreds of thousands of people and disrupted basic services. An estimated 1,3 million people were in need of humanitarian assistance and hundreds of thousands of people across the country are suffering. They are living in unsafe conditions with little or no access to health care, essential medicines, food, safe drinking water, shelter or education (UNHCR 2017). This situation has created a humanitarian crisis with 197 000 people displaced inside the country and 29 000 new displacements due to conflict and violence (IDMC 2017). Indiscriminate and direct attacks on civilians and their properties have been committed by all sides, and hundreds have been abducted and tortured because of their perceived political or tribal affiliation, origin or opinion.

The domestic criminal justice system has deteriorated. Courts in the east especially have mostly remained shut or they operate at a reduced level, offering no prospects for accountability (Amnesty International 2017). Freedom of expression has been generally on the decline. Journalists, human rights activists and NGO workers have been threatened, abducted and assassinated by various armed groups. United Nations Support Mission in Libya (UNSMIL)/Office of the United Nations High Commissioner for Human Rights (OHCHR) also reported attacks on media outlets (HRC 2018).

Women and children face increasing restrictions to their basic rights. An order issued on 16 February banned women under the age of 60 from travelling abroad unless they were accompanied by a male guardian. The ban threatened the freedom of movement of women, including for the purpose of medical treatment, education and professional travel, as Human Rights Watch reported. Women activists have been intimidated and threatened.

Children were unlawfully deprived of their liberty. UNSMIL/OHCHR received reports of children being detained together with adults in official prisons and facilities controlled by armed groups. At times they were denied sufficient food and diapers (HRC 2018).

Over the past three years abductions and kidnappings in Libya have been on the rise. Although up-to-date statistics are not available, in 2015 the Libyan Red Crescent Society declared that more than 600 people had gone missing between February 2014 and April 2015. The victims range from politicians to activists, businessmen, doctors and children (BBC 2017). Torture and ill-treatment as well as deprivation of liberty and arbitrary detention continue to be reported. During the year, UNSMIL/OHCHR documented patterns of torture, ill-treatment and inhumane prison conditions in a number of detention facilities. It moreover received reports of deaths in custody throughout the whole of 2017. From January to October, at least 35 bodies bearing signs of torture were brought to Tripoli's hospitals (HRC 2018). Up to 20 000 migrants were held in detention centres in horrific conditions of extreme overcrowding, lacking access to medical care and adequate nutrition, and systematically being subjected to torture and other ill-treatment, including sexual violence, severe beatings and extortion (Amnesty International 2017/2018).

In February 2017 European governments reached an agreement to support the Libyan coast guard in stopping migrants from crossing the Mediterranean sea in an effort to reduce the number of arrivals in Europe. This policy, which has successfully decreased the number of migrants arriving in Italy by 67 per cent, has *de facto* allowed for further abuse and human rights violations in Libya and at sea (HRW 2017). The absence of protection for victims of trafficking allows for thousands of migrants to be stuck in Libya, vulnerable to arrest at any time, and at the mercy of armed groups, militias and criminal gangs (Amnesty International 2017). As of October 2017, Libya was hosting 43 113 refugees and asylum seekers who were registered with UNHCR (UNHCR 2017). The International Organisation for Migration (IOM) reported in November of the same year that it had identified around 276 957 migrants, but estimated the true number to be between 700 000 and 1 million (in 2016 IOM reported that there were around 264 000).

Reports on the existence of markets for trading migrants in Libya have led to international clamour and protests in Europe and Africa. The UN-backed government in Tripoli investigated these reports on African migrants being sold as slaves for \$400 (*The Telegraph* 2017). Overall, refugees and migrants have increasingly become a resource to exploit. In this environment of illegality, Libyan coast guards have been reported as engaging with smugglers in securing freedom from prison and passage through Libyan waters without interception to those migrants attempting to reach Europe, in exchange of abuse and extortion (PRI 2017).

Overall, Human Rights Watch disclosed that between January and November, 2 772 migrants died during perilous boat journeys in the central Mediterranean sea, most having departed from Libyan shores (HRW 2017).

5.2 Iraq

In Iraq, the human rights situation continued to be critical in 2017, especially due to the multiplicity of actors involved in the political arena. For several months, the US-backed Iraqi army, alongside some Kurdish forces and other allies, have been fighting Daesh, the so-called Islamic State (ISIS), pushing them out of their territories. However, there are several other paramilitary organisations that have played a significant role

in the fight against ISIS. The most important is the Hashd al-Sha'abi, the Iraqi Popular Mobilisation Forces (known as PMF or PMU), which is mainly Shia-dominated and counts among its participants and leaders roughly 63 factions, such as religious scholars, Iraqi political leaders, but also Iran's Revolutionary Guard Corps (Najjar 2017).

In addition, the Kurdish authorities, whose military forces are involved in the fight against ISIS, together with the Iraqi government and several Western countries, primarily the United States, in September 2017 held a non-binding referendum for the independence of the Kurdish region in Iraq, but also the areas controlled by Kurdish forces. The referendum, which resulted in 92 per cent of the votes in favour of independence (The Independent High Elections and Referendum Commission 2017), did not receive the praise of the international community. Turkish, Iranian and Iraqi governments opposed the referendum and, despite the Kurdish officials calling these measures illegal, the United States refused to help the Kurdish community, confirming their strong alliance in fighting Daesh (Salim et al 2017).

It is in this context that most of the violations occurred. On the one side, there is the so-called Islamic State, which has continuously carried on abuses of civilians of the conquered cities. On the other side, the forces involved in fighting ISIS very often use violent means of fighting, such as executions or torture of alleged ISIS members or suspects. The attempt to exert its influence, which the Caliphate of Abu Bakr Al-Baghdadi started in 2011, has witnessed the abuse of civilians in different ways, from sexual violence to torture, not to mention the use of child soldiers and the killings, which include not only grotesque and symbolic beheadings (often recorded on video to be used as a warning), but also car bombing attacks and suicide in the name of the organisation. The absence of the rule of law allowed the ISIS administration, which includes a moral body called Diwan al-Hisba, to impose restrictions on movement, on the use of phones and social media, on clothing and on the behaviour to be adopted in public – especially for women and girls. The absence of a fair trial resulted in extremely severe punishment, sometimes including executions, and the isolation from family and public life (Human Rights Watch 2018).

In addition, as in the typical pattern of terrorist – especially *jihadi* – organisations (Baker 2012), ISIS members have been looting antiquity sites to sell artifacts on the black market and finance their operations, destroying several UNESCO world heritage sites and other religious symbols, such as the Grand al-Nuri Mosque in the Islamic State stronghold, Mosul. The main victims of ISIS war crimes have been the citizens, who have been severely taxed by ISIS authorities in cities under their control, while being used as human shields during operations, making them casualties in chemical attacks or mass executions (Human Rights Watch 2018).

To fight the Islamic State, the Iraqi government forces and Kurdish authorities have been carrying out several attacks. Human Rights Watch reports that in the battles to re-conquer the cities under ISIS control, many of the people arrested have been tortured and executed. As for the ISIS attack, social media has played a prominent educative role: The abuses of the forces against the 'enemy' from the Caliphate have been recorded and posted online. The same treatment, before and during the battles in the strongholds of the Islamic State, has been reserved for those who were

merely suspected of being affiliated with ISIS. This is the case of many that have been tortured, which constitutes a crime in the Iraqi Constitution (OHCHR 2017) and forced away from their families and their communities. Others have also been killed and, according to the Human Rights Watch 2017 report, the recorded number of 78 condemned people actually is higher. Despite the prohibition on condemning children to the death penalty, Prime Minister al-Abadi in September considered the capital punishment of a German girl accused of being an ISIS affiliate (Human Rights Watch 2018).

In general, statistics about civilian casualties in Iraq are disturbing: In the first half of 2017, a minimum of 5 706 people were killed during conflicts, terrorist attacks and other forms of violence perpetrated by different actors. Among the people killed were children. There have been several incidents during which approximately 257 children were killed (211 of them have been verified by the UN international observers) and another 547 injured (343 verified) (UNAMI/OHCHR 2017).

Apart from the civilian casualties, several other violations were reported by UN officials, including abuses regarding the judicial system and the protection of girls and women. Several detainees claimed to UNAMI/OHCHR that their rights to due process had been violated; others were detained for longer periods than the limits prescribed by law. Some of the detainees also reported having been subjected to physical abuse, torture and ill-treatment to confess their alleged crimes. Other than this, the conditions in national prisons remained poor, with a lack of basic services, which was worsened by a permanent situation of overcrowding. The same conditions in the judicial and detention systems were observed also in the area under the control of the Kurdish Authority (UNAMI/OHCHR 2017).

In post-ISIS Iraq, accountability is a key factor. It is crucial to ensure justice and accountability to succeed in the transitional and reconciliation period after the fall of the Islamic State. There is a need to find a way to allow Iraq to proceed with trials for international crimes (Iraq is not part of the Rome Statute that established the International Criminal Court and therefore has no jurisdiction over international crimes committed in Iraq) and ensure the safety of and justice for its own citizens.

5.3 Syria

Since 2011 the Syrian territory has been undergoing violent turmoil fuelled by armed conflicts in which several actors (state and non-state, domestic and foreign) have an active, indirect or direct, hand. This murky and ever-changing political situation inevitably complicated efforts to apply, further and enforce human rights; monitor and report these, establish who is responsible for neglect, abuse and violation, and hold them accountable. What is more, the human rights and democracy situation in Syria not only concerns the people living in Syria today, which includes minorities (Kurds, Palestinian refugees), but also Syrians living abroad (refugees, emigrants) who are impacted by changes in Syria as well as in their current host country. According to the UN, more than 5 million people were seeking refuge outside Syria, and over 6 million were displaced internally. In June 2017, 40 000 people were still living in besieged areas.

5.3.1 *Use of prohibited chemical weapons*

With the UN reporting at least 34 known instances since 2013 – 12 occurring in 2017 alone (OHCHR 2017) – the international investigation into the use of prohibited chemical weapons reached another level in 2017. In November, the Organisation for the Prohibition of Chemical Weapons (OPCW) – United Nations Joint Investigative Mechanism – addressed the UN Security Council with a report finding that prohibited chemical weapons had been used and holding responsible the Islamic State of Iraq and the Levant (ISIS/Da'esh), on the one hand, and the Syrian government, on the other; ISIS with sulfur mustard at Umm Hawsh and the Syrian government with sarin at Khan Shaykhun.

5.3.2 *Killings of civilians and destruction of cities*

Whether non-combatant civilians have been overlooked or even targeted by forces engaged in the conflict is an ongoing discussion. This concerns the Syrian government and ISIS as well as armed groups but also state coalition forces such as Iran, Turkey, Russia and the UK, the US and France. NGOs on the ground pointed to the indiscriminate nature of the attacks and its illegality under international law. The principle of proportionality is also suspected not to have been respected. Evidence of cluster weapons and heavy firepower were often found in heavily-populated civilian areas.

The destruction of cities has also been a regular warfare expression in Syria, raising the question of whether these are necessary means to an end, and whether they are not part of a war tactic of annihilation. For example, as Amnesty International notes, in the process of trying to free the city of Raqqa from the grips of ISIS, the US-led coalition left the city 'in ruins and civilians devastated' (Amnesty International 2018).

5.3.3 *Displacement and freedom of movement*

While intense population movement is taking place outside and inside Syrian borders, instances of preventing Syrians from escaping the violence by crossing a national border have occurred. As Human Rights Watch reports: 'Guards at Turkey's closed border with Syria are indiscriminately shooting at and summarily returning Syrian asylum seekers attempting to cross into Turkey' (HRW 2017). The right to seek refuge from a threat to one's life is at the forefront of human rights, and although Turkey (and the region as a whole) is dealing with many refugees, an immigration crisis cannot justify the denial of the right to safety, to find refuge and to apply for asylum.

5.3.4 *Education for Syrian child refugees*

In Lebanon, Jordan and Turkey (who are hosting more than 5 million refugees), 750 000 children were out of school. Enrolment in schools is free but the transportation cost is too high for families prevented from working by harsh local regulations. Syrian children are growing up in unstable environments that cannot guarantee their future.

5.3.5 *Right to property*

Since 2016 the Syrian government has been discussing large development projects in the Damascus area and passed a new property law which allows for urban renovations while confiscating property without due process or compensation: 'Once a development zone has been designated, the authorities must publicly notify home and land owners, who have only 30 days to assemble the necessary paperwork and claim their property' (Amnesty International 2018). Yet, numerous Syrians are unable to claim property, either because they are displaced and prevented from presenting themselves to the authorities, or because they have lost the necessary papers (according to the UNHCR, only 9 per cent of Syrian refugees saved their documentation) or they were never issued documents, since most areas concerned by urban planning are informal constructions, more often than not connected to the 2011 uprisings. Therefore, many argue that the law is aimed at punishing the dissident populations and complicating their right to return (Le Nouvel Observateur 2018).

5.3.6 *Detention and execution*

Both the Syrian government, ISIS, Jabhat Fatah al-Sham and armed groups have been using repression and violence to terrorise the populations under their power. The Syrian government made use of its incarceration system. In the Saydnaya military prison alone 'between 5 000 and 13 000 civilians have been killed there after being repeatedly tortured and systematically deprived of food, water and medical care' (NATO 2017). As Amnesty International reports, the victims were not fighters but 'civic activists, human rights advocates, journalists and other civilians perceived by the government as a threat' (NATO 2017).

As far as territories controlled by Jabhat Fatah al-Sham and ISIS are concerned, violence included 'summary executions of civilians including women accused of adultery and homosexual men and boys' (OHCHR 2017).

It is worth noting that other armed rebel groups, such as the Kurdish People's Protection Units (YPG) and the Syrian Democratic Forces, may be blamed for not attending to the humanitarian needs of the populations under their control or displaced because of their activities. Furthermore, YPG reportedly continued to forcibly conscript men and boys for military service. Forcing civilians to take part in the conflict happened regularly, as in the case of the Yarmouk refugee camp where many Palestinians had to pick a side while still being targeted by all of them.

Lastly, with the detention of former fighters from ISIS and other similar armed groups comes the difficult practice of fair trial, as access to the prisoners is not always ensured and several risk torture or accelerated death sentences. This challenges the core principles of democracy, one that values the justice system and humanitarian treatment of all.

5.3.7 *Elections*

In September 2017, local elections were organised by the Kurdish Democratic Union Party (PYD) in the Kurdish-controlled self-administered territories (Jazirah, Afrin and Kobani). The territories are home to nearly 5 million residents, including significant Kurdish, Arab,

Syriac and Turkmen populations. The first round was the election of commune representatives (September); the second round an election for town, city and regional councils (November); and, in January 2018, an election for the region's highest office, the People's Democratic Council, which is currently dominated by the Democratic Union Party (PYD). Finally, '[t]he third round of the elections, which will replace current representatives who were appointed by the self-administration, will also include a vote for legislative councils in each of the three cantons' (Syria Direct 2017). However, not all residents have the same participation rights: 'Thousands of Arab residents who were relocated by the Syrian government to majority-Kurdish areas in the 1970s will be barred from the third and final round' (Syria Direct 2017) because of their special status, which makes one question the equality of all participants in this democratic process.

Democracy and human rights conditions in Syria are complicated by the multiplicity of actors in charge of upholding these as well as being potential abusers. Different geographical areas bring out diverse humanitarian (illegal weapon, civilian death), human rights (refugee, torture, education) and democracy (detention, elections) issues with different intensities. An essential problem is the difficulty to monitor all of these, sometimes purposefully so. It still seems that local, regional and international efforts are needed to ensure a minimal respect of human rights and push for much more, which would be possible when fragmented leaderships unite.

6 Going beyond the borders: The grim realities facing Arab refugees abroad

Throughout 2017, Europe saw the continued arrival of refugees and displaced persons from the Arab world and beyond, most of whom were fleeing war and conflict, persecution and protracted emergencies in countries such as Iraq, Libya, Sudan, Syria, and Yemen. Large-scale human rights infringements continued to be inflicted against these groups across the European continent, seemingly due to a combination of insufficient resources allocated to the European refugee response combined with an unforgiving implementation of policies regulating movement into and across Europe.

During the course of 2017, the EU-Turkey deal from March 2016 and its corollary found within the Greek confinement policy prohibiting movement from the islands to mainland Greece, continued to keep thousands of Syrian, Iraqi and a small number of Yemeni individuals trapped in less than humane conditions on Lesbos, Chios and other islands. This, in combination with the closed borders along the Balkan route, led to more than 60 000 asylum seekers being stalled in Greece by the end of 2017, according to recent data (Al-Jazeera 2018). Those contained on the islands typically experienced a range of human rights infringements, as illustrated by extensive field research in Chios in May 2017, where 300 individuals recounted their lived experiences (Refugee Rights Europe 2017a). The study found that the right to adequate living conditions was severely undermined on the islands in 2017, with hot water being a rare commodity, if at all available. The same study found that no water was available in the toilets in certain camps, and that access

to adequate food was a major problem. Spoiled food was common, leading to recurring episodes of food poisoning (Saoud & Welander 2017) and despite tireless efforts by small charities operating on the ground, an alarming shortage of healthcare services was reported on the island of Chios. Among those refugees who reported suffering from a health problem, 71,5 per cent reported that they had not received any medical help (Refugee Rights Europe 2017a). Among women in displacement, there appeared to be a striking lack of safeguarding measures and adequate camp design, coupled with a lack of access to sexual and reproductive health care, including during pregnancy and following rape (Refugee Rights Europe 2017b).

At Europe's southern border, the EU's Italian-led efforts to stem the number of Sudanese, Northern African and other asylum seekers arriving from Africa via the largely lawless post-Gaddafi Libya via the Mediterranean sea raised serious concerns. Europe's support for the Libyan Prime Minister Seraj and allied militias running notorious detention centres was decried by NGOs, rights groups and the UN High Commissioner for Human Rights, Zeid Ra'ad Al Hussein alike (Reuters 2017). Such agreements struck between the EU and Libyan authorities in 2017 meant that thousands of individuals from Sudan and Northern African countries, alongside fellow displaced people from across the African continent, found themselves trapped in detention on Libyan soil, suffering torture, rape, arbitrary killings and unfathomable living conditions in detention camps (OHCHR 2016). The President of *Médecins Sans Frontières* (MSF), Dr Joanne Lui, in an open letter in September 2017 criticised European governments, stating: 'The detention of migrants and refugees in Libya is rotten to the core. It must be named for what it is: a thriving enterprise of kidnapping, torture and extortion. And European governments have chosen to contain people in this situation. People can't be sent back to Libya, nor should they be contained there' (*Médecins Sans Frontières* 2017). Meanwhile, among those who managed to leave Libya and board a Europe-bound vessel, more than 3 000 individuals tragically lost their lives in 2017, according to the International Organisation for Migration (International Organisation for Migration 2018).

Once in Europe, refugees from the Arab world and beyond that managed to make it past the hardships at the European borders typically continued to face harsh realities and continuous human rights violations during their time in transit throughout 2017. Hoping to continue their journey to their envisaged European destination country, thousands of people from Syria, Iraq, Yemen, Libya and Sudan faced rights infringements partly brought on by the arbitrary mobility rules imposed by the European Union Dublin Regulation (Dublin III), which holds the EU country responsible for examining an asylum application under the Geneva Convention of 1951. In accordance with Dublin III, refugees need to claim asylum in the first 'safe country' of the EU (Regulation (EU) No 604/2013), and thus do not have the legal right to continue their journey as they wish, unless they apply and qualify for relocation or family reunification – two seemingly opaque and excessively lengthy processes. As a result, Dublin III meant that thousands of refugees were caught in limbo, with waning hope in the face of horrific conditions encountered at the hotspots and in transit points. Many of those who were determined to be reunited with friends or family elsewhere in Europe took treacherous journeys: They often fell into the hands of smugglers and traffickers, and

suffered widespread human rights violations on European soil due to an absence of services and harsh treatment by law enforcement officials.

For instance, at the border between Italy and France, two countries often praised for their domestic human rights records, violence perpetrated against refugees and displaced persons was commonplace throughout 2017 (Welander 2018). To illustrate this point, research conducted in the border town of Ventimiglia in August 2017 revealed that refugees in this transit point were typically denied their right to reasonable living standards; 82,1 per cent of the respondents said that they did not have access to sufficient amounts of drinking water, and many reported having been abused in the town centre when trying to ask for water. The overall living environment for hundreds of destitute refugees at the Franco-Italian border was highly unsanitary and dirty, with the majority, 85 per cent, stating that they would use the water in the river to wash themselves. They also used the river to go to the toilet and sometimes also to drink (Refugee Rights Europe 2017c). More than a third of respondents (40,4 per cent) had experienced violence by Italian police, which took the shape of tear gas or other forms of physical violence as well as verbal abuse (Welander 2018).

By the same token, at the border between France and Britain, refugees continued to face human rights violations throughout 2017. While the notorious Calais 'Jungle' camp was demolished in the latter part of 2016, displaced persons from Syria, Iraq, Sudan and elsewhere continued to circulate in the area throughout 2017, hoping to one day reach the United Kingdom. During their time in displacement, individuals often faced daily instances of police violence, ranging from verbal abuse to tear gassing and physical violence. Prominent organisations such as Human Rights Watch issued reports evidencing alarming levels of police violence in Calais in 2017 (Human Rights Watch 2017a), and an investigation by the French administration and security forces' internal investigations departments in October 2017 found evidence that police had used 'excessive force and committed other abuses against child and adult migrants in Calais' (Human Rights Watch 2017b).

The list of human rights violations experienced among Arab refugees in Europe in 2017 is long. It appears that such rights infringements often were a result of an unwillingness among European and international actors to allocate sufficient resources in response to the large numbers of arrivals, combined with the unforgiving implementation of a much too rigid policy framework and an outdated international refugee protection regime unfit for the current realities on the ground. The year 2017 was thus a somber year for internationally-adopted human rights in Europe, giving rise to cynicism regarding the universality of human rights as these did not appear to apply to refugees and displaced people from the Arab world and beyond.

7 Conclusion

The year 2017 was an intense year throughout the Arab region, with certain limited developments and legal reforms in countries such as Tunisia and Lebanon, but also Saudi Arabia, Egypt and Morocco, to a lesser degree, combined with continued protracted humanitarian disasters

in Libya, Syria and Iraq and intensified violence and occupation in Palestine. In this context, the West is allegedly working to promote rights, democracy and liberalism in the region, but Arab societies continue to struggle both in and outside their countries. When individuals seek to mobilise support for change from within, they were isolated and marginalised. When they run away, they faced challenges to their lives and survival at the international borders, in particular on European soil.

The World Bank has recently published a study, 'Pathways to Peace', promoting inclusion, the rights of minorities and women, and the elimination of poverty in order to enhance peace and stability. However, in the Arab world this paradigm does not hold true as war causes further exclusion, authoritarian regimes reinforce segregation on the ground of stability, democracies co-opt to avoid real integration, and countries under threat, such as Palestine, are isolated from the rest of the world. If 'inclusion' is the new paradigm, then change has to be systemic and must come from all sides.

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Challenges to the EU in 2017: Brexit implementation, populism, and the renewed attempt at advancing the social dimension of the European integration project

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Abstract: *Over the last decade, the European Union has faced a number of challenges, several of which have also dominated the regional political climate during 2017. For the first time in history, one of its member states is leaving the EU. In many other EU countries, the phenomena of populism and Euroscepticism are on the rise, while terrorist attacks continue to occur; the migration crisis continues to question EU solidarity, and social and economic inequalities are increasing. In light of these manifold challenges, this article examines the EU's renewed attempt to advance the social dimension of the European project against the backdrop of two related political developments: the implementation of Brexit and the election outcomes in key member states in 2017. Brexit and the rising influence of populist, Eurosceptic parties pose a threat to European integration and effective political leadership, which in turn hinders the ability of the EU to tackle the challenges it faces. At the same time, these political developments highlight the importance of the social dimension of Europe for a large part of the electorate. Brexit and the election outcomes in The Netherlands, France, the UK and Germany in 2017 demonstrate that many citizens are concerned about the social implications of globalisation, urbanisation and digitalisation, particularly in light of the financial and economic crises that many EU countries had to confront over the last decade. The final section of the article examines the EU's renewed pledge to strengthen its social dimension through the European Pillar of Social Rights. It considers that the political landscape has started to shift towards a more social stance during 2017 and argues that the operationalisation of the European Pillar could revitalise the EU narrative and ground for social policies and, accordingly, the European integration project, which needs to deepen its social dimension in order to survive and prove that it is able to enhance the living standards of European citizens.*

Key words: *European Union; Brexit; elections; political parties; populism; social Europe; European Pillar of Social Rights*

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1 Introduction

The European Union (EU) turned 60 on 25 March 2017. The Treaties of Rome¹ established the European Economic Community, aimed at creating a common market where people, goods, services and capital can move freely, and to foster cooperation in the peaceful use of nuclear energy. They shaped the conditions for stability and prosperity for European citizens. This anniversary provided an important chance to look back on past achievements and towards the future. In the Rome Declaration adopted on this anniversary, the leaders of 27 EU member states and of the European Council, the European Parliament and the European Commission acknowledged that they were ‘facing unprecedented challenges, both global and domestic’ (including ‘regional conflicts, terrorism, growing migratory pressures, protectionism and social and economic inequalities’) and pledged to work towards various objectives. A strong social Europe was included among them, and its significance was outlined specifically as follows (Rome Declaration 2017):

[a] Union which, based on sustainable growth, promotes economic and social progress as well as cohesion and convergence, while upholding the integrity of the internal market; a Union taking into account the diversity of national systems and the key role of social partners; a Union which promotes equality between women and men as well as rights and equal opportunities for all; a Union which fights unemployment, discrimination, social exclusion and poverty; a Union where young people receive the best education and training and can study and find jobs across the continent; a Union which preserves our cultural heritage and promotes cultural diversity.

In light of the acknowledgment of the EU facing serious challenges and its renewed commitment to foster social rights and principles, this article examines the EU’s renewed attempt to advance the social dimension of the European project against the backdrop of two related political developments: the implementation of Brexit and the election outcomes in key member states in 2017. Brexit and the rising influence of populist, Eurosceptic parties in several other EU member states pose a threat to European integration and effective political leadership, which in turn hinders the EU’s ability to tackle the challenges it faces. At the same time, these political developments highlight the significance of the social dimension of Europe for a large part of the electorate. The result of the British referendum to leave the EU as well as the election outcomes in The Netherlands, France, the United Kingdom and Germany in 2017 show that many citizens are concerned about the social implications of globalisation, urbanisation and digitalisation, particularly in light of the financial and economic crises many EU countries have had to grapple with over the last decade. Therefore, the final section of the article examines the EU’s renewed pledge to strengthen its social dimension. It considers that the political landscape has started to shift (albeit slowly) towards a more social stance during 2017 in view of the European Pillar of Social Rights (EPSR). This has even been called ‘the last chance for social Europe’ (Brooks 2017),

1 The Treaties establishing the European Economic Community (EEC) and the European Atomic Energy Community (EAEC or Euratom), otherwise known as the Treaties of Rome, were signed on 25 March 1957 and entered into force on 1 January 1958. Belgium, France, Germany, Italy, Luxembourg and The Netherlands were the six founding member states.

after austerity policies were ordered for years with an adverse impact on European citizens and were widely criticised for not being capable of a return to growth.

2 Implementing Brexit

In March 2017, British Prime Minister Theresa May invoked article 50 of the Treaty of European Union (TEU) triggering the process for the UK leaving the EU (or Brexit). On 23 June 2016, British voters were asked in a referendum, which had been approved by the British Parliament in 2015 at the request of then Prime Minister, David Cameron, whether the country should leave or remain in the EU. In a shocking upset to many, 52 per cent voted to leave the EU. Political turmoil followed and Cameron resigned as Prime Minister. Less than a month later Cameron was succeeded by May, who decided to invoke article 50 of the TEU by the end of March 2017. Parliament approved her decision in December 2016 and, after lengthy political and legal deliberations involving the UK Supreme Court, the path was cleared for May to trigger article 50 of the TEU on 29 March 2017, a few days after the EU celebrated its 60th anniversary.

No EU member state has ever left the EU and, as one of the drafters of article 50 of the TEU points out, '[n]one of us in the Convention ever expected the provision actually to be used – which might explain its relatively sketchy character' (Duff 2016). This provision sets out a two-year timeframe during which the UK and EU have to complete the negotiations for the separation. While this complicated process is unfolding and the legal debates about the practicalities of the UK leaving the EU continue, it is worth looking at the implications of Brexit for the EU, now that the UK government has officially launched the separation procedure.

For one thing, 60 years after the European project was launched with the Treaties of Rome, Brexit signals a renunciation of the trend towards greater European integration. Indeed, over the last ten years the EU has had its fair share of major crises, most notably the 2007-2008 financial crisis, which led to the sovereign debt and Eurozone crises, as well as the more recent migration crisis. Together with the reality of one of its biggest member states deciding to leave the Union, these crises have raised the question of the current and future status of European integration; arguably 'Europe as a space of economic progress and social development and cohesion is now at stake' (Da Costa Cabral, Gonçalves & Cunha Rodrigues 2017: 2). Some have argued that this challenging moment can serve as an opportunity for the EU to review its structure and decision making in order to develop a clearer idea for its path forward (Cunha Rodrigues 2017: 78). In light of such reform discussions, the European Commission (2017a: 15-25) released a White Paper on the future of the EU after British departure. It provides five scenarios for future developments of European integration up to 2025:²

- carrying on (the EU focuses on delivering its positive reform agenda);

2 The White Paper was accompanied by various 'Reflection Papers' relating to certain policy areas, including one on the social dimension of Europe, which was published in April 2017 together with the recommendation on the EPSR.

- nothing but the single market (the EU is gradually re-centred on the single market);
- those who want more do more (the EU allows willing member states to do more together in specific areas);
- doing less more efficiently (the EU focuses on delivering more and faster in selected policy areas, while doing less elsewhere);
- doing much more together (the EU decides to do much more together across all policy areas).

However, whether and, if so, which one of these scenarios will guide the EU through the next decade remains to be seen. In the meantime, Brexit comes with practical implications, particularly in the economic realm, that do not bode well for a way out of the EU's crises in the near future. With Brexit, the EU is in the process of losing its second-largest economic power, while the UK will lose its largest trading partner, the EU. This means bad news for both sides at least in the medium term, when Brexit will result in a loss of gross domestic product (GDP) and productivity in the UK and the EU countries (Della Posta and Rehman 2017: 23). Considering that economic growth in Europe is already slow, these Brexit consequences, if unmitigated, are likely to lead to more economic instability, problems for the Eurozone, for job growth and, by extension, to more economic inequality.

At the same time, scholars have pointed out that the Brexit vote signalled a disillusionment with the political establishment. It showed that many people felt left behind in a globalised world by the political elites in the capital cities and in Brussels. Out of frustration with the traditional, particularly centre left, parties, they voted for a dramatic change (McGowan 2018: 3). In light of this political climate, the UK Independence Party (UKIP) was able to mobilise voters for its anti-EU, anti-immigration cause. A similar trend is occurring across many European countries, as the next section on key European elections in 2017 shows. In France, presidential contender Marine Le Pen from the populist Front National has called for a Frexit, while in The Netherlands Geert Wilders's nationalist party advocates a Nexit. These are disturbing developments for the EU. However, on the bright side, the reckless gamble of David Cameron, who seemingly called for the British referendum under the impression that a victory for the 'leave' camp was not a real possibility, has served as a warning for mainstream politicians in other countries to be more careful with supporting referendums on EU membership.

In overall terms, the exit of the UK leaves the EU weak and in a very uncertain position. Due to Brexit, many of the EU's debates and resources understandably are focused inwardly at the moment, but global problems also require attention, particularly in the area of solving the underlying causes of the migration crisis, which in turn is weaved into the causes of Brexit and the rise of nationalist, anti-EU movements across Europe. The latter have gained political momentum in several key EU countries in 2017, as the next section examines in more detail.

3 Key elections in EU member states in 2017

Elections in several EU member states took place in 2017, accompanied by increasing concerns about the rise of right-wing, nationalist and EU-sceptical parties across Europe. The following section provides an

overview of these major elections and discusses the possible implications of their outcome for European politics and the future of EU integration.

3.1 The Netherlands

The Dutch general elections took place on 15 March 2017. Geert Wilders's anti-Islam and anti-EU Party for Freedom (PVV) became the second-largest party in the House of Representatives after Prime Minister Mark Rutte's Conservative-Liberal Party (VVD). Rutte's party remains the largest, but lost a significant number of seats in parliament. The Social-Democratic Labour Party (PvdA) was hit even worse, suffering its largest loss in history, dropping from 38 to only nine seats (Boersma 2017). Although many observers in The Netherlands and in Europe were relieved by the fact that the populist Wilders and his party did not receive enough votes to become the ruling party, the outcome of the elections nevertheless signals challenging political developments.

For one, Wilders's stance on immigration and integration will continue to have an influence on the mainstream political parties. As a political scientist at Amsterdam's Free University put it: 'What [Wilders] wanted, and he's pretty much already achieved it, is for the two mainstream rightwing parties ... to say and do what he wants. In a sense, he had already won the elections' (Henley 2017). Unlike most of the populist politicians who have in recent years become influential in other European countries, Wilder is not a political outsider. He has been in parliament since the 1990s and has for many years proposed the de-Islamisation of The Netherlands (Serhan 2017). His party's current platform calls for the closure of all mosques in The Netherlands and a ban of the Koran; proposes to close Dutch borders to asylum seekers and immigrants from Islamic countries; and demands that The Netherlands leave the EU (Geert Wilders Weblog 2016). These are drastic proposals for policies that, if enacted, would in some cases blatantly violate human rights. Based on the election outcome, such policies nonetheless seem to speak to a significant number of Dutch citizens. The mainstream parties, therefore, have tailored their rhetoric to appeal to such voters. For example, Rutte adopted some of Wilders's rhetoric on immigrants in a bid to win over Wilders supporters during the election campaign (Henley 2017).

The Dutch election outcome also signals a second trend in European politics, namely, that it is becoming increasingly difficult for the mainstream parties to build stable governing coalitions. Historically, in The Netherlands it was possible to build coalitions of two or three parties, but after the 2017 elections four were needed (Boersma 2017). Coalition negotiations among more partners naturally are more difficult and take longer. The 2017 Dutch coalition negotiations broke the country's record, leaving it without a government for 225 days (Reuters 2017). What is more, observers have pointed out that larger coalitions require even more political compromise, which does not encourage strong policy making and is likely to lead to further frustration among voters, which in turn can play into the hands of populists and fringe parties (Van der Staak 2017).

On 26 October 2017, the new Dutch government, made up of Rutte's Conservative-Liberal party, two conservative Christian parties (CDA and Christian Union) and the liberal D66, was finally sworn in. The coalition is outspokenly pro-EU, but has moved towards more nationalist policies such as stricter limits on immigration and a stronger focus on upholding

traditional notions of Dutch identity. In sum, observers have warned that challenges from the far-right have led one of Europe's most progressive countries to embrace more conservative policies that will lead to more inequality (Rubin & Schuetze 2017).

3.2 France

In 2017 French voters took to the polls in April and May to elect a new President, and in June to elect the members of the National Assembly. The independent liberal centrist Emmanuel Macron won the presidential election with 66,1 per cent of the vote against the far-right National Front's Le Pen, who received 39,9 per cent in the second round of voting (France 24 (undated)). The presidential election has been described as a turning point in French electoral politics because Macron, at 39 years of age the youngest French President ever, was a newcomer to the French political establishment and did not represent any of the mainstream parties that had dominated French politics since the establishment of the Fifth Republic (Gougou & Persico 2017: 303-4). The first round of elections had already been remarkable because the results placed the candidates of the major parties and Macron, with his newly-created party, *La République en Marche!* (LRM), almost equally, with an average margin between them as low as 1,5 percentage points (Evans & Ivaldi 2018: 3).

This situation demonstrated that the electorate was split between four very different policy alternatives: Macron stood for moderately liberal policies in favour of immigration, gay rights and business. Le Pen proposed the far-right manifesto against immigration and economic globalisation. Republican François Fillon advocated social conservatism and neoliberal reforms, while Jean-Luc Mélenchon merged policies from the traditional left and the green movement (Gougou & Persico 2017: 304). Interestingly, by voting for Mélenchon's Left Party, which split from the mainstream Socialist Party in 2009, a substantial number of French voters also voiced their support for left-wing populism that runs on anti-EU and anti-globalisation policy proposals (Evans & Ivaldi 2018: 10-11). Overall, these results underline the dissatisfaction of the French voters with the two major establishment parties on the centre left and centre right, the Socialist Party and *Les Républicains*. They had dominated the party system in France and had for several decades alternated in holding government power. However, now they had to ask their supporters to vote for a centrist to avoid a victory by the far-right Front National (Evans & Ivaldi 2018: 2).

The landslide victory of Macron was widely seen as a relief both within and outside France and as a sign that amidst the rising tide of right-wing populism across Europe, liberalism at the heart of the continent was still alive and well. In other European capitals and in Brussels, the Macron victory was also greeted as a renewed sign of faith in the European project, which Le Pen had prophesised would die and had threatened to undermine by calling for a referendum on leaving the Eurozone (Rankin 2017). However, despite the positive implications of the election result for the EU, the presidential elections were a sign that traditional party politics were changing in France. The legislative elections held in June 2017 indeed followed the trend. Although only having been established a year earlier, Macron's party, along with its coalition partner, won by a landslide and secured 350 out of a total of 577 seats in the National Assembly,

introducing more women and a number of younger law makers, albeit many of them less politically experienced. The Front National retained its eight seats, short of the 15-seat threshold of forming a parliamentary group, which would have given them more resources and influence. For the parliamentary centre left and centre right, the elections were disappointing. Although the Republicans remain the strongest opposition party with 137 seats, they lost significantly, but not as much as the Socialists. For the Socialist Party, the elections were nothing short of a debacle. After having previously controlled the National Assembly under President François Hollande, they and their coalition partner now only hold 44 seats (Briançon 2017).

Although, the political system has changed, the trend that emerged from the 2017 elections in France is similar to that emerging in The Netherlands: The right-wing populists are kept at bay, but the mainstream parties suffer because of an increasingly split electorate. While the Dutch parties compensate for this development by creating larger government coalitions, the traditional French parties have been side-lined by an entirely new party that is politically located at the centre, something that is a novelty in French politics, which had long been dominated by an alternation between the centre left and centre right.

3.3 United Kingdom

The United Kingdom also experienced what turned out to be extraordinary elections in 2017. Following the UK referendum to leave the EU and the resulting personnel changes in the ruling Conservative Party, Prime Minister May called for snap general elections in order to secure a larger majority, which would strengthen her hand in the Brexit negotiations. Less than two months before the elections, most polls showed a considerable lead for the Conservatives, and May led with personal ratings at unprecedented numbers at least 40 points above those of Jeremy Corbyn, the leader of the Labour Party. Given these numbers, the Prime Minister was sure to secure her own mandate and deliver a landslide majority for the Tories (Thorsen, Jackson & Lilleker 2017: 8).

The elections took place on 8 June 2017 and did not go according to plan for the Conservative Party. It remains the biggest party in the House of Commons, but lost 13 seats, and in the process also its majority. The Labour Party, on the other hand, gained 30 seats and received 40 per cent of the vote, just behind the Conservatives who received 42 per cent (The Electoral Commission (undated)). These results did not bode well for the Prime Minister and the Brexit negotiations. Although the outcome did not reverse the Brexit referendum or change the fact that article 50 of the TEU had been triggered, May nonetheless faced concerns over whether her weakened political mandate would undermine her ability to balance the demands of different domestic players in the Brexit negotiations (Usherwood 2017: 114). For example, after losing their majority, the Tories now have to rely on the support of Northern Ireland's Democratic Unionist Party (DUP) to stay in power. The DUP supports Brexit, but is concerned about Brexit creating a hard border between Northern Ireland and the Republic of Ireland. They therefore might undermine May's stance with regard to negotiating a 'hard' or 'soft' Brexit (BBC News 2017).

Contrary to trends emerging in The Netherlands and France, the general election of 2017 marked the return of two-party dominance after

more than a decade of rising multi-party politics in the UK (Thorsen, Jackson & Lilleker 2017: 8). Yet, the UK election outcome also underlined the disillusionment with the political establishment and the desire of voters for a different type of politics. Some have argued that Corbyn and the Labour Party under his leadership embodied this type of politics during the 2017 election campaign, which accounts for his electoral success. He offered a different type of content, shifting to the left by calling for higher taxes and nationalisation, and a different type of form, chaotic and amateurish, that contrasted with the clean-cut image of the professional political elite (Flinders 2017: 19).

3.4 Germany

The Germans are another important electorate that took to the polls in 2017. On 24 September elections were held to elect the members of the *Bundestag*. Chancellor Angela Merkel's party, the Christian Democratic Union/Christian Social Union (CDU/CSU), remained the strongest party with 26,8 per cent of the vote. With only 20,5 per cent of the vote, the Social Democratic Party (SPD) achieved their worst result since the end of World War II. Most disturbingly, the populist, anti-immigrant, right-wing Alternative for Germany (AfD) became the country's third largest party with 12,6 per cent of the vote, followed by the Liberals (10,7 per cent), the Left (9,2 per cent) and the Greens (8,9 per cent) (The Federal Returning Officer 2017).

The election outcome meant a defeat for Merkel despite winning a fourth term as Chancellor. Her party lost 55 seats and had to enter into difficult coalition negotiations. Given that a coalition with the far-right AfD and the far-left party was out of the question, not many options for a stable governing coalition remained. In addition, the Social Democrats, who have been Merkel's coalition partners for the last decade and who blame this circumstance, at least partly, for their historical defeat in the September elections, initially were reluctant to continue to rule as part of the so-called Great Coalition. However, after a failed attempt to form a coalition with the Liberals and the Greens, and tense negotiations between the Social Democrats and Merkel's Christian Democrats, another Great Coalition was formed in February 2018 (Martin & Rinke 2017).

The election results thus show that the German political establishment is facing the same developments as other European countries with regard to the decreasing appeal of traditional parties. As in The Netherlands, the Social Democrats in Germany experienced a dramatic defeat and coalition talks became increasingly difficult and lasted for more than four months. What is more, the success of the AfD, which for the first time entered parliament with a staggering 94 seats, demonstrates that many German voters are looking for alternatives to mainstream parliament politics. That the AfD counts right-wing extremists among their ranks is even more disturbing. Although the party cannot pass legislation, it will be able to use its position to influence the public debate on their core issues: refugees, law and order, and the supposed 'Islamisation' of Germany. Because the party likes to gain publicity through provocation and breaking taboos, it will be a balancing act for the mainstream parties to engage with the AfD in a way that does not alienate its current and potential supporters in a bid to curb their popularity. The AfD is already attempting to position itself as legitimate successor to the conservative CDU and is claiming issues such

as law and order that used to be considered the purview of the conservatives (Chase 2017). Dealing with this new party of primarily political outsiders, therefore, will require finesse from the establishment parties.

When comparing these elections, several similarities become obvious. First, anti-immigration and anti-EU parties are on the rise. What they have in common is that they are narrowly focused on policy areas pertaining to national identity, which makes them different from traditional parties that have a more comprehensive policy platform. The second trend that can be observed across these European countries is that, despite successfully keeping extreme right-wing parties out of power, the mainstream parties face difficulties. They increasingly lose votes to these right-wing, nationalist parties, which qualify more as political movements rather than traditional parties. The centre left parties are particularly affected by this trend and several of them, especially in The Netherlands and in Germany, received a historically low number of votes in 2017. They seem to be losing their influence on classic left-wing welfare and redistributive goals. The centre right, on the other hand, is struggling to deal with the strong competition of radical right-wing parties (De Sio & Paparo 2018: 11). In the case of The Netherlands, the Prime Minister's ruling party attempts to cope with this threat by embracing some of the radical right-wing rhetoric, as mentioned above. The UK seems to be the outlier in the context of challenger parties, as the 2017 general elections marked a return to a narrower two-party dominance after successful showings of third parties such as UKIP in previous elections and in the Brexit campaign.

As a result of the successes of the challenger parties and new voting patterns, it is becoming increasingly difficult for the mainstream parties to form effective governing coalitions. The Netherlands and Germany, for example, were without governments for more than four months during which tense coalition negotiations took place. These new coalition circumstances undermine strong decision making at the national level, which is likely to lead to more popular disillusionment with the politics of the mainstream parties, which in turn might play into the hands of the populist movements, thus further undermining the mainstream parties (Van der Staak 2017). At the same time, weak decision makers in France, Germany and The Netherlands are not good for the EU either. At a time when the EU faces unprecedented challenges such as Brexit, migration, the rise of right-wing and anti-EU populists, the breakdown of liberalism and the rule of law in Eastern Europe, and slow economic growth and recovery from the financial and Eurozone crises, strong leadership is essential to put the EU on a path towards more unity. Unfortunately, Brexit and the 2017 election outcomes across Europe do not signal that Europe is on that path just yet. Furthermore, the success of populist movements and political outsiders, as manifested in electoral successes in The Netherlands, France, the UK and Germany in 2017, demonstrates the popular dissatisfaction with traditional parties and their policies. In light of growing social and economic inequality and fears over the forces of globalisation in many countries, this is hardly surprising. Yet, the EU has only recently started to again pay more attention to the importance of its social dimension. The next section will look at recent EU efforts to bolster social rights in more detail.

4 European Pillar of Social Rights

After a year-long preparatory phase,³ the European Pillar of Social Rights (EPSR) was enacted on 26 April 2017 in the form of a recommendation by the European Commission pursuant to article 292 of the Treaty on the Functioning of the European Union (TFEU).⁴ The EPSR sets out a range of rights and principles ‘to support fair and well-functioning labour markets and welfare systems’, tackling evolving social challenges and changes in view of emerging types of employment originating from the digital revolution and new technologies, with the objective of fostering ‘a renewed process of convergence towards better working and living conditions across Europe’.⁵ Notably, delivering on these principles and rights has been conceived as ‘a joint responsibility’. While most of the tools to deliver on the Pillar are in the hands of EU member states (precisely local, regional and national authorities), as well as social partners and civil society, the EU institutions can assist and set the framework giving relevant guidance, in full respect of specific national circumstances and institutional set-ups.⁶ Hence, the European Commission proposed a supplementary package of implementation measures (including both pre-existing⁷ and new legislative proposals as well as soft law initiatives, such as on the work-life balance for parents and carers;⁸ on access to social protection for all employment types;⁹ on working time;¹⁰ and on information of workers about essential aspects of their employment

3 European Commission, Communication launching a consultation on a European Pillar of Social Rights, COM(2016)0127, 8 March 2016. The EPSR was first announced by European Commission President Juncker in his State of the Union Address of 2015.

4 European Commission, Recommendation on the European Pillar of Social Rights, C(2017) 2600 final; Communication to the European Parliament and the Council, Establishing a European Pillar of Social Rights, COM(2017) 250 final, 26 April 2017. See the EPSR booklet at https://ec.europa.eu/commission/sites/beta-political/files/social-summit-european-pillar-social-rights-booklet_en.pdf (last visited 23 June 2018).

5 Commission Staff Working Document, Communication to the European Parliament, the Council, the European and Social Committee and the Committee of the Regions, Establishing a European Pillar of Social Rights, SWD (2017) 201 final, 2.

6 As above.

7 Eg, European Commission, Proposal for a Council Directive on implementing the Principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation (SEC (2008) 2180), (SEC(2008) 2181), COM (2008) 0426 final – CNS 2008/0140; Proposal for a Directive aimed at further ensuring greater equality among management positions in the corporate sphere, COM(2012) 614; and Proposal for a Directive of the European Parliament and of the Council on the approximation of the laws, regulations and administrative provisions of the member states as regards the accessibility requirements for products and services, COM/2015/0615 final.

8 European Commission, Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, ‘An initiative to support work-life balance for parents and carers’, COM(2017) 252 final, 26 April 2017; Proposal for a Directive of the European Parliament and of the Council on work-life balance for parents and carers and repealing Council Directive 2010/18/EU, COM(2017) 253 final, 26 April 2017; Commission’s statement accompanying the Commission Proposal for a Directive of the European Parliament and of the Council on work-life balance for parents and carers and repealing Council Directive 2010/18/EU, 26 April 2017.

9 European Commission, Proposal for a Council Recommendation on access to social protection for workers and the self-employed, COM(2018) 132 final, 13 March 2018.

10 European Commission, Interpretative Communication on Directive 2003/88/EC of the European Parliament and of the Council concerning certain aspects of the organisation of working time (2017/C 165/01), 26 April 2017.

relationship);¹¹ along with a ‘social scoreboard’ to track performances and trends across EU member states in 12 areas, which analysis will feed into the European Semester for economic policy coordination.¹² Then, the following EPSR proclamation signed by the European Parliament, the Council and the European Commission on 17 November 2017, at the Social Summit in Gothenburg, expressed a clear inter-institutional political commitment to endorse the principles and rights enshrined in the new soft law instrument.

According to both these non-legally-binding manifestations, the EPSR ‘is primarily conceived for the Euro area’, particularly in view of the risks stemming from persisting social and economic imbalances in several member states whose inability to correct them may result in costlier divergence. The recommendation specifies the additional applicability of the Pillar ‘to all member states that wish to be a part of it’, but the subsequent proclamation indicates that ‘it is addressed to all member states’ (paragraph 13), thus making it clear that the core pronouncement of social values is shared by all and that the commitment to EU social policy is stronger. In concrete terms, such principles and rights are addressed to EU citizens and legally-residing third country nationals in EU member states, irrespective of their employment status, as well as to public authorities and social partners.

As far as the content is concerned, the EPSR covers a wide range of areas of social policy and labour law, categorised in three chapters: (I) equal opportunities and access to the labour market; (II) fair working conditions; and (III) social protection and inclusion. Under these headings, 20 policy domains are acknowledged, to which various principles and rights are attached, covering subjects already part of the EU social *acquis* (for instance, ‘gender equality’ or ‘healthy, safe and well-adapted work environment’) as well as subjects beyond the EU’s legislative competence (for instance, ‘wages’, ‘housing and assistance for the homeless’).¹³ They also formulate some rights that are novel in respect to the EU system (for instance, ‘the right to adequate minimum income benefits’ under principle 14; ‘the right to fair wages that provide for a decent standard of living’ under principle 6(a); and the rights to adequate social protection for the self-employed under principle 12), while restating certain long-existing entitlements (such as the right to equal pay for work

- 11 European Commission, First phase consultation of Social Partners under Article 154 TFEU on a possible revision of the Written Statement Directive (Directive 91/533/EEC) in the framework of the European Pillar of Social Rights, C(2017) 2611 final, 26 April 2017; Commission Staff Working Document, REFIT Evaluation of the ‘Written Statement Directive’ (Directive 91/533/EEC) 26 April 2017. See also European Commission, Proposal for a Directive of the European Parliament and of the Council on transparent and predictable working conditions in the European Union, COM/2017/0797 final - 2017/0355 (COD), 21 December 2017.
- 12 For details of the three dimensions of the social scoreboard, see <https://composite-indicators.jrc.ec.europa.eu/social-scoreboard/>.
- 13 Under art 153 of the TFEU the EU’s competence is to ‘support and complement the activities of the member states’ in various fields for people inside and outside the labour market (ie the unemployed, job seekers, workers), with the objective to advance working conditions; social protection and social security; workers’ safety and health; consultation and information of workers; and the integration of people left out from the labour market. In fact, EU member states are primarily responsible for and competent in the determination of their employment and social policy, including labour law and the organisation of welfare systems.

of equal value for men and women under principle 2(b), and the right to information and consultation for workers in case of transfer or restructuring of undertakings under principle 8(b)). Instead, some social dimensions traditionally covered by EU law (for example, the right to limited working time, the right to maternity leave and the rights of migrating workers) are not included.

It must be highlighted that the EPSR builds on the relevant body of law existing at EU and international level but does not provide further direct, legally-binding social rights protection in the Union.¹⁴ When it comes to the enforcement of the EPSR, the Preamble expressly states that for its principles and rights to be legally enforceable, they first 'require dedicated measures or legislation to be adopted at the appropriate level' (paragraph 14). Furthermore, it refers to an implementation which should take into account the different socio-economic environments (paragraph 17), which has to occur within the Union's powers and competences conferred by the EU treaties (paragraph 18), which does not affect member states' rights to define the basic principles of their social security systems and manage their public finances, and must not significantly affect the financial equilibrium thereof (paragraph 19).¹⁵ Therefore, extensive political discretion is clearly recognised for EU member states as well as EU institutions on the follow-up and future compliance with the new Pillar. Indeed, in early 2017 the non-binding nature of the EPSR was critically viewed by the European Parliament, which called upon the European Commission to

build on the review of the social *acquis* and of EU employment and social policies as well as on the outcomes of the 2016 public consultation by making proposals for a solid European Pillar of Social Rights that is not limited to a declaration of principles or good intentions but reinforces social rights through concrete and specific tools (legislation, policy-making mechanisms and financial instruments).¹⁶

Nonetheless, the EPSR has been regarded as 'a boost to the EU's social dimension through renewed use of the legal competences of the Social Policy Title' (Garben 2018: 222). The Union legislative action in fact is limited (in comparison to the national competence in this area) under article 153(1) of the TFEU and article 155 of the TFEU, but in the course of the European integration process a social mandate and output have to

- 14 On the one hand, it draws on the Union's social *acquis* as developed over the last 30 years, through novel provisions in the EU treaties, the Charter of Fundamental Rights of the European Union (CFR), which has acquired the same legal value as the TEU and the TFEU following the ratification of the Treaty of Lisbon, new legislation and the case law of the CJEU, but also the political declaration that is better known as the Community Charter of the Fundamental Social Rights of Workers of 1989. On the other hand, the EPSR draws on the European Social Charter of 1961, the Revised European Social Charter of 1996, and the European Code of Social Security of the Council of Europe, besides taking into account many International Labour Organisation (ILO) conventions, recommendations and related protocols, and the United Nations Convention on the Rights of Persons with Disabilities.
- 15 The CJEU has also acknowledged the financial equilibrium as a legitimate objective that potentially permits restrictions to social protection; *Hepple & Others v Chief Adjudication Officer C-196/98* [2000] ECR I-3701.
- 16 European Parliament, Resolution of 19 January 2017 on a European Pillar of Social Rights (2016/2095(INI)), para 1. As the main concrete suggestion, the European Parliament called on the social partners and the European Commission to provide a common proposal for a framework directive on decent working conditions (para 4).

some extent been developed by the EU, although with a low use of its allocated competences in recent years (Barnard 2014: 199). Such critical practice in the pursuit of reinforcing the European Social Model has been debated as 'a first type of social displacement' (Muir 2018). Underlying political or constitutional factors have been addressed in this regard, such as the Union enlargement complicating the EU decision making in this policy area by raising the number of member states advocating liberal market economies (Scharpf 2010: 211; Scharpf 2002: 645; Copeland 2012: 476); the CJEU case law on national social standards in the context of the internal market, which has reinforced the bargaining positions of those countries and made social re-regulations by the Union very difficult (Scharpf 2010); the strengthened role of national parliaments in the EU legislative process via the Early Warning System, with two of the three yellow cards so far triggered concerning social initiatives; the EU Better Regulation Agenda holding back the progress of social initiatives in the Barroso Commission (Dawson 2016: 1209); and the financial and economic crisis making it more challenging to uphold or raise social standards at both the national and European level. Paradoxically, some of these factors, such as the deepened economic diversity among EU member states and the worsening social and economic conditions within them, have intensified the necessity for social protection and integration at the EU level but also made it more problematic. In this context, the EPSR implementation by means of the needed legislative measures as currently envisaged in the aforementioned package would be capable of tackling some of the urgent issues of social justice and protection relating to European labour markets and workers (Garben 2018: 224-226).

Conversely, the EPSR does not have the potential to resolve the basic constitutional asymmetry underlying the 'social problem' of European integration, which is principally due to other forms of 'social displacement'. First, the most important social decisions made in the EU during the past decade have been undertaken in other areas, namely, the internal market and European economic governance. Second, such decision making has been done by the judiciary and the executives respectively, rather than by the national or European legislators, and therefore is not the result of democratically legitimate procedures and genuine parliamentary participation (Garben 2018: 227-230).

In any case, possible levels to 'instrumentalise' the EPSR in favour of an actual impact on certain dimensions of the EU policy-making process, both within and beyond the social policy area, have been addressed (Rasnača 2017b). On the one hand, in terms of re-shaping and indirectly influencing EU primary law (at the very least, by serving as 'an interpretation aid' for the social rights enshrined in the CFR and widened by the Pillar as well as by reinforcing article 9 of the TFEU and paving the way for attaining the EU social objectives under article 3(3) of the TEU and articles 151 and 152 of the TFEU), in terms of inspiring and structuring EU secondary law initiatives in the field (particularly given that various matters covered by the Pillar have not yet been regulated at the EU level) and, finally, in terms of triggering the mainstreaming of more social standards into the EU's governance mechanisms such as in the European Semester. On the other hand, a possible role beyond the social *acquis* is seen in terms of utilising and influencing the EU institutions' discretion when their actions have an effect on issues covered by the Pillar, in view of the inter-institutional nature of its proclamation. In this vein,

for instance, the CJEU's use of such proclamation to define the obligations of EU institutions when implementing all its policies would be desirable to guarantee respect for the enshrined social rights and principles.¹⁷ The EPSR could also function as a reference for policy proposals outside the social policy domain, in any area of EU law.

Significantly, the non-legally-binding nature of the EPSR does not exclude its possible use as a source of interpretation of EU law. In this regard, the judicial application of the EPSR by EU and national courts is seen as another pathway for the Pillar to gain a certain protective role, especially given that it comprises principles mostly formulated as individual rights and that it covers various areas where its principles could be complementary to the existing EU *acquis* (Rasnača 2017a). Emblematically, the consideration of its principle 2 (on equal opportunities regardless of gender, racial origin, religion, disability or sexual orientation) by the CJEU when interpreting EU legal acts regulating this area would represent a step closer towards 'a substantive equality approach' which is mostly absent in EU law (Mulder 2017: 59).

According to an analysis of the various social revivals in the history of European integration (Pochet 2017), every 15 years the social dimension has been addressed and debated for between five and six years before disappearing for a moment from the European agenda. Emerging within the tough social mobilisation at the beginning of the economic crisis in the 1970s, the first attempt led to the development of the gender equality and health and safety flagship policies. The second attempt stemmed from the project of a large internal market at the end of the 1980s, with the entering into force of the Single European Act in 1987 and the adoption of the non-binding Community Charter of the Fundamental Social Rights of Workers of 1989. The ambitious but less successful third attempt was made in the context of the negotiation of the treaty establishing a Constitution for Europe in 2004 and the proclamations of the CFR in 2000 and 2007, even though the latter has become a key element of the Union's body of constitutional rules following the ratification of the Lisbon Treaty in 2009. Thus, the Union and its member states have a new round of years to guarantee the translation of the EPSR into concrete effects for a tangible, long-lasting European social construction. Against the rising Euroscepticism, however, they are urged to rebalance the economic growth and social progress concerns of the European integration project via an ambitious social plan of action, in order to ensure a strong and effective social dimension. The credibility and survival of such project seems in fact to rely on something beyond the peace brought to the continent over 60 years and beyond the economic law of regulation by the market.

17 After having been proclaimed and before having acquired legally-binding force, the CFR was referred to by the CJEU to delimit institutional discretion; *Parliament v Council* C-540-03 [2006] ECLI:EU:C:2006:429. According to the same Court, institutions cannot depart from their obligations stemming from soft law instruments in their relations with third parties, as this could violate the general principle of legal certainty; *Dansk Rørindustri & Others v Commission* C-189/02 P ECLI:EU:C:2005:408.

5 Conclusion

The EU continued to confront multiple crises during 2017, putting the European construction under exceptional pressure as well as putting into serious question the Union's policies and the legitimacy of its institutions. Whether the EU was able to address citizens' and workers' tangible concerns became increasingly questionable, while the inability of member states to deliver on security, economic and social progress also raised doubts. Nonetheless, according to Eurobarometer surveys from 2017, 75 per cent of Europeans have a positive view of the EU (Eurobarometer 2017a: 6); 47 per cent (a rising trend) trust the EU (Eurobarometer 2017b: 18); and 70 per cent identify as EU citizens, representing the highest percentage recorded since 2010 (Eurobarometer 2017c: 31). In the midst of this unprecedented crisis in which the EU finds itself, these numbers provide the hope that many Europeans still look to the EU to solve some of their most pressing concerns. At the same time, Brexit and the election outcomes in many EU member states in 2017 have shown that wide margins of the European electorate feel increasingly let down by the political establishment that, in their mind, fails to adequately address the consequences of globalisation and migration. Against this political backdrop, the EPSR represents an opportunity for the Union. If implemented and developed further, it could become a way to alleviate concerns of the citizens that are increasingly turning away from mainstream politicians towards populist, anti-EU movements. Bolstering social rights and principles might offer one way of tackling these trends in the context of addressing rising social and economic inequalities that might resonate with the electorate, and by extension increase approval for EU policies and institutions.

Indeed, as a political initiative in evolution, the EPSR has a certain potential to contribute to the real inauguration of a more socially-oriented era of European integration. However, the EPSR's promising content needs to be made operational both at national and EU level. While the role and action of EU member states remains fundamental to accelerate this process, the consultation with and support of EU institutions is necessary to further deliver on the new Pillar, and the principle of subsidiarity under article 5 TEU applies.¹⁸ Besides being endorsed unanimously by all member states, the inter-institutional proclamation intensifies the relevance and political legitimacy of the Pillar but is just a first positive step, while it is a collective responsibility (which also includes social partners and civil society in general) to ensure that it turns into a living instrument. Thus, a roadmap for the implementation of the EPSR should

18 The first steps of the 2018 European Semester Package have been influenced by the EPSR, which featured strongly in the European Commission's Annual Growth Survey; the Country Reports published on 7 March 2018 used the new Pillar 'as a compass' for social policy guidance, focusing on reforms that can assist in increasing the resilience of labour markets, the effectiveness of national welfare systems and the ability to cope with longer-term structural drivers of change (such as demographic ageing or novel forms of work). On the other hand, as part of a Social Fairness Package, on 13 March 2018 the European Commission adopted a proposal for a Regulation establishing a European Labour Authority and a proposal for a Council Recommendation on access to social protection. It also published a staff working document recalling the legal framework for each of the principles of the EPSR, considering the respective competences of the EU and its member states, including the role of the social partners and recent EU-level initiatives in each area.

be settled by the European Commission as it would assist in fostering convergence and realising its objectives. A clear consensus on who should do what in the social policy domain is in fact needed, together with more transparency and accountability (also for any failure to act). In this vein, the completion of the various aforementioned initiatives already envisaged at the European level in this context would be desirable, and as such would also address the critical ‘displacement of the Social Policy Title’ in the construction and regulation of Social Europe. Moreover, implementing the Pillar through the European Semester is intended to advance the social dimension of the Economic and Monetary Union, but more adequate social benchmarks and objectives should be included in the annual recommendations and related follow-up. Nonetheless, concrete proposals and actions are desirable at national level for the implementation of the Pillar rights and principles, particularly where the Union has no direct competence. As emphasised by the European Economic and Social Committee (EESC) following several national consultations, the new Pillar should make a progressive impact on the need for social stabilisation and to address growing poverty, inequality and social exclusion, and rising divergences between and within EU member states. The EESC has also called for further efforts to delineate common principles, standards, policies and strategies at appropriate levels on better convergence of wages, establishing or increasing minimum wages, minimum income for all, and the increase of social cohesion and social investment (EESC, Opinion: para 1.5). Overall, the EPSR operationalisation could revitalise the Union narrative and ground for social policies and, accordingly, the European integration project, which needs to deepen its social dimension to survive and prove that it is able to enhance the living standards of European citizens besides handling economic markets.

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Selected developments in human rights and democratisation during 2017: Sub-Saharan Africa

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Abstract: *This article reviews selected developments in human rights and democratisation in sub-Saharan Africa during 2017. It discusses the presidential elections held in Kenya, Liberia, Angola, Rwanda and Somalia/Somaliland, noting in particular democratic gains in Liberia, Angola and Somalia where elections resulted in changes of government, which brought in new leadership. It further notes the democratic crises in Zimbabwe, where President Mugabe was removed from power through military intervention, and in the Democratic Republic of the Congo, where instability continued due to efforts by incumbent President Kabila to prolong his term of office. It reports on incidents of protests, recurrent internet shutdowns and interference with the freedom of expression and right of access to information in various African countries. The authors identify the cause of the rift between the African Union and the International Criminal Court as the Al-Bashir warrant issued pursuant to a Security Council Resolution, and recommend that the AU should focus on petitioning the Security Council to withdraw its referral, rather than to persist with its current onslaught against the ICC. In this context, they discuss the decision of ICC Pre-Trial Chamber, which clarified that there is no conflict between article 27(2) and article 98 of the ICC Statute in relation to state parties to the Statute or states referred to the ICC by the Security Council. As far as women's rights are concerned, the article traces significant normative and jurisprudential gains, in particular the adoption of the Joint General Comment on ending child marriage, the Guidelines on combating gender-based violence and its consequences, and the decision of the ECOWAS Court of Justice against Nigeria denouncing gender-based discrimination as a violation of the right to dignity and non-discrimination.*

Key words: *human rights; democracy; sub-Saharan Africa; elections; mass atrocities; accountability; women's rights*

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1 Introduction

In this article we review selected developments in human rights and democratisation in sub-Saharan Africa during 2017. The issues discussed cover developments at the global level that are relevant to sub-Saharan Africa as well as developments at the regional, sub-regional and national levels. The themes covered in the article include democracy; protests and internet shutdowns; accountability for mass atrocities; and women's rights. The article provides an analytical commentary on some of the most important developments in human rights and democratisation across sub-Saharan Africa, mainly focusing on normative and jurisprudential developments, although relevant sections contain descriptive overviews of some issues that are worth noting.

2 Democracy

In 2017 elections were scheduled to take place in 23 African countries. These included presidential elections, national and provincial legislative elections as well as local elections. Presidential elections were expected to be organised in Kenya, Rwanda, Liberia, Somalia/Somaliland, the Democratic Republic of the Congo (DRC), Libya and Angola (Electoral Institute for Sustainable Democracy in Africa 2017). Only the DRC and Libya did not hold their presidential elections. National legislative elections were expected to be held in Algeria, Angola, Republic of Congo, the DRC, Equatorial Guinea, Gabon, The Gambia, Kenya, Lesotho, Liberia, Libya and Senegal. The DRC, Gabon and Libya did not organise these elections. Local and provincial elections were scheduled in Algeria, Chad, Equatorial Guinea, Kenya, Madagascar, Mali, Niger, Swaziland, Togo and Tunisia, but only Swaziland and Algeria held these elections. Constitutional referenda scheduled in Sierra Leone and Libya were postponed to 2018.

In the next section we briefly discuss the presidential elections held in Kenya, Liberia, Angola, Rwanda, and Somalia/Somaliland. Both positive and negative developments and democratic lessons are highlighted. This exposition is followed by a brief discussion on democratic crises in the DRC and Zimbabwe.

2.1 National elections

2.1.1 Kenya

Kenya organised its sixth presidential elections on 8 August 2017. Eight candidates, including the main contenders, Raila Odinga of the National Super Alliance (NASA) coalition, and the incumbent President, Uhuru Kenyatta of the Jubilee coalition, contested the elections. However, the elections were marred by a number of incidents of violence, sometimes resulting in ethnic and tribal clashes. According to Carter Centre observers, 'several politicians from both Jubilee and NASA were arrested on hate speech charges' (Carter Centre 2018: 29). The sudden murder of Chris Msando, the head of information, communication and technology at the Independent Electoral and Boundaries Commission (IEBC), nine days before the elections (Freytas-Tamura 2017), brought into question the

commitment of parties to free, fair and transparent elections. Such a commitment was needed to break away from a culture of electoral violence and deaths that have become characteristic of elections in Kenya. Msando played a key role in the establishment of the electoral voting management system in the country (Burke 2017). Other incidents were recorded subsequent to the annulment of the elections by the Supreme Court of Kenya. When the Supreme Court annulled the August 2017 presidential election results and ordered a rerun, verbal attacks by members of political parties toward the Court and the IEBC increased. Uhuru Kenyatta, whose declaration by IEBC as President-elect was annulled by the Court, labelled the majority judges as 'crooks' and threatened to reform the Court. Concerns about transparency during the rerun presidential elections became more apparent when Roselyn Akombe, a commissioner at the IEBC, unexpectedly resigned and fled to the United States of America, blaming her colleagues of partisanship in the decision-making process (Al Jazeera 2017). Supporters of both Odinga and Kenyatta resorted to protests in their strongholds. During some of these protests in Nyanza and Nairobi, for example, clashes between security forces and young protesters resulted in the death of six persons and many injuries (Carter Centre 2018: 30). The Inspector-General of Police acknowledged the death of 19 persons before and during the elections, even though the Independent Medico Legal Unit reported that 36 Kenyans had been killed by police (Cherono 2017).

Despite the violence and controversies that marred the elections, the 2017 Kenya elections will be remembered across the world largely because of the decision of the Supreme Court to annul the first round of elections. This decision marked the first time that a presidential election petition in Africa resulted in the annulment of the election in its entirety (Kaaba 2015). The Supreme Court ordered the rerun of the election within 60 days. In a majority judgment of four to two, the Supreme Court was convinced that the elections had not conformed to the Constitution and relevant electoral laws. It consequently declared the results 'invalid, null and void' (Supreme Court 2017). The Court annulled the elections on the basis that 'irregularities and illegalities ... were so substantial and significant that they affected the integrity of the election' (Supreme Court 2017). These irregularities and illegalities were reported to have occurred during the 'process of electronically transmitting polling station results and tabulation of results at county level tallying centres' (Carter Centre 2018). This process was found not to be 'simple, accurate, verifiable, secure, accountable and transparent', necessitating the annulment of the elections.

This decision marks a departure from the established pervasive culture of judges rubberstamping election results in Kenya, specifically, and Africa, more generally. African judges tend to hold the view that courts must uphold election results in order to ensure political stability (Kaaba 2015: 335). This may be one of the reasons why, until the September 2017 ruling by the Supreme Court of Kenya, no other court in Africa had ventured to annul presidential election results. The then President of the Supreme Court of Ghana made this clear when in 2013 he stated that the Ghanaian judiciary 'does not readily invalidate a public election but often strives in the public interest to sustain it' (Azu 2015: 165) – a 'public interest' that mostly benefits the incumbent or his political party to maintain its grip on power.

What prompted opposition leaders to lodge a petition with the Supreme Court was the fact that the election results sent to the National Tally Centre were not accompanied by the 'scanned copies of polling-station results forms' as required by the Electoral Act. The day after the elections, the Independent Electoral and Boundary Commission (IEBC) published online 30 000 out of 40 833 polling station result forms. When the election results were declared, the IEBC was yet to receive results from 11 883 polling stations and 17 constituency tallying-centres and polling station result forms of 5 015 polling stations (Supreme Court: para 39). Constituency result forms were posted online two days before the expiration of the deadline to challenge presidential results in court. The impatience on the part of the IEBC to obtain and post all the required forms prior to announcing the election results as well as the interruptions in the transmission of election results are said to have jeopardised the transparency of the tallying process and the ability of stakeholders to cross-check results (Carter Centre: 17-18).

The Court in fact did find that the IEBC had not properly conducted the elections and that the irregularities and illegalities were substantive so as to affect the integrity of the elections, and ordered the organisation of fresh elections. The rerun, held on 26 October 2017, was won with a landslide result of 98 per cent in favour of the incumbent Uhuru Kenyatta, due to the boycott by the main opposition leader, Raila Odinga, by alleging that the IEBC had not fully complied with the Court's orders.

The role played by the Kenyan Supreme Court to uphold democracy, the rule of law and constitutionalism reveals the courageous role apex court judges can play in presidential election petitions. While it may be too soon to assess the influence of the Kenyan 2017 Supreme Court ruling on other courts in Africa, one may submit that the fever of this ruling might have been instrumental in the Liberian Supreme Court decision to delay the organisation of the run-off, initially scheduled for 7 November, by a month and a half until it was satisfied that the 2017 presidential elections in Liberia contained no irregularities as contented by complainants (Toweh 2017).

While the decision provides an important precedent and a lesson for other African courts, it remains to be seen whether any African court will ever be bold enough to declare an election in favour of an opposition candidate. The ruling also provides a lesson to electoral observation missions. African Union (AU) and regional economic communities observation missions always applaud elections as having been free and fair and seldom engage in a critical assessment of the period before, during and after elections. The first round Kenyan elections were lauded by almost all electoral observation missions as having been fair (Obulutsa & Njuguna 2017), even though the Court found the irregularities to be so substantial that they affected the integrity of the results.

2.1.2 *Liberia*

The first peaceful alternation of power in Liberia since 1944 occurred in 2017 when President Ellen Sirleaf Johnson handed power over to Georges Weah, the confirmed winner of the 26 December 2017 presidential elections runoff. Sirleaf had served as the country's President for two consecutive constitutional terms of six years each. Liberia is comprised of former African and Caribbean American slaves and their descendants,

known as ‘American Liberians’ that settled in the country in the 1800s, and the indigenous inhabitants. Between 1980 and 2003, Liberia’s political history was marred by military rule, autocratic presidency and civil war. Eventually, in 2005, the country succeeded in holding general elections that marked the dawn of a new democratic dispensation in the country. Ellen Sirleaf Johnson’s two terms in office mainly focused on political stability, security and social cohesion at the expense of the social and economic needs of Liberians. The courage, enthusiasm and stamina of George Weah finally paid off with his victory (61,5 per cent) over the then sitting Vice-President (38,5 per cent). Before his 2017 victory, Weah had unsuccessfully competed in elections as presidential candidate and presidential running mate in 2005 and 2011.

President Sirleaf, the first African female President, will be remembered for her courage to step down as President after two consecutive terms in office on a continent where incumbents are all too often altering presidential term limits to maintain their grip on power (Makunya 2017). Setting this example was crucial in Liberia because of its past and was instrumental in the Mo Ibrahim Institute awarding president Sirleaf the Achievement in African Leadership prize worth US \$5 million.

In spite of these significant gains, it is essential to highlight that Liberia is yet to take meaningful steps to advance the participation of women, the youth and persons with disabilities. For instance, Liberia did not endeavour to ensure, through affirmative action, that 30 per cent of candidates nominated by political parties and coalitions are women as contemplated by sections 4(5)(1)(b) and (c) of the amended 1986 Elections Law. The lower representation of women is also evidenced by the fact that out of 20 presidential candidates, only one was female and six out of 20 running mates were female, while 16 per cent of candidates for legislative elections were female (EISA 2018). In the previous House of Representatives (2011-2017), only nine women were elected compared to 64 men. The paradox of the poor representation by women is remarkable in light of the fact that a female president ruled the country for 12 years.

2.1.3 *Angola*

Angola witnessed its first transfer of presidential power in 2017, when José Eduardo Dos Santos was replaced by Joao Lourenço. Dos Santos had for 38 years been President of Angola. However, the euphoria behind Dos Santos’s decision to stand down and the apparent dawn of a new democratic era in the former Portuguese colony were undermined by the decision of Dos Santos to handpick his successor and to remain president of the ruling dominant party, the People’s Movement for the Liberation of Angola (MPLA). It was easy for the outgoing President to handpick his successor as the MPLA enjoys an absolute majority in parliament (61 per cent of the 220 seats). Also, since the adoption of the 2010 Constitution the head of state is no longer directly elected (Freedom House 2018). Rather, the President is nominated by the party that obtains the most votes in elections without any confirmation process by the elected parliament (Freedom House 2018). This state of affairs until recently had suggested that Dos Santos would continue to influence government decisions. However, current political developments in Angola provide a glimmer of hope that the system is beginning to change. Dos Santos had been forced to stand down as president of the MPLA despite his desire to delay the

process (Pauron 2018). Key leaders of parastatal enterprises, mainly sons and daughters of Dos Santos, cabinet ministers and some government officials have been dismissed by the new President (France 24 2017).

Several issues, particularly with regard to human rights and the independence of the judiciary, need to be addressed by the current President. In 2017 Angola was ranked as 'not free' because of increasing violations of individual rights and freedoms including those of opposition parties, the prevalence of corruption and the absence of an independent justice system (Freedom House 2017). With regard to the judiciary, the Constitutional Court dismissed the 2017 election petition filled by four political parties on the grounds that the alleged irregularities and abnormalities had not been supported by evidence. The opposition parties were seeking a recount of the votes 'on the basis that the National Electoral Commission did not follow procedure when tallying ballots in 15 of the country's 18 provinces' (Mendes 2017). The elections once again produced a 'monolithic parliament' in Angola, thereby diminishing the prospects of having open and democratic debates in parliament.

2.1.4 *Rwanda*

Rwanda's presidential elections followed its regular pattern of landslide victories for the incumbent Paul Kagame who won 98.63 per cent of the votes (Burke 2017). The AU Electoral Observation Mission to Rwanda reported that although six individuals filed applications with the National Electoral Commission (NEC), only three were confirmed by the NEC to contest the election (African Union 2017a). Diana Rwigara, Fred Sekikubo Barafinda and Gilbert Mwendata were barred by the NEC from running for not having gathered the required number of signatures to support their candidacy and allegedly presenting invalid signatures (Human Rights Watch 2017). Thomas Nahimana, another self-proclaimed candidate, was denied access to Rwandan territory (*The East African* 2016). Ever since her declaration of intent to run for President, Diane Rwigara, along with her mother and sister, were held in custody and tried on charges of incitement to insurrection and forging signatures that were supposed to endorse her candidacy (Jeune Afrique and Agence France-Presse 2017).

The Rwigara trial and the continuous shrinkage of political and democratic spaces in Rwanda put into question the commitment of Paul Kagame, as the new AU Assembly Chairperson, to 'democratic principles, human rights, the rule of law' that he is expected to further in Africa. It also highlights the sharp contrast between Rwanda's commitment to democracy as one of the only 10 state parties to the 2007 African Charter on Democracy, Elections and Governance (African Democracy Charter) and the day-to-day lives of political dissidents. This suggests that Rwanda's ratification of the African Democracy Charter was largely cosmetic, seeking to improve its image on the continent. This may also be evidenced by the amendment of the country's Constitution in 2015, affording a third seven-year term to Paul Kagame (Human Rights Watch 2015). Free speech and political participation are of the utmost importance in the consolidation of democracy and are much needed in the era of political instability and unconstitutional change of government in Africa.

2.1.5 *Somalia/Somaliland*

In the Republic of Somalia, the electoral process that started in 2016 with the elections for the Upper House (Senate) and Lower House (House of the People) culminated in the election of Mohamed Abdullahi Mohamed Farmajo, who was indirectly elected as the President of Somalia for a four-year term by the two Houses of Parliament, in 2017 (EU Election Expert Mission 2017). The elections were supposed to have been held under universal and direct suffrage. However, as argued by EU observers, security concerns, mainly because of the protracted civil war in the country, the lack of an institutional and legislative framework as well as the reluctance of political leaders, did not create an environment conducive to universal suffrage. It is expected that the 2020 general elections will be organised under universal direct suffrage. However, there are no signs that by that time obstacles to universal direct suffrages will have been overcome since Somalia remains plagued by sporadic terrorist attacks. The fact that the government does not control the entire territory of Somalia is an impediment to universal suffrage. EU observers have noted the lack of electoral campaign timelines and 'the general conditions of insecurity, intimidation and limited transportation infrastructure constrained the exercise of freedoms of movement, assembly and expression for delegates and candidates' (EU Election Expert Mission 2017: 3).

Despite these challenges, the 2016-2017 general elections in Somalia were a democratic milestone for a number of reasons. The incumbent President, Hassan Sheikh Mohamud, who was seeking re-election, conceded defeat after a runoff, a move that is yet to be anchored in broader African political culture. Such a concession and the peaceful transfer of power were necessary in Somalia considering that any further political wrangling would have exacerbated the ongoing civil war. The second unique feature of the Somali elections was the nomination of delegates (electoral college) both for presidential elections and the election of members of the House of the People by clan and sub-clan leaders (EU Election Expert Mission 2017: 15). In total, 14 025 delegates were nominated to elect 275 members of the House and 54 senators. This is justified by the fact that parliamentary seats, including political power, are more readily allocated to the four major clans of Somalia and a 'half share for minority clans'. The third most important achievement was the increase in female representation from 14 per cent of seats in 2012 to 24 per cent of seats in 2017, representing a total of 67 women elected to the House of the People and 13 women in the Upper House (EU Election Expert Mission 2017). This in fact is the result of affirmative action policies such as the inclusion of a 30 per cent quota for women in parliamentary elections; the fact that fees for the registration of the candidacy of women were reduced by up to 50 per cent; and the requirement that 16 out of 51 delegates ought to be women (EU Election Expert Mission 2017). While the 30 per cent target was not reached, it is a marked improvement that should be safeguarded and further pursued in subsequent elections. The failure to reach the intended target has been attributed to the fact that the clan leaders who nominate candidates are predominantly male, leaving the participation of women at the mercy of the clan leaders rather than the general population. The absence of a legal mechanism to constrain the government to comply with the 30 per cent quota may be cited as another reason, because of the fact that Somalian

society and customary practices exclude women's participation (Carver 2017).

During the same period, the self-proclaimed independent Republic of Somaliland, an autonomous region of Somalia with no international recognition as a state or government, held its third presidential elections in November 2017 (the first and second elections took place in 2003 and 2010) (Felter 2018). Historically, Somaliland had politically evolved separately from the rest of Somalia. Until 1960, the state of Somaliland was a British Protectorate (British Somaliland). It was, however, merged with the Trust Territory of Somaliland which was under Italian rule during colonisation (Italian Somaliland), to form what was known as the Somali Republic or Federal Republic of Somalia (Adan 2015: 3; Gonnelli 2013: 8-10; Felter 2018). In 1991 Somaliland self-proclaimed its independence. Even though Somaliland is not recognised as a state, the 2017 elections were observed by France, the United Kingdom, the United States and the European Union (EU). Somaliland maintains informal commercial and political relationships with neighbouring Djibouti and Ethiopia.

The 2017 Somaliland presidential elections were a safe seat for the ruling party as the incumbent President Ahmed Mohamed Mahamoud decided not to run for a second term, thereby paving the way for a peaceful alternation of power with a nominee from his party, Muse Bihi Abdi. Two other candidates, Adbirahman Mohamed and Faisal Ali Warabe, contested these elections, but lost to Bihi Abdi. The Republic of Somalia and Somaliland remain examples of respect for presidential term limits, even in the midst of conflict, along with other progressive African countries. War-torn and post-conflict countries, such as the DRC and Burundi, that justify the elongation of presidential terms with the quest of political stability, may learn from their experiences.

2.2 Democratic crises

2.2.1 Zimbabwe

Zimbabwe witnessed a dramatic regression in democracy following what many have described as a military *coup* that compelled President Robert Mugabe to resign. The plotters of the *coup*, which included senior leaders of the army and members of the Zimbabwe African National Union Patriotic Front (Zanu-PF), accused Mugabe of attempting to pave the way for his wife to take over the reign of the country. Mugabe led a kleptocratic, 'despotic, corrupt and dysfunctional' regime for 37 years since the country's independence in 1980 (Ngwena 2017). Many Zimbabweans, therefore, applauded the move of the army with the hope that the new leadership would address 'poverty, inequality and social injustice' (Ngwena 2017). This dream may be regarded as legitimate, given the suffering of many Zimbabweans under the stewardship of Mugabe. Nonetheless, the resignation of Mugabe under the threat of force and the swearing in of Emerson Mnangagwa as acting head of state contravene basic democratic principles that people have to elect their leaders, and that the impeachment of a sitting president needs to follow laid-down constitutional principles.

Both the resignation and the removal from office of the President are stipulated in sections 97 and 98 of the 2013 Zimbabwean Constitution,

which do not contemplate any role to be played by defence forces in these matters. A reading of section 97 suggests that the resignation is a personal unilateral decision taken by the President, while his removal may be decided by half the members of the Senate and National Assembly upon the conviction that the President is guilty of 'serious misconduct'; a 'failure to obey, uphold or defend' the Constitution; its voluntary violation; or an 'inability to perform the functions of the office because of physical or mental capacity' (2013 Zimbabwe Constitution, section 98). No parliamentary or judiciary processes were commenced regarding the fitness of President Mugabe to remain in office. We submit that section 212 of the Zimbabwean Constitution that allows defence forces to uphold the Constitution should be read with sections 97 and 98 as well as the principles that underlie a democratic state to exclude any interference whatsoever by the military in civil politics. The 2017 military intervention in Zimbabwe is a move that should not be tolerated by the AU as it is reminiscent of erstwhile violent overthrows of African presidents, military interference in and control of politics, which might set a negative precedent on the continent.

2.2.2 *Democratic Republic of the Congo*

Joseph Kabila retained his grip on power despite the fact that his second and last presidential term ended in December 2016. Kabila, his ruling coalition and the National Independent Electoral Commission (CENI), backed by a ruling of the Constitutional Court, insist that he should remain in power until such time as the government has mobilised funds to conduct elections and a new President has been sworn-in. On the one hand, pro-democracy groups and the political opposition have suggested that Kabila should have handed over power in December 2016 to the Chairperson of the Senate who, according to the Constitution, should lead the country pending the election of a new President between 60 and 90 days following the vacancy in the office of the President (2006 DRC Constitution, article 76). The political manipulations of Kabila, in spite of the clear constitutional provision, provide credence to suspicions that the failure to conduct elections in the DRC has little to do with the lack of financial resources to hold elections or a matter of inconsistency in the interpretation of presidential tenure. There has been growing suspicion that President Kabila intends seeking an additional term in office. As a consequence, Kabila and his allies have mounted a myriad of strategies that would resort to a *de facto* or *de jure* elongation of his presidential term. These include the organisation of political dialogues, the recruitment of opposition leaders and prominent civil society activists into the government and the appointment of his sympathisers to the CENI and the Constitutional Court (Kibangula 2017; Makunya 2017).

Hope for a peaceful alternation of power was regained at the end of 2016 when the ruling coalition, opposition leaders and civil society agreed to hold presidential, national and provincial legislative elections in December 2017 (Accord Global de la Saint Sylvestre 2016). What was known as the Saint Sylvestre political deal, brokered by Catholic bishops, in addition stipulated that the opposition party, the *Rassemblement*, was entitled to propose to the President a Prime Minister and to chair the national mechanism tasked with following up on the implementation of the Accord. As previously argued, Kabila had no prospect of running for President in such a difficult political and legal environment. Therefore, he

decided to buy more time by offering the coveted position of Prime Minister, cabinet ministers and the Chairperson of the follow-up mechanisms to the *Rassemblement*, in exchange for their political acceptance of the prolongation of his term. Elections subsequently were postponed to December 2018, prompting protests in many parts of the country, mostly led by the Catholic Church.

3 Increasing securitisation: Demonstrations and internet shutdowns

Incidents of protests, recurrent internet shutdowns and interference with the freedom of expression and right of access to information were reported in various African countries including Cameroon, Ethiopia, Tanzania, the DRC and Egypt. In 2017 the north-western and south-western regions (Anglophone regions) of the Republic of Cameroon were regularly subjected to restrictions 'to social media and messaging applications' for more than 150 days combined. The first internet blackout in the Anglophone regions of Cameroon that started in January ended on 20 April 2017. Shutdowns were informed by the fact that the internet was (and continues to be) used as a medium to send pictures and videos related to torture, brutality, extra-judicial killings and numerous other rights violations recurrently perpetrated by state agents in those regions (Dahir 2017). Similar reasons were invoked for the shutdown of the internet in the DRC, Ethiopia and Togo. Human rights groups have argued that 'by its actions and omissions, the government of Cameroon has failed to protect its citizens and as such stands in violation of obligations imposed upon it by the Preamble to the Constitution of Cameroon and provisions of the African Charter' (Centre for Human Rights 2017), and further argued that '[a]ny interference with the freedom of expression should be provided by law, serve a legitimate aim and is such that is necessary and proportionate in a democratic society' (Centre for Human Rights 2017).

These legal arguments remain valid for the situation in Ethiopia where the government interrupted access to the internet on 30 May ahead of the national examinations to prevent examination leaks that had occurred in 2016. The government contended that its action was meant to allow young students to focus on the examinations. Two months before this interruption, an Ethiopian court sentenced Yonatan Tesfaye, spokesperson of the opposition party, the Semayawi Blue Party, to six and a half years' imprisonment on terrorism charges for a Facebook comment in which he called for the destruction of '[the ruling party's] oppressive materials' and declared that it was 'time to make our killers lame' (BBC May 2017). In December, access to Facebook, Twitter and YouTube was denied following protests that resulted in the death of 16 people and injuries in Oromia region (Dahir December 2017).

In the DRC, demonstrations coupled with internet shutdowns increased in 2017 in the main cities of Kinshasa, Lubumbashi, Kananga, Bukavu, Goma, Kisangani and Uvira. Demonstrations were mainly aimed against President Joseph Kabila's continued stay in power after his last constitutional term had expired in December 2016. Over 600 violations of the rights to freedom of peaceful assembly, freedom of movement and freedom of expression were reported to have been committed by the

national police, the intelligence bureau, administrative and political authorities and protesters (Makunya 2017: 31-34; Human Rights Watch 2018a). A commission that inquired into human rights violations committed during the December 2017 (and early January 2018) demonstrations in the DRC notes the killing of 14 people and the detention and torture of 40 Congolese (Ministère des droits humains 2018: 13-15). Violations occurred amid protests aimed at urging President Kabila to step down. Victims mainly were political opponents, members of pro-democracy groups and other civil society organisations as well as the civilian population that took part in different protests. Protesters were also alleged to have attacked, injured or killed police officers and burnt down police stations to retaliate against police brutality and the unlawful or excessive use of force. On the eve of each demonstration, access to internet and short message services was completely restricted to deter people from mobilising countrywide. With such a record of human rights violations, it was astonishing that AU member states confirmed the candidature, and later contributed to the election of the DRC as a member of the Human Rights Council (2017-2020), highlighting the reluctance with which African leaders are willing to censure one of their own, even those in clear breach of democratic rules.

The increasing shrinkage of digital space in countries such as Tanzania, Egypt, Algeria, Togo, Equatorial Guinea and Morocco are evocative of government securitisation measures to protect the interests of political leadership in the name of state security (Appigjeyi-Atua 2017: 328). Tanzania in 2017 proposed the Electronic and Postal Communications Regulation that would require blogs and online forums to be registered. The regulation broadens the definition of 'hate speech' and 'indecent material' with the potential of limiting the right to freedom of expression and access to information provided for by article 18 of the Constitution of Tanzania (CIPESA Policy Brief 2017). This over-securitisation of the country was further evidenced by the arrest of activists who called for protests against an 'authoritarian government' in Tanzania and the statement by the police chief of the Central Dodoma region, who promised that protestors would end up with 'a broken leg and go home as cripples' (ENCA March 2018).

In September 2017, WhatsApp and short message services were blocked in Togo on the eve of protests organised by opposition parties to register their displeasure at a proposed Bill to prolong the presidential term of the incumbent, Fauré Gnassingbé, and calling on him to relinquish power (Dahir December 2017). Fauré had assumed power in 2005 following the death of his father, Gnassingbé Eyadema, who had ruled Togo for 38 years. In Equatorial Guinea the internet was completely shut down during the parliamentary elections on 12 November 2017. Access to Facebook was blocked since the beginning of political campaign in October.

In Egypt, the government sought to implement technology that facilitates the restriction of access to internet, prevent calls made through social media and ban numerous national and foreign websites in April 2017 (Dahir December 2017). All these restrictions in various countries were aimed at circumventing individual rights and uphold the interest of ruling elites.

4 Accountability for mass atrocities

Accountability for mass atrocities remains a thorny issue especially with regard to the contentions between the AU and the International Criminal Court (ICC). Within the framework of the AU, not much progress was recorded in relation to accountability for mass human rights violations during 2017. As at the end of 2017, no African state had ratified the Protocol on Amendments to the African Court of Justice and Human Rights (Malabo Protocol), which seeks the establishment of a three-chamber court: a chamber for international crimes, for the prosecution of the most egregious violations international human rights and humanitarian law; one for the adjudication of human rights violations; and one for inter-state disputes. Notwithstanding the lack of progress within the AU's own mechanisms, the AU continued its campaign of non-cooperation with the ICC. Specifically, the AU Assembly of Heads of State and Government continued to call on member states not to comply with the warrants issued by the ICC against Sudanese President Omar Al-Bashir. The Assembly also expressed its full support for the withdrawal of Burundi, The Gambia and South Africa from the ICC and called on member states to consider implementing the ICC withdrawal strategy (African Union 2017b). This is an unfortunate occurrence, given the Assembly's own recognition of the reluctance of member states to ratify the Malabo Protocol, establishing the criminal chamber. The continued calls for African states to withdraw from the ICC, in the absence of a clear indication of when the criminal chamber of the African Court will come into existence (if ever), is a serious threat to accountability for mass human rights violations on the continent given the accountability gap that will be created should African states withdraw. While there would still be the possibility of setting up *ad hoc* tribunals to prosecute such crimes, *ad hoc* tribunals are financially and technically costly and would clearly be quite wasteful especially in situations where the ICC would have had concurrent jurisdiction had the state not withdrawn.

The AU's position regarding the ICC is confusing given that, despite its calls for African states to withdraw from the ICC, the AU Assembly requested African state parties to the ICC 'in collaboration with the [African Union] Commission to actively participate in the deliberations of the [ICC] Working Group on Amendments to ensure that African proposals are adequately considered and addressed' (African Union 2017b). The Working Group on Amendments was established in 2009 (ICC 2009, para 4) and mandated to consider 'amendments to the Rome Statute and to the Rules of Procedure and Evidence, with a view to identifying amendments to be forwarded to the Assembly of States Parties ... for consideration' (ICC 2012). While it is important that appropriate concerns be taken into consideration by the Working Group on Amendments, the AU needs to clarify its position on whether it seeks the complete withdrawal of member states from the ICC or to procure amendments to the ICC Statute. As it now stands, it appears that the AU is using the threat of withdrawal as a means of negotiating for its desired amendments. The current position begs questions about the good faith with which the AU is pressing forward with these proposals for amendments. It is important that the AU, if indeed it wants to press forward with the amendments, restrains itself from continuing its calls for withdrawals or openly supporting African states that withdraw.

Withdrawal would appear to be less beneficial than pressing for amendments. As Gumedde notes, African countries form the majority bloc of ICC state parties, which presents an opportunity 'in partnership with other developing countries and sympathetic industrial countries, to influence international law to become more equitable, fairer and transparent' (Gumedde 2018). It, therefore, is imperative that the AU focuses more on creating alliances than on encouraging the withdrawal of African state parties.

The withdrawal of African states from the ICC seems quite inconsequential in light of the UN Security Council's authorisation to refer situations in non-member states to the ICC. The Security Council can through a referral compel all member states of the UN to cooperate with the ICC in the execution of any processes subsequent to the referral (Wenqui 2006; Akande 2009; Trahan 2013; Tladi 2015; Asaala 2017). Consequently, the withdrawal from the ICC would not necessarily exonerate African states from their obligation to cooperate with the Court when expressly authorised through a Security Council referral. Additionally, since the Al-Bashir warrant, which seems to be the major factor causing the rift between the ICC and the AU, was issued pursuant to a Security Council Resolution, perhaps the more prudent course of action for the AU is to continue petitioning the Security Council to withdraw its referral, rather than to persist with its current onslaught against the ICC.

While The Gambia and South Africa rescinded their withdrawal from the ICC Statute, The Gambia following the change of government and South African subsequent to a High Court ruling that the withdrawal was illegal without prior parliamentary approval¹ (Nyarko 2017), the threat of withdrawals has not completely disappeared. For instance, the ruling African National Congress (ANC) government recently indicated its intention to withdraw from the ICC subject to prior parliamentary approval (Fabricius 2017). Although this was decided under the leadership of President Jacob Zuma, this decision was taken by the ANC governing body and not by President Zuma or his cabinet as such. Consequently, while Jacob Zuma has subsequently resigned paving the way for his then deputy, Cyril Ramaphosa, to ascend to the presidency, it is not clear whether the ANC has discarded its initial plans of withdrawal. However, the departure of Jacob Zuma presents an opportunity for Cyril Ramaphosa to lead the ANC away from the previous policies spearheaded by Zuma. It is imperative that the Ramaphosa-led administration moves away from the Zuma era policies of non-cooperation with the ICC, especially with regard to the ICC's request for the arrest and surrender of President Omar Al-Bashir. South Africa as a regional political and economic powerhouse needs to demonstrate leadership regarding accountability for mass human rights violations and work with the ICC on necessary reforms rather than withdrawing from the ICC Statute, which will effectively make it impossible for South Africa to engage with the ICC towards reforms, if indeed there are genuine concerns for reform.

In a related development, the ICC had the opportunity to pronounce itself on South Africa's failure to arrest President Omar Al-Bashir who

1 *Democratic Alliance v Minister of International Relations and Co-operation & Others (Council for the Advancement of the South African Constitution Intervening)* (83145/2016) [2017] ZAGPPHC 53 (22 February 2017).

visited South Africa during the 2015 AU Summit, which was held in Johannesburg in June 2015. Omar Al-Bashir had been the subject of two international arrest warrants issued by the ICC in 2009 and 2010 for war crimes, crimes against humanity and genocide, allegedly committed in Darfur between 2003 and 2008, following a 2005 referral of the situation in Darfur by the UN Security Council to the ICC for investigation. The ICC had consequently requested South Africa to arrest Al-Bashir and surrender him to the Court when it became clear that he would be attending the AU Summit in South Africa. In South Africa, a local non-governmental organisation (NGO), the Southern Africa Litigation Centre, petitioned the Pretoria High Court to order the arrest of Al-Bashir. The High Court ordered the state not to allow Al-Bashir's departure from the country until such time as it had ruled on the application. However, contrary to the request of the ICC and the order of the Pretoria High Court, the South African authorities allowed Al-Bashir to leave the country without arresting and surrendering him to the ICC. Both the Pretoria High Court² and the Supreme Court of Appeal³ subsequently held that South Africa had an obligation to arrest and surrender Al-Bashir to the ICC.

Subsequent to these events, Pre-Trial Chamber II 'requested the competent authorities of South Africa to submit their views on the events surrounding Omar Al-Bashir's attendance of the African Union summit in Johannesburg on 13, 14 and 15 June 2015, with particular reference to their failure to arrest and surrender Omar Al-Bashir, for the purposes of the Chamber's determination pursuant to article 87(7) of the Statute'.⁴

The issues that were set down for determination by Pre-Trial Chamber II were whether South Africa had breached its obligations under the ICC Statute by its failure to arrest and surrender Al-Bashir to the Court despite having received a request under articles 87 and 89 of the ICC Statute and whether such non-compliance warrants a referral of South Africa to the Assembly of State Parties or the UN Security Council, in terms of article 87(7) of the ICC Statute.

South Africa, among others, submitted:⁵

Omar Al-Bashir enjoys immunity from criminal proceedings, including from arrest, under customary international law, and that since that immunity had not been waived by Sudan or otherwise, the Court was precluded by article 98(1) of the Statute from requesting South Africa to arrest and surrender Omar Al-Bashir and, consequently, South Africa was not obliged to arrest Omar Al-Bashir and surrender him to the Court.

South Africa also submitted that in terms of the Host Agreement it had concluded with the African Union, it had an obligation to respect the immunities of Al-Bashir and further that Security Council Resolution 1593, in the absence of an explicit waiver, could not be interpreted as waiving the immunities of Al-Bashir as a head of state and, consequently, only Sudan could waive his immunities.

2 *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development & Others* (27740/2015) [2015] ZAGPPHC 402.

3 *Minister of Justice and Constitutional Development & Others v Southern African Litigation Centre & Others* (867/15) [2016] ZASCA 17.

4 *The Prosecutor v Omar Hassan Ahmad Al-Bashir*, ICC-02/05-01/09-302 06-07-2017, para 17.

5 *The Prosecutor v Omar Hassan Ahmad Al-Bashir* (n 6) para 32.

The Office of the Prosecutor submitted that, in terms of the relationship between articles 27(2) and 98(1) of the ICC Statute, the Court was not required to seek the consent of a state party for the waiver of immunities of officials in the execution of a request for surrender, since the acceptance of article 27(2) already operates as a waiver of such immunities. In relation to Sudan, which is a not a state party to the Rome Statute, the Prosecutor submitted that the Security Council request that Sudan fully cooperate with the Court placed it in the same position as a state party and, consequently, the immunities of Al-Bashir would be deemed as having been waived in terms of article 27(2). Consequently, third states such as South Africa had no conflicting obligations that would prevent them from complying with a request for arrest and surrender. In terms of immunities under the Host Agreement concluded between South Africa and the AU, the Prosecutor submitted that Resolution 1593 waived any immunities granted by an international agreement and, therefore, the Host Agreement could not purport to grant Al-Bashir immunity.

Pre-Trial Chamber II held that Al-Bashir did not enjoy immunity on the basis of the Host Agreement because the relevant provisions on immunities only applied to members of the AU Commission, the Commission's staff members and other delegates or representatives of inter-governmental organisations. Since Al-Bashir, being head of state of Sudan, did not fall into this category, the Pre-Trial Chamber concluded that he did not enjoy immunity from arrest under the Host Agreement and, consequently, deemed it unnecessary to make any further pronouncement on the treaty-based immunity arguments made by South Africa.

In terms of South Africa's submissions based on customary international law, the Court acknowledged that under customary international law, heads of state enjoy immunity from arrest by other states. However, the Court held that this immunity was waived by virtue of article 27(2) of the Rome Statute. By ratifying the ICC Statute, state parties accept that immunities based on official capacities are irrelevant when it comes to the exercise of the Court's jurisdiction. The Court proceeded to elaborate that the article 27(2) waiver operates both vertically – between the Court and state parties – and horizontally between state parties. Vertically, a state party cannot refuse to cooperate with the Court on the basis of immunities belonging to the state party, including that of its head of state. This would require a state party to arrest and surrender its own head of state upon a request by the Court. In similar terms, the horizontal application of article 27(2) precludes a state party from invoking the immunities of another state party as the basis for non-cooperation with the Court. A state party, therefore, cannot ignore a request to arrest and surrender the head of state of another state party on the basis of immunities claimed by the latter state party. Consequently, as between state parties, since article 27(2) waives immunity on the basis of official capacity, the possibility of state or diplomatic immunity, which would impede the arrest and surrender of an individual as contemplated by article 98(1), does not apply.

The Court further elaborated that non-state parties had no obligation to cooperate with the Court and the waiver of immunity of officials in terms of article 27(2) did not apply. Consequently, the contemplation of article 98(1) only relates to non-state parties. In this regard, the Court may not request a state party to arrest and surrender the head of state of a non-state

party without first procuring the waiver of immunities by the latter state. However, the situation is quite different when it comes to Security Council referrals of non-state parties to the Court. Such a referral places the non-state party in the same position as if it was a state party and, consequently, the article 27(2) waiver applies in equal measure to a non-state party subject to a Security Council referral. Thus, the effect of the Security Council referral of the situation in Darfur to the Court places Sudan in an analogous position with a state party to the Statute, conferring on Sudan the same rights and obligations of a state party for the purposes of the referral. This, according to the Court, meant that Sudan could not claim immunity before the Court and had an obligation to arrest and surrender Al-Bashir; and that Sudan could not claim immunity from prosecution of its head of state from other state parties. Therefore, as a state party to the Statute, South Africa had an obligation to arrest and surrender Al-Bashir to the Court. The Court also clarified that, once the Security Council triggers the Court's jurisdiction by way of a referral, the article 27(2) waiver kicks in as a 'necessary, un-severable' consequence of the referral, without the need for the Security Council to explicitly or implicitly express such waiver in the referral resolution (para 95).

The Court further clarified that article 98 of the Statute did not grant state parties a right to refuse to comply with a request of the Court because article 98 is addressed to the Court and not to state parties. Consequently, while it acknowledges the potential for conflicts between an obligation of a state party to cooperate with the Court and other international obligations relating to immunities, the Statute leaves the duty to the Court and not to state parties to address the issue. It is for the requested state to provide the Court with relevant information so that the Court can make an informed decision on whether or not to proceed with a request. South Africa, therefore, was not entitled to unilaterally apply its understanding of the Statute to refuse to cooperate with the Court regarding the request to arrest and surrender Al-Bashir. Consequently, Pre-Trial Chamber II concluded that South Africa had breached its obligation to arrest and surrender Al-Bashir to the Court. The Court, however, decided not to refer South Africa's non-compliance to the Security Council for two reasons: First, the Court considered that it was significant that South Africa is the first state party that made efforts to seek a final determination from the Court on its obligations to arrest and surrender Al-Bashir. Pre-Trial Chamber II also took into account the fact that the domestic courts of South Africa had already made significant rulings censuring the South African authorities for non-compliance amounting to a breach of both its obligations under the Statute and domestic law. Second, previous referrals to the Security Council in similar cases of non-compliance had not yielded any significant measures being taken by the Security Council and, therefore, referring South Africa to the Security Council was not an effective means of obtaining cooperation (paras 127-138).

The decision of the Court is important for various reasons. First, it is important for clarifying the relationship between article 27(2) and article 98 as the apparent ambiguity or conflict between the two provisions has been a source of confusion for both state parties and commentators. The decision finally clarifies that there is no conflict between the two provisions in relation to state parties to the Statute or states referred to the Court by the Security Council, as in both instances immunities are waived in terms of article 27(2). Second, it is important for clarifying that a

consultation requested by a state party in terms of its obligations pursuant to a request by the Court does not operate as a suspension of the Court's request. This is necessary to prevent state parties from using the consultation process as a delaying tactic in a bid to plan the departure of the subject of the arrest warrant which, as the Office of the Prosecutor argued, was what South Africa in this case did. Third, this ruling highlights the complementary role played by the ICC in relation to local judicial processes. It is significant that the Court recognised that national judicial processes had already censured South Africa for its non-compliance and, therefore, warranted no further action by the Court in terms of referring South Africa to the Security Council. This supports the complementary role played by the Court, which requires it not to intervene unless local judicial institutions are either unable or unwilling to enforce the Statute. Forth, one of the important outcomes of this case is the Court's expression of its seeming frustration with the reluctance by the Security Council to take action against non-compliant states, therefore deeming it unnecessary to refer South Africa to the Security Council. The Security Council needs to take non-compliance by state parties more seriously if states are to take their obligation to cooperate with the Court seriously.

Another important development relating to accountability for massive human rights violations is the establishment of the Special Criminal Court (SCC) in the Central African Republic (CAR). The law establishing the SCC was promulgated in 2015 pursuant to a memorandum of understanding signed between the then transitional government of the CAR and the UN (Human Rights Watch 2018b; Labuda 2018). The SCC is mandated to investigate and prosecute 'grave violations of human rights and international humanitarian law committed on the territory of the Central African Republic since January 1st, 2003, as defined by the Central African criminal code and under international law obligations of the Central African Republic, notably the crimes of genocide, crimes against humanity and war crimes' (Human Rights Watch 2018). The SCC's mandate spans a period of five years, which may be renewed. The SCC enjoys priority over the regular national courts in terms of the selection of cases, but the ICC is given priority where both the SCC and the ICC desire to work on the same case. The various chambers of the SCC are structured in a manner that ensures that there is a power balance between national and international judges (Labuda 2018). After having stagnated for two years, the Court finally gained momentum during 2017 with the appointment of key staff including the appointment of 11 international and national magistrates to serve as prosecutors, investigating judges, judges of the indictment chamber and the registrar of the court (Human Rights Watch 2018). A strategy on witness and victim protection has also been developed (Bussey 2017).

The establishment of the SCC marks an important step towards accountability for massive human rights violations and presents an important avenue for access to redress by victims. This is because while ICC investigations focus on the prosecution of senior officials, the SCC will investigate and prosecute many other grave human rights violations committed during the period (FIDH 2017). The establishment of the SCC also marks the first time a hybrid court will be in operation in a country already subject to an ICC investigation and may highlight an important

innovation, especially if the SCC and the ICC are able to effectively coordinate (Bussey 2017).

5 Women's rights

At the continental level, some progress was recorded in the realisation of women's rights both in terms of normative and jurisprudential developments. Some of the most significant normative developments within the AU include the adoption the Joint General Comment on Ending Child Marriage (Joint General Comment) and the Guidelines on Combating Sexual Violence and its consequences in Africa (Guidelines).

The Joint General Comment marks the first time the two quasi-judicial bodies of the AU have collaborated to provide normative elaboration on an issue of mutual concern to both institutions. It elaborates on the obligations of states in terms of article 6(b) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol) and article 21(2) of the African Charter on the Rights and Welfare of the Child (African Children's Charter), both of which stipulate the minimum age of marriage as being 18 years. Regrettably, even though both provisions prohibit child marriage, the prevalence of child marriage in Africa continues to be higher than the global average (Centre for Human Rights 2017), necessitating the need to provide guidance on how to combat this issue. The Joint General Comment describes legislative, institutional and other measures that should be taken by state parties to give effect to the prohibition and to protect the rights of those at risk or affected by child marriage' (Joint General Comment 2017, para 2).

The adoption of the Joint General Comment marks an important milestone of collaboration between the African Commission on Human and Peoples' Rights (African Commission) and the African Committee of Experts on the Rights and Welfare of the Child (Africa Children's Committee). While these two institutions have different mandates, the practical implications of their mandates result in issues of mutual concern, especially regarding the rights of women under the African Women's Protocol, over which the African Commission has supervisory jurisdiction, and the rights of girls under the African Children's Charter, which is supervised by the African Children's Committee. This reality makes it imperative that the two institutions work together to address issues of mutual concern. Not only does such collaboration eliminate unnecessary duplication that could lead to a wastage of scarce resources, but it also enables the sharing of expertise and experience, which will potentially lead to discussions that are more comprehensive, leading to well-informed solutions to common problems. In terms of substance, the Joint General Comment provides an instructive guide to the prevention, protection and support for children at risk and victims of child marriage. If effectively implemented, it has the potential to significantly contribute towards ending child marriage and its attendant consequences.

The Guidelines aim to 'guide and support member states of the African Union in effectively implementing their commitments and obligations to combat sexual violence and its consequences' (Guidelines 2017: 6). The development of the Guidelines was necessitated by the high prevalence of

sexual violence in both conflict and crisis situations and during peacetime. It comprehensively elaborates on the legal framework on sexual violence, the obligations of states towards combating sexual violence, the practical measures that should be taken to prevent sexual violence, to protect and support victims, to investigate and prosecute perpetrators and to provide reparations to victims of sexual violence. Together with the Joint General Comment, the Guidelines provide an important tool towards combating gender-based discrimination in Africa.

In terms of jurisprudence, the Economic Community of West African States (ECOWAS) Community Court of Justice (ECCJ) had the opportunity of being the first international court to pronounce itself on the African Women's Protocol in the case of *Dorothy Njemanze & Others v Nigeria*.⁶ The complainants in this case, all citizens of Nigeria, alleged that they had been sexually, physically and verbally assaulted and unlawfully detained on accusations of engaging in prostitution on various occasions between 2011 and 2013. The only evidence that formed the basis for this treatment at the hands of Nigerian security officials was the fact that they were found on the streets at night. Complaints to various state agencies, including the National Human Rights Commission, about the violations they had suffered yielded no results, prompting the complainants to approach the ECCJ. The complainants alleged that the treatment they suffered at the hands of agents of the Nigerian government amounted to gender-based violence contrary to articles 3, 4(2) and 5; gender-based discrimination contrary to articles 2 and 8; cruel, degrading and ill-treatment contrary to articles 3 and 4(1); and a violation of the right to a remedy contrary to articles 5, 8 and 25 of the African Women's Protocol. The complainants also alleged violations of commensurate provisions of the African Charter on Human and Peoples' Rights (African Charter); the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); the International Convention on Civil and Political Rights (ICCPR); and the Convention against Torture (CAT).

In response the Nigerian government submitted that the Court had no jurisdiction to entertain the suit on the grounds that the complainants were prostitutes and their actions could not be justified under the African Charter. In this regard, article 6 of the African Charter, which prohibits the deprivation of liberty and security of the person, provides an exception where the conditions have previously been laid down in law. Thus, since prostitution is prohibited by Nigerian law, the arrest and detention of the complainants for prostitution could not be a basis for invoking the jurisdiction of the Court. Consequently, the Nigerian government submitted that the complaint was inadmissible as it would culminate in the Court granting the complainants the right to violate Nigerian law.

Regarding jurisdiction, the Court held that it had jurisdiction in all cases in which complainants allege violations of human rights enshrined in international instruments or community obligations of a member state. The complainants' allegations that their rights to freedom from deprivation of liberty had been violated, therefore, came within the jurisdiction of the Court. On the merits, the Court held that even though the Nigerian government disputed the fact that the complainants were ever arrested, the

6 ECW/CCJ/JUD/08/17.

government had failed to lead any evidence to controvert or disprove the testimony of the complainants. In this regard, while the government submitted that the records of the police station did not bear witness to the complainants' detention, the government had failed to submit the register of detention on the date in question for perusal by the Court. Of particular note is the Court's holding that where a complainant alleges to have been arrested and detained, it usually is difficult for the complainant to have a record of such arrest and detention, since such records would be within the knowledge and in the custody of the arresting officer. Consequently, the Court will presume the alleged arrest and its unlawfulness to be factual unless the government produces credible evidence to rebut the presumption, and a general denial by the government without more will not suffice as a rebuttal. On this basis, the Court accepted the complainants' testimony that they had on various dates been arrested by security officials. However, the Court held that the complainants were unable to prove the allegations of physical violence because, even though one of the complainants alleged that she had gone to the hospital after the abuse and another had purchased medication from a pharmacy subsequent to the abuse, neither submitted any documentation to back up these allegations.

Regarding the verbal abuse of the complainants by the security officials, including by calling them prostitutes, the Court concluded that the government in its defence admitted this claim and even proceeded to submit that the complainants were well-established prostitutes. Consequently, there was no need for the complainants to provide any further proof that agents of the government had verbally abused and degraded them. The Court then turned its attention to examining whether any evidence had been led by the government to warrant the branding of the complainants as prostitutes. The only submission made by the government in this regard was that the complainants were found on the streets at night. Since there is no law prohibiting women from staying outside at night, the Court concluded that the government could not simply consider the complainants to be prostitutes for merely staying out late, without any further evidence. On the import of government agents calling the complainants prostitutes, the Court held that it was 'humiliating, derogatory and degrading' for government agents to call the complainants prostitutes without any justification (*Dorothy Njemanze & Others v Nigeria* 2017: 37). The Court further held that the nature of the sting operation purportedly conducted to combat prostitution was inherently discriminatory as only women found on the streets at night were arrested, while similar treatment was not meted out to men found on the streets at night. On these bases, the Court held that the treatment meted out to the complainants by the government agents and the failure or refusal by the government to investigate the alleged violations and bring the perpetrators to justice amounted to violations of the complainants' rights not to be subjected to arbitrary arrest and to degrading treatment; not to be discriminated against; and to have access to a remedy, contrary to articles 2, 3, 4(1) and (2), 5, 8 and 25 of the African Women's Protocol and commensurate provisions of the African Charter, CAT, CEDAW and ICCPR. The Court awarded the first, third and fourth complainants monetary compensation in the sum of 6 million Naira each.

The findings of the Court are significant not only for being the first pronouncement of an international court on the African Women's

Protocol, but also for upholding the obligation of states to adopt legislation, policies and practical measures to prevent gender-based discrimination. The judgment could also have positive implications for commercial sex workers, especially those who work at night. While the Court did not directly pronounce itself on the (il)legality of sex work, it is important that it came to the conclusion that women commit no crime by being on the streets at night and, therefore, cannot be subjected to arbitrary arrest merely on that basis. The Court's denunciation of gender stereotyping of women found on the streets at night as prostitutes (as being against their dignity) may also help in the fight against such stereotypes, even though it unfortunately could have the counter-effect of perpetuating the stigma usually attached to sex work. The findings of the Court further exemplify the difficulty of providing proof of the crime of prostitution without invading the right to privacy of the accused and, therefore, may provide a further opportunity for challenging the criminalisation of prostitution as a violation of the right to privacy (Reprohealthlaw 2017).

Another important judicial pronouncement on women's rights was made by the Pretoria High Court in the case of *Rahube v Rahube & Others*.⁷ This case involved a 68 year-old woman, Mary Rahube, who was facing eviction by her brother, Hendrine Rahube, from the house she had lived in and maintained for over 32 years. Mary and her extended family had moved into the property in Mabopane around 1970 when they were removed by the apartheid government from the area known as Lady Selbourne. In all, eight people occupied the property at the time, including Mary, her grandmother, her uncle, her three brothers and two children. While the occupants of the property varied over the years, she and her immediate family had exclusively occupied the property since 2000. When the family moved into the property around 1970, apartheid laws at the time prevented black people from having title to landed property and, therefore, the family was issued with a certificate of occupation in the name of her brother, Hendrine, as only an adult male could hold occupational rights in property. Hendrine moved out of the property in 1990 and since then had not resided there nor contributed to the maintenance of the property. It was not until 2009 when Hendrine commenced eviction proceedings against her that Mary discovered that her brother had been granted a deed of grant in 1988 under Proclamation R293 of 1962 in accordance with the Native Administration Act of 1927 (subsequently renamed the Black Administration Act) by the erstwhile Republic of Bophuthatswana.

The enactment of the Upgrading of Land Tenure Rights Act (ULTRA) in 1991, section 2(1) of which automatically converted deeds of grant relating to certain properties, including the property in dispute in this case, into ownership rights, meant that Hendrine became the legal owner of the property, although he no longer lived there. Mary applied to the High Court to declare section 2(1) of ULTRA unconstitutional as it indirectly discriminated against women in the manner in which it automatically converted deeds of grant (held only by men because of gender discriminatory laws under apartheid) into ownership rights without notice to the occupiers of the property, who may also wish to

7 101250/2015 [2017] ZAGPPHC 651.

claim ownership. The Court held that although ULTRA was well-intentioned to provide ownership rights to previously-prohibited groups, section 2(1) indirectly discriminates against women and 'it perpetuates the exclusion of women, such as the applicant, from the rights of ownership in so far as it provided for automatic conversion and failed to provide any mechanism in terms of which any other competing rights could be considered and assessed and a determination be made' (para 51). According to the Court, this was contrary to the right to equality and right to access courts guaranteed in sections 9 and 34 of the 1996 Constitution of South Africa respectively and, therefore, unconstitutional. The order of constitutional invalidity was suspended for 18 months to allow parliament to make the necessary amendments to ULTRA to bring it in conformity with the Constitution. Hendrine was also enjoined from selling the property until parliament had passed the necessary amendments to ULTRA. The Court further ruled that persons in similar positions could commence similar proceedings in court until parliament has enacted the necessary amendments.

This case is important not only because it provided relief to Mary who was facing imminent eviction from the property she had lived in and maintained for many decades and other women similarly placed who may rely on this precedent to mount legal action, but also because it recognises the gendered impacts that even well-intentioned legislation such as ULTRA can have due to the discriminatory historical past of apartheid, which was both pervasively racist and sexist, and the need for legislation in democratic South Africa to not rubber stamp nor condone these. This case comes at an opportune time when there is much talk about land reform and the possible amendment of section 25 of the Constitution to allow for expropriation without compensation in some instances, as a means of redressing the injustices of apartheid. It is, therefore, imperative that while the land reform initiatives should address racial injustices of the past, such initiatives should be fully aware of the gendered context of land ownership under apartheid in order to ensure that women's access to land is duly protected (Kariseb & Muhumuza).

6 Conclusion

The year 2017 recorded modest gains in human rights and democratisation even though the threat of powerful leaders holding onto power, either through constitutional or electoral manipulation, and the danger of democratic backsliding remains. Democratic gains were made in Liberia, Angola and Somalia where elections resulted in changes of government, bringing in new leadership, evidencing the potential for democratic consolidation in these countries. While the elections in Kenya did not result in a change of government and generally were marred by violence, the decision of the Supreme Court to nullify the election of a sitting president brought hope that independent judiciaries can play and have played an important role in the democratic consolidation of Africa. In other jurisdictions, such as the DRC and Togo, political elites seem bent on holding onto power regardless of the consequences.

Many states continued to use internet shutdowns and over-securitisation to quell protests. These have a significant impact on various

human rights and require the urgent attention of human rights groups and other relevant stakeholders.

With regard to accountability for mass atrocities, the AU's campaign for withdrawal from the ICC continued even though African states have generally shown reluctance to subject themselves to the AU's proposed International Crimes Chamber of the African Court of Justice and Human Rights. More than three years after its adoption, no African state has ratified the Malabo Protocol. The campaign for withdrawal from the ICC seems rather futile in light of the powers of the Security Council to refer situations in non-member states to the ICC and the recent ruling of Pre-Trial Chamber II that such referral imposes the same obligations on the referred state to cooperate with the ICC in the manner that state parties are required to. On a positive note, the Special Criminal Court of the Central African Republic finally started to gain momentum with the appointment of key officers of the Court, which has since 2003 been mandated to prosecute violations of human rights and international humanitarian law.

As far as women's rights are concerned, significant normative and jurisprudential gains were recorded, including the adoption of the Joint General Comment on ending child marriage, which marked the first time the African Commission and African Children's Committee have worked together to provide normative elaboration on a problem of mutual concern. The Joint General Comment provides instructive guides on the legislative, policy and practical measures that state parties to the African Women's Protocol and African Children's Charter need to take towards ending child marriage. In a similar vein, the African Commission adopted Guidelines on combating gender-based violence and its consequences, which elaborates on the measures that African states need to take to prevent, investigate and prosecute incidences, protect those at risk of and provide reparations to victims of sexual violence. These normative developments, combined with the decision of the ECCJ against Nigeria denouncing gender-based discrimination as a violation of the right to dignity and non-discrimination, provide important tools towards combating gender-based discrimination in Africa. In another important judicial decision concerning women's rights, the Pretoria High Court decision in *Rahube* highlights the gendered nature of property rights in South Africa and should put policy makers on notice that the recent land reform efforts should not only focus on past racial injustices, but should also be fully cognisant of the disadvantaged position of women concerning land ownership due to historically sexist legislation coupled with certain customary practices.

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Selected regional developments in human rights and democratisation in the Asia Pacific during 2017: 'Diverse region with divergent stance'

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Abstract: With the human rights situation in the Asia-Pacific region characterised by clashes resulting from religious and ethnic extremism, challenges to free speech, and attacks on women and lesbian, gay, bisexual and transgender persons, the year 2017 in the Asia Pacific remains unchanged from previous years. Incidents ranged from the systematic curtailment of basic freedoms and violent religious, ethnic, and gender-based conflict. Even though most Asia-Pacific nations are democratic in nature, arbitrary anti-democratic actions by government remain common. The major incidents that occurred during 2017 were the ongoing Rohingya crisis in Myanmar and religious extremism in countries such as Afghanistan, India and Malaysia. These setbacks were to some extent offset by the ratification of core human right treaties by countries such as Singapore, Indonesia and Thailand. Regional organisations such as ASEAN, SAARC, and PIF continue to avoid systematically protecting international standards and following up on UN recommendations.

Key words: human rights; ASEAN; SAARC; Rohingya; extremism

1 Introduction

The year 2017 was marked by some key events with regard to human rights violations in the Asia Pacific. Most notable was the attack on Rohingya Muslims in the Rakhine state by members of the Myanmar military which left entire villages torched, women and children raped and killed, resulting in a massive forced migrant into neighbouring Bangladesh. This massive influx of refugees was estimated to be as high as 655 000 people (Amnesty International 2018a). Another key incident was

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the killing of thousands of drug suspects in the name of the ‘War on drugs’ in the Philippines. Across the region, states continue to exhibit a lack of accountability for rights violations. In Thailand, the military regime that gained power through a *coup*, the National Council for Peace and Order (NCPO), ensured that they were immune from accountability in their newly-promulgated Constitution. The death in custody of Nobel Peace Prize laureate, Liu Xiaobo, in China exemplified the extent of the existing arbitrary rule of law in China and in the region as a whole.¹ The fact that security forces, the police and the military, that are supposed to protect citizens, are found to be abusing and curtailing fundamental freedoms portrays a depressing picture of the lack of equal protection by the law. However, not everything was gloom and doom; there were some key events that symbolically capture the existing hope for progress in the region.

Asia and the Pacific region has much scope for advancement as its diversity has much to offer. At the same time issues of violence, discrimination and impunity are profound. Violence and discrimination are centred on different views towards religion, gender and sexual identity. Apart from this, state-endorsed limitations to human rights are found in the restriction of basic freedoms and freedom of expression. Any expression, such as any form of art, writing, comment or activity that displays dissent with the government, is frequently punished in a number of countries. Against this backdrop, the overview does not only indicate the incidents that took place in the region in the year 2017, but also analyses the pre-conditions that have shaped the foundations upon which these incidents persistently exist. Extremism, fundamentalism and impunity are concepts that can explain the incidents of human rights violations, and these emerge from a long history of discrimination, political bias and misperceptions.

This overview of regional developments in the Asia Pacific consists of four sections. The first section discusses four cases that encapsulate the threats to human rights and democracy in the region: the existence of extremism in the region; the rampant violations of rights to freedom of expression including cyber censorship in the region; the existing plight of refugees in the region; and the status of impunity. The second section provides various new developments in the region, both progressive and regressive. The third section examines the sub-regional organisations, specifically the Association of Southeast Asian Nations (ASEAN), the South Asian Association for Regional Cooperation (SAARC), and the Pacific Islands Forum (PIF) in relation to human rights. Finally, the fourth section discusses the Asia Pacific in relation to the United Nations (UN).

1 The Liu Xiaobo case is one of a number of arbitrary acts of the Chinese government in 2017. Authorities continued the politically-motivated prosecution of human rights activists and lawyers; Lawyer Wang Quanzhang and activist Wu Gan remained in police custody, awaiting trial or verdict on baseless charges. Activist Su Changlan and political commentator Chen Qitang faced charges of ‘inciting subversion’ and eventually were imprisoned for three and four and a half years respectively. Founders of independent news websites were jailed. Lu YuYu, a citizen journalist, was sentenced to four years’ imprisonment in August, for ‘picking quarrels and provoking trouble’. Also, in August 2017, the Chinese government blocked approximately 300 articles of the *China Quarterly*, a Cambridge University Press publication (Amnesty International 2018a).

2 Threats to human rights and democracy

2.1 Extremism

Extreme manifestation of ideologies exists in almost every part of the world, yet there is no specific standard or criterion of defining extremism or fundamentalism.² The UN Secretary-General in 2017 made defining extremism a prerogative of member states (Guterres 2017). Extremism is the radical idea of re-establishing an order of society based on ascribed and prescribed qualities, namely, race, class, faith, ethnicity and religion. Most extremists reject diversity, pluralism and the universal notion of human rights, while portraying themselves as threatened due to the differences (Schmid 2014: 21). The mode of doing so, mostly in terms of religion, more often than not is violent. USAID notes that violence is inherent in this process: '[Extremism is] advocating, engaging in, preparing, or otherwise supporting ideologically motivated or justified violence to further social, economic or political objectives' (USAID 2011: 2). The Special Rapporteur on the Right to Freedom of Peaceful Assembly considers that extremism and fundamentalism take on multiple forms, whether it be religious, secular, political, cultural, economic or otherwise. It mainly is a 'mind-set based on intolerance of differences' (A/HRC/32/36). As was outlined in the Report of the Special Rapporteur on Freedom of Religion or Belief, Heiner Bielefeldt, to the Human Rights Council in 2014,

[v]iolence in the name of religion can be in the form of targeted attacks on individuals or communities, communal violence, suicide attacks, terrorism, state repression, discriminative policies or legislation and other types of violent behaviour. It can also be embedded and perpetuated in the *status quo* in various forms of structural violence justified in the name of religion (A/HRC/28/66).

The rise in modes and motivation for extremism in the region has its base in rejections of notions of equality and universality. It requires the alignment of situational, social, cultural and individual factors (Allan 2015), and poses a threat to human rights everywhere. These extreme views often use human rights to justify their differing viewpoints, exploiting the right to freedom of association and expression. Political and religious opponents often target each other through violent means and justify their actions by blaming the other through 'reciprocal radicalisation' (Bartlett & Birdwell 2013). An obvious challenge is justifying human rights when they are exploited to violate the rights of others.

Ethno-religious differences and discrimination based on gender and sexual identity have energised extremist groups and largely shape most conflicts in the Asia-Pacific region. Violent activities are on the rise, and so far the response has been limited. As this regional update notes, many states are unresponsive to extremist violence in their own countries. Their actions often exacerbate and do not reduce the tensions. Regional

2 This article sees extremisms and fundamentalism as basically the same, as can be seen in the similar definition given to fundamentalism: 'political movements of the extreme right, which in a context of globalization manipulate religion, culture or ethnicity, in order to achieve their political aims' (Helie-Lucas 1999: 23-24).

organisations are too weak and unwilling to respond, leaving gross violations to continue unabated.

2.1.1 Ethnic and religious extremism

In India, mob attacks by extremist Hindu groups, claiming themselves to be affiliated with the ruling government, took place against minority communities. The main targets were Muslims who were rumoured to have sold, bought or killed cows for meat. Since November 2017, 38 attacks and 10 killings have been reported. In September, Gauri Lankesh, a renowned editor who vocally criticised the militant Hindu nationalism, was shot dead outside her home in Bengaluru (Forum-Asia 2017). In these instances, even the police were found to have acted against the victims by filing complaints in their names against the minorities, under laws that ban the slaughter of cows instead of prosecuting the attackers. The actions are justified by these groups through the call for *Hindutva*,³ a form of Hindu nationalism, endorsed by leading political and religious figures, and causing extreme animus towards Muslims in India (Alliance for Justice and Accountability 2017).

Blasphemy remains punished by the death penalty in Pakistan and 19 people, most of whom members of religious minorities, have been given this sentence and await trial in 2017 (Amnesty International 2018a). In June 2017, hundreds of houses belonging to indigenous people were burnt down by a mob in Langadu, in the Chittagong Hill Tract area of Bangladesh. The police did not succeed in protecting the villages, and the people were not re-housed (*Daily Star* 2017). Besides South Asia, Southeast Asia also faced violence and conflict arising out of extremism. Two concepts are applicable in terms of religious extremism in Southeast Asia: the concept of *jihad* (*fard al-ayn*), and the concept of *al-walawa'l-bara*. The former is based on a necessary and obligatory fight to defend fellow Muslims, and the latter is based on a polarisation view of the world between Muslims and non-Muslims (Zeiger 2016: 7). Sometimes these acts are state sanctions, for example in July, the Kelantan state of Malaysia permitted public caning imposed by Shari'a courts through its legislation (Amnesty International 2018a). At other times, they are created by conservative religious groups, for instance the sentencing of the ex-Governor of Jakarta, Nasuki Tjahaka 'Ahok' Purnama, to two years' imprisonment by an Indonesian court for posting a video which allegedly 'insulted Islam'. Ahok, a Christian ethnic Chinese man, claimed that his main opponents in the race for governor (a hard-line Islamic party) were using the Quran to get votes.

3 The beginnings of *Hindutva* can be traced to the 19th century organisations such as the Brahmō Samaj and the Arya Samaj and the ideology today is carried by contemporary *Hindutva* organisations such as the RSS. The first expression of Hindu mobilisation emerged in the 19th century as an ideological reaction to European domination and gave birth to what came to be known as 'neo-Hinduism' (Jaffrelot 2007). The word *Hindutva* was for the first time used by a national leader, Vinayak Damodar Savarkar, in 1923. Savarkar's book *Hindutva: Who is a Hindu?* published in 1923 is considered central to the *Hindutva* ideology which is based on the idea that 'Hindus are those for whom Hindustan, or India, is not only their fatherland, but also their holy land – thus precluding the possibility of Muslims and Christians being true members of the Hindu nation' (Hansen 1999).

In response to extremism, states in the region have sometimes overreacted. In April 2017, the Malaysian government threatened to withdraw the publishing licence of *Nanyang*, a Chinese-language newspaper, because of a satirical cartoon about the parliamentary debate on Shari'a law. In Vietnam, 10 Montagnards were sentenced for participating in independent religious groups by a people's court. The Chinese government has published a list of names of people that are prohibited on account of being of Islamic origin, and anyone under 16 is required to change if they have one of these names. Also, the Xingjiang province of China has enacted the 'De-Extremification Regulation' which prohibits a number of activities such as having an abnormal beard or wearing *burkas*, as these are categorised as 'extremist behaviour' (Uyghur Human Rights Project 2017). The main instance of ethno-religious extremism in the region is the case of the Rohingya, who are not accepted as citizens in Myanmar. Many link these actions to the rise of radical Buddhist nationalism (Wade 2017). More than 655 000 Rohingya Muslims have fled from Burma to escape the large-scale ethnic cleansing carried out by the military (Amnesty International 2018a).

2.1.2 *Extremism and violence based on gender, sexual orientation and gender identity*

Gender-based violence and discrimination exist in every part of the world, but sometimes it reaches an endemic level. Acts of gender-based violence, such as child marriage, domestic violence and barring girls from education, are normalised in many parts of the Asia Pacific. According to the United Nations Assistance Mission in Afghanistan (UNAMA), armed groups in Afghanistan have attempted to impose restrictions on girls from receiving formal education. In February 2017, several girls' schools were threatened and closed, which prevented approximately 3 500 girls from receiving education (UNAMA 2017). Gender-based extremism in Pakistan, where 'honour killing' of females still exists, is widespread in areas such as Khyber Pakhtunkhwa, where 94 women were killed by close relatives. Most investigations failed to hold the perpetrators accountable. In July 2017, a teenage girl was ordered to be raped by the village council in Multan district as 'revenge' for the crime of rape that her brother had committed upon another girl (Srivastava 2017). Women have less bargaining power as they live with their husbands' families after marriage and are also dependent upon them for economic, social, and physical security. The fact that acts of violence are unprotected means that data on these actions is of a very poor standard as very few women will approach the police to report physical and sexual abuse. Deep-rooted notions of power, dominance and patriarchy tend to blame the victim for the violence inflicted upon them rather than seeking their protection. Thus, psychological, institutional and social factors contribute to this situation.

Violence and extremism motivated by prejudice towards sexual orientation are prevalent in the Asia Pacific. In countries such as Afghanistan, India, Pakistan, Myanmar and Malaysia, same-sex sexual activities are penalised by national laws. Pervasive discrimination against lesbian, gay, bisexual and transgender (LGBT) persons exists in Malaysia, both through law and practice. Sexual relations between same sexes and cross-dressing are both prohibited under Shari'a law (HRW 2017). In Sri Lanka, the Penal Code, according to sections 365 and 365A, prohibits 'carnal intercourse against the order of nature and gross indecency', which

is a relic of colonial rule. Sri Lanka rejected Universal Periodic Review (UPR) recommendations to repeal such laws. In Singapore, any form of positive depiction of LGBT lives is prohibited on radio or television by the Media Development Authority (IAGCI 2017). The promotional advertisement for the 2017 Pink Dot Festival, a pro-LGBT public festival, was removed from a shopping centre by the Advertising Standards Agency to protect 'public sensitivities'. Gay men in Pakistan were targeted for their sexual orientation and arrested for a violation of the Control of Narcotic Substance Act of 1997. China has since 1997 decriminalised homosexuality, but same-sex partnerships still are not recognised by law and thus lack protection from discrimination based on sexual orientation and gender identity.

There are social and sometimes legal sanctions when one identifies oneself as an LGBT person. Violence because of sexual orientation, gender identity and intersex status is the outcome of institutionalised discrimination, criminalisation and social intolerance. Forced marriages, therapies to 'correct' sexual behaviour and orientation, social exclusion, threats and humiliation by family members themselves all contribute to the existing situation of violence. Homosexuality is considered as being against the norms of religion and culture and, thus, orthodox and patriarchal states criminalise this, which in turn encourages homophobic violence. China has shut down lesbian dating applications, banned homosexuality online by regarding it as 'abnormal sexual lifestyle', and cancelled conferences about homosexuality (UNDP 2014; Amnesty International 2018a). Homophobic violence is on the rise in most of the Asia-Pacific region (Human Rights Watch 2018a).

There are some legal movements in this area. While many countries have criminalised homosexuality and cross-dressing with heavy sanctions, the response across the regions differs with South Asian countries and members of the Organisation of Islamic Cooperation (OIC) displaying hostility on this topic, while other countries in the Pacific and East Asia are more tolerant. In September, the Philippines House Bill 4982 against discrimination based on Sexual Orientation and Gender Identity and Expression (SOGIE) was introduced to the House of Representatives. In the 2017 census, *Khwaja Siras* or transgender women were for the first time included in the national census in Pakistan (Pakistan Bureau of Statistics 2017), whereas in India, a parliamentary committee submitted a report examining the draft Transgender Persons (Protection of Rights) Bill, 2016. In the report it was recommended that the Bill should recognise the rights of marriage, divorce and adoption with regard to transgender people.

2.3 Freedom of expression

Rights relating to assembly, association, political activities and culture are all intertwined with the right to the freedom of expression, making this a highly-contested right in the region. Despite international efforts, incidents of systematic violations of freedom of expression are widespread in most Asia-Pacific countries. Even in countries such as South Korea, which is considered to practise freedom of expression (and was ranked as 'free' by Random House in 2017), the Supreme Court rejected the final appeal against the imprisonment of Han Sang-Gyun, President of the Korean Confederation of Trade Unions, despite the opinion of a UN

Working Group on Arbitrary Detention that the detention was arbitrary and the charges against him violated the right to freedom and peaceful assembly (Public Service International 2018). He was imprisoned for leading trade union protests. In China, instances of the curtailment of academic freedom include the banning of staff from Sun Yatsen University, Guangzhou in January 2017 for criticising the Communist government; the dismissal of professors from 14 top universities by the Central Commission for Discipline Inspection for speaking critically of the government; and punishing people involved in the Umbrella Movement with seven years' imprisonment for 'public nuisance'-related offences. Laws limiting expression are commonly abused across the region, for example by section 44 of the Thai Constitution (which allows anyone to be jailed by the military Junta, for any reason), and the Malaysian Sedition Act and the Communication and Multimedia Act which can be enacted by the Malaysian government to harass, detain and prosecute critics of government or any government-related satire.

From the acts of curtailment of expression in countries such as China, South Korea and Pakistan it is evident that freedom of expression is provided more as a privilege by the state and not as a basic human right that is vested in all. Restrictions are imposed upon speech, press, assembly and association. A free and unhindered media ensures freedom of opinion and expression, constituting one of the cornerstones of a democratic society, while media censorship is a distinctive feature of an authoritarian state. However, even democratic nations are found to be censoring the media, especially the 'new media'. The main platform for expressing freedom in today's digitised world is social media. Since the internet was introduced and commercialised in China in 1995, the Chinese government has limited access to information available on the internet that it deemed detrimental or sensitive (Amnesty International 2006: 16). Media outlets in China are required to regulate the publication of content that is seemingly threatening and objectionable. According to the administrative regulations and the legal framework, media outlets will face serious penalties if they do not do so. The content is further edited and censored by the Propaganda Department of China (Chen & Yang 2018). Most social media websites are banned in China, and Chinese internet companies are obligated to censor user contents. Service providers WeChat, Weibo and Tencent have been investigated by the Cyberspace Administration of China because of claims that there were accounts which 'spread information that endangers national security, public security and social order, including violence and terror, false information, rumours and pornography' (Amnesty International 2018b). Users who did not use their real names were barred from posting any content or comments on their profiles. Zhen Jianghua, an activist who founded a website 64tianwang.com,⁴ was detained and accused of 'inciting subversion' (Reed Smith 2017). In January 2017, the Ministry of Industry and Information Technology issued regulations making it unlawful to provide circumvention tools, such as proxy servers, without the ministry's prior approval (Amnesty International 2018b).

4 The website has information about people who have disappeared. Originally set up to combat human trafficking, it now more frequently addresses people who have disappeared at the hands of the Chinese state.

Similar limitations to online freedom of expression are found throughout the region. In 2017 a US-based academic, Li Shenwu, uploaded a post on Facebook suggesting how the courts in Singapore were not independent. He was accused and charged with contempt of court (Human Rights Watch 2018). The Computer-Related Crime Act and provisions relating to sedition in the Criminal Code of Singapore provides broad powers to the government to restrict free speech and to enforce censorship on vague grounds such as ‘against public morals’ and ‘violations of the good morals of people’. In Malaysia, graphic artist Fahmi Reza was sentenced to a month in prison and a fine of RM 30 000 (US \$7 675) for posting an online caricature of Prime Minister Najib wearing clown makeup (Human Rights Watch 2018a). Further, in Vietnam about 21 rights bloggers and activists were arrested for using their civil and political rights in a way that threatened national security. The Bangkok Military Court in Thailand sentenced a man to 35 years’ imprisonment solely based on a series of Facebook posts which were considered to be critical of the monarchy (*The Telegraph* 2017).

Cyber censorship also prevails in Pakistan with the use of the Prevention of Electronic Crimes Act, 2016. The Act has been used to harass and detain human rights activists for online content. Blasphemy is regarded as a serious offence and, according to the then Interior Minister, Nisar Ali Khan, blasphemers are to be considered enemies of the state. In March 2017, the Islamabad High Court ordered the removal of all alleged blasphemous content online and to take action against the people who uploaded such content (Human Rights Watch 2018). Following this, in June, Taimoor Razi, who posted an allegedly blasphemous poem on Facebook, was sentenced to death (Bukhari 2017). The same actions were taken in September when Nadeem James, a Christian, shared an allegedly blasphemous poem on WhatsApp. The enforced disappearance of five bloggers who posted anonymous online content criticising the military further substantiates the fact that the right to expression online in Pakistan is restrained and repercussions are serious.

2.4 Plight of refugees

The Rohingya refugee crisis is the worst refugee situation in the Asia-Pacific region. Over the past few years the Rohingya Muslims in Burma have been the target of a systematic campaign of ethnic cleansing carried out with impunity by the military and non-state actors in the country’s Rakhine province (Idris 2018). The anti-Rohingya violence is taking place against a nationwide background of heightened Buddhist and Muslim tensions largely fuelled by nationalist Buddhist groups (Walton & Hayward 2014: 1). The Constitution of Burma explicitly guarantees to every citizen ‘the right to freely profess and practise religion’ (article 34). Despite this, the government has taken no steps to protect the right to religious freedom and has in no way protected or defended the lives of Rohingya Muslims. Rather, the government has sometimes tacitly, and sometimes overtly, supported these persecutions. Attacks on a massive scale were carried out in 2017 by the Burmese military after the Arkan Rohingya Salvation Army attacked police posts in the northern Rakhine state in August 2017 (*Aljazeera* 2017). The Burmese military carried out armed attacks on Rohingya Muslim villagers, raping and sexually assaulting women and girls, and torching entire villages (Human Rights Watch 2018a). As a repercussion, by late August Bangladesh received an

inflow of over 655 000 Rohingya refugees (Amnesty International 2018a). This crisis has several negative impacts on the local Bangladeshi people. Their economic and educational situation has worsened, prices have increased significantly, and there has been a rise in criminal activities linked with the refugee camps (Mahmud 2017). The Rohingya camps have become unsanitary with no clean water or washrooms, or even the minimum facilities to protect against the weather (White 2017). A health crisis is looming as an increasing number of refugees are suffering from diarrhea and skin diseases.

The governments of Bangladesh and Myanmar in November signed an agreement to facilitate the return of newly-arrived Rohingyas to Myanmar. This reparation agreement violates international standards of voluntary reparation and the principle of *non-refoulement* (Chaudet 2018). Instead of helping to resolve the conflict, many fear it might further extend it. The big powers of Asia, specifically India, China and Japan, have failed to become responsible stakeholders. Rather than condemning the incidents, the Prime Minister of India paid a three-day visit to Myanmar in early September 2017 and showed his support for the Burmese government (Chaudet 2018). At the UN, China, in discussions behind closed doors with the Burmese military, opposed the language recognising the right to return of the Rohingya refugees, and opposed recognising the atrocities committed by the military (Amnesty International, 2018a). The Chinese media further endorsed the situation as being linked with Islamic terrorists, even though senior UN officials described the military campaign as ethnic cleansing (Chaudet 2018). Japan in March stated that it did not support the international fact-finding mission to Burma established by the UN Human Rights Council and abstained from Myanmar Resolutions at the UN General Assembly, which called for an end to violence against Rohingya (UNHRC 2018a). Further, ASEAN countries individually or as a group have maintained silence towards these atrocities and have not taken any concrete steps that could help resolve these issues.

Apart from the Rohingya crisis, other refugee situations account for 3,5 million refugees, 1,9 million internally-displaced persons (IDPs) and 1,4 million stateless people, with the majority of refugees originating from Afghanistan and Myanmar, according to UNHRC (UNHCR 2018b). Up to 96 per cent of all Afghan refugees live in the neighbouring Islamic Republics of Iran and Pakistan where they constantly face discrimination and threats of mass deportation. Approximately 60 000 Afghan refugees were involuntarily returned by Pakistan in 2017 (UNHRC 2017a). Furthermore, more than 180 000 refugees and asylum seekers are hosted by Thailand, Malaysia and Indonesia, all countries that are not parties to the 1951 Refugee Convention (ECHO 2018). Refugees in these countries have no formal legal status and are vulnerable, facing fear of exploitation, persecution, illegal detention and possible repatriation.

2.5 Status of impunity in the region

Several incidents in the region demonstrate that the culture of impunity is still deeply rooted in governance. In the Philippines, thousands of unlawful killings by the government in the name of the 'War on Drugs' continued. According to Human Rights Watch, the highest number of killings on a single day reached 32, with the actual number still unknown but estimated to be as many as 12 000 (Human Rights Watch 2017b). The

government estimates through its Philippines Drug Enforcement Agency that 3 906 ‘suspected drug users’ were killed up to 26 September 2017. The victims almost exclusively are poor Filipinos. No more than a handful of people have been brought to court for these killings, and it is extremely unlikely that anyone will be imprisoned, given that President Duterte has promised pardon to any convicted killer. In Thailand, the Constitution promulgated in 2017 gives absolute power without oversight and accountability to the Prime Minister. It further guarantees that neither the National Council for Peace and Order (NCPO) nor its officials can be held accountable for any rights violations. The NCPO refused to prosecute any member of the security forces, even though persuasive evidence exists for their involvement in the killing and torture of ethnic Malay Muslims in the restive southern provinces. No senior politician has been investigated for corruption, although in one of the more well-known cases, the Deputy Prime Minister was photographed wearing different luxury watches worth around \$1.5 million. His case has been with the National Anti-Corruption Commission for nearly a year, with no action taken.

In August in the Papua province of Indonesia, the police arbitrarily used force and opened fire on a crowd without giving warnings to the protesters, wounding 10 people, among them children. In Malaysia, the custodial death of S Balamurugan while being interrogated by the police caused an outrage but no police investigation into his death took place (*Malay Mail* 2017).⁵ The continued killing of environment defenders, especially in the Philippines, Cambodia and India, is a reminder of impunity that prevails in Asia and the Pacific region. *The Guardian* has listed the Philippines as the second most dangerous place for environment defenders with 102 deaths up to 2017 (*The Guardian* 2017). According to Reporters without Borders, after Syria and Iraq, India is the third least safe country for journalists. Journalists Gauri Lankesh, Santanu Bhowmik and Sudip Datta Bhaumik were killed in India in 2017, and their killings were not investigated (*Outlook India* 2017). In the Philippines, broadcaster Rudy Alicaway and columnist Leo Diaz, who reported on corruption, illegal gambling and drugs, were shot dead (*ABS CBN News* 2017). These incidents illustrate the failure by the government to bring perpetrators to account and the arbitrariness of government security.

However, some major incidents during in the year 2017 could pave the way for breaking this culture of impunity. Examples of these changes are the upholding of the parliamentary vote of impeachment of the then South Korean President, Park Geun Hye, by the Constitutional Court for charges including bribery and abuse of power (McCurry 2017); the disqualification of Prime Minister Nawaz Sharif from office in July by the Pakistan Supreme Court for failing to disclose a source of income; and the conviction of a former Member of Parliament of Nepal, Bal Krishna Dhungel, for a 1998 murder in connection with which he for a long time evaded prosecution due to political protection (*The Himalayan Times* 2018). In 2010, the Supreme Court of Nepal found former Member of Parliament Dhungel guilty of the 1998 murder of Ujjan Kumar Shrestha and ordered life imprisonment coupled with the confiscation of property.

5 However, in 2018 charges were recommended by the Enforcement Agency Integrity Commission (EAIC). Given the significant changes in Malaysia’s political system, charges are more likely to be filed (Surach 2018).

However, the judicial decision was not enforced, largely due to political protection he received. In a writ petition against the Inspector-General of Police, Prakash, on 12 April 2017 for disregarding the order of the Supreme Court to arrest Dhungel, the police chief was ordered to deploy personnel to arrest him. While he was finally arrested in October 2017, his premature release puts hopes that the culture of impunity has been broken on hold. However, the above examples illustrate the retreat of impunity that has for decades been a hindrance to justice for the victim.

3 New domestic developments – Progress and regression

3.1 Progress

Some notable progress in the region includes the amendment of the Afghanistan Penal Code, which now incorporates provisions of the ICC Statute, and removes the death penalty as punishment for several offences, reducing this to life imprisonment. The Penal Code also criminalised *Bacha Baazi*,⁶ which was a medium for sexually abusing young boys. In Nepal, *Chaupadi*⁷ was criminalised in August (Criminal Code 2074), after a long advocacy campaign for women's rights. Another advance for women's rights includes the Supreme Court of India banning the practice of *Triple Talaq*⁸ as it was considered arbitrary and unconstitutional. The Supreme Court of India in a ruling in August provided privacy as a fundamental right and stated that section 377 of Indian Penal Code, which criminalises same-sex relationships, had a 'chilling effect on the unhindered fulfilment of one's sexual orientation, as an element of privacy and dignity'. In China, a court of first instance in April declared that the refusal to extend work benefits to the same-sex husband of a civil servant was discrimination based on sexual orientation. This is one of a number of progressive steps that protect human rights and freedoms of LGBT persons. Other steps include the recognition by Pakistan of transgenderism for the first time in the 2017 census, and the introduction of Bill 4982, the SOGIE Equality Bill, by the Philippines.

Other advances are the extension for a year of the mandate in Nepal of the Truth and Reconciliation Commission (TRC) and the Commission of Investigation on Enforced Disappeared Persons. The TRC began its preliminary investigations into approximately 60 298 complaints mainly resulting from the civil war (Informal Sector Service Centre 2018). In the area of workers' rights, the Sri-Lankan government, in order to protect its migrant workers (and especially its migrant domestic workers), called on Middle Eastern states to end the *Kafala* system, an action that is mirrored in the progressive step in the protection of domestic workers by the Technical Training Act in Japan which criminalises the abuse of workers.

6 *Bacha Baazi* directly translates into 'boy play'. It is practised in Afghanistan where young boys are dressed as women and made to perform for older men. They are then abused by men for sexual gratification. The boys engaging in *Bacha Baazi* can be as young as 10 years of age.

7 This traditional practice forces menstruating women and girls to stay outside their homes in makeshift huts or in cattle sheds.

8 *Triple Talaq* is the practice of instant divorce in the Muslim community. According to this practice, a Muslim man can divorce his wife by simply uttering the word *talaq* three times.

However, these progressive steps might be overshadowed by a number of regressive advancements.

3.2 Regression

One area where there has been constant regression concerns freedom of expression and the media. In 2017 the Bangladeshi government stated its intention to introduce the Digital Security Act, which would restrict some rights to freedom of expression online. Similarly, in China, the National Intelligence Law was adopted on 1 June, which had vague concepts of national security and also granted unchecked power to national intelligence institutions allowing for arbitrary detention and violations of the right of privacy (Amnesty International 2018b). As mentioned previously, the state of Kelantan in Malaysia passed legislation that permitted public caning imposed by Shari'a courts. The government of the Maldives declared that it would reinstate the death penalty by the end of September. Despite the repeated requests by the UN Human Rights Committee to stop executions in compliance with the Optional Protocol to the ICCPR, there were no positive responses from the Maldivian government (UNHRC 2017). In June, an Act which incorporated broad surveillance power and which could threaten freedom of expression and privacy was adopted in Japan (*The Japan Times* 2017). The commitments made by Sri Lanka in 2015 to establish the truth, justice and reparation mechanisms as part of the post-civil war reconciliation were not implemented. In Pakistan, a Bill that would have equalised the age of consent to marriage for men by raising the minimum age of marriage for girls from 16 to 18, was blocked by the upper house of Parliament. In the region, positive developments are overshadowed by laws that allow for human rights to be violated and fundamental freedoms not to be realised.

4 Regional organisations and human rights

Unlike most other major regions, the Asia Pacific does not have a region-wide inter-governmental system. There are no treaties, institutions or courts that protect human rights, although most regional organisations claim to promote human rights. Some steps have been taken to address some human rights violations on a sub-regional level, for instance, work on protecting women, children and victims of trafficking, but there still is little protection.

4.1 Association of Southeast Asian Nations

Weaknesses in Asian-Pacific regional responses are clearly seen in the Rohingya crisis, with both ASEAN and SAARC passing off this problem to the national level. Rather than taking concrete measures for the protection of human rights, ASEAN maintained a deafening silence on the issue of Rohingya expulsion. It also did not comment on Duterte's 'War on Drugs'. This is evidenced by the statement given by the ASEAN Chairperson in September 2017 that failed to even mention the incident of Rohingya expulsion (Gavilan 2017). The silence was rooted in the principle of non-interference, enshrined in the Treaty of Amity and Cooperation of 1976. Although the ASEAN Intergovernmental Commission on Human Rights (AICHR) was established in 2009, the Commission has not taken any substantial measures for the protection of human rights in the region.

AICHR operates mainly through consultation and consensus of the ten representatives of member countries. The fact that individual states can enjoy veto power because of the consensus rule makes solutions to the situation improbable. This leaves violence in the ASEAN region unchecked even if it is against the ASEAN Declaration of Human Rights.

4.2 South Asian Association for Regional Cooperation

SAARC has no human rights mechanisms to tackle violations as a regional organisation. Despite the challenges to human rights in the region, such as extremism and the influx of Rohingya refugees, SAARC has not adopted any specific steps or mechanisms to address these issues. The main reason for this, as in the case of ASEAN, is the principle of non-interference and the exclusion of contentious issues enshrined in the SAARC Charter (article 2). Until these terms are amended or alternative ways are found to raise human rights issues in SAARC, there is little possibility that any concrete steps will be taken to solve the persisting issues. Disharmony in the region is another contributing factor, the tense relationship between India and Pakistan being a major problem within SAARC.

4.3 Pacific Islands Forum

The PIF is the major regional organisation for the Pacific with 18 members and six observing states, made up of the Pacific Islands, Australia and New Zealand. This regional forum does not have a specific human rights programme or mechanism, but human rights form part of the governance programme, and some specific human rights issues have been given prominence in PIF work. PIF is not recognised as a strong supporter of human rights, neither is it seen as being opposed. The ambivalence is due to a number of factors. There is the role of Fiji, which is an important state in the PIF, but faces criticism for its lack of democracy and rights violations. In order to escape these criticisms (mainly from Australia and New Zealand), Fiji has increased its diplomatic efforts in competing regional groups, such as the Fiji-led Pacific Island Development Forum (PIDF), the Pacific Community and the Melanesian Spearhead Group (MSG). The MSG was recently involved in rights and self-determination for West Papuans, although accepting the Indonesian government as an associate member in 2015 undercut support to the Papuan independence movement. Competing regional forums can weaken the PIF's role in the region (Moyle 2018). The limited impact on human rights by the regional organisation has its consequences. The region has a poor record in terms of ratifying human rights treaties, with important treaties such as ICCPR recognised by only three Pacific Island states and ICESCR by four. Similarly, the individual complaints mechanisms are ignored, with no states recognising the Optional Protocols to ICCPR and ICESCR; only one state making the optional declaration under the Convention Against Torture (CAT) and the Convention on the Rights of Children (CRC) accepting the submission of individual complaints; two states accepting the Optional Protocol to the Convention on the Rights of Persons with Disabilities (CRPD); and three states accepting the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

Another explanation for the marginalisation of human rights is the fact that the PIF attaches importance to the environment, ocean management

and climate change. The theme of the 48th 2017 PIF Forum was 'The Blue Pacific – Our Sea of Islands – Our Security through Sustainable Development, Management and Conservation'. While the theme is primarily environmental, it does involve some human rights issues, particularly around gender, such as women and climate change, and the role of the ocean in economic opportunities, health and livelihoods of women. The recognition is that more emphasis on gender equality is needed around women's economic empowerment, their participation rates in the labour force, and violence against women and girls. A regional level response has been the first human rights and gender peer review in Nauru, followed by Vanuatu and Palau later in the year (Pacific Islands Forum Secretariat 2017).

Other human rights-related issues in the PIF include labour rights concerns, because of the growth of labour mobility and the number of Pacific Islanders working as migrant labourers. However, this was not reflected in any country ratifying the Convention on Migrant Workers and Their Families. There are some highlights for peace and democracy in the region with the completion in June of the successful Regional Assistance Mission to the Solomon Islands (RAMSI), which brought peace and the rule of law to a region threatening to descend into civil war. With the assistance of many Pacific Island states, the predominantly Australian forces entered the Solomon Islands in 2003, and over 15 years have successfully undertaken a state-building project, with the Solomon Islands acknowledging its success (Wyeth 2017). Finally, in 2017 there was a PIF Forum Election Observer Team for the 2017 Tonga national parliamentary elections held in November.

5 Asia Pacific and the United Nations system

In the year 2017 Nepal, Afghanistan and Pakistan were elected into the Human Rights Council for three-year terms expiring in 2020. Several countries were assessed under the UN Universal Periodic Review (UPR) process. In May, India, the Philippines and Indonesia went through the UPR process. In November, the 28th session reviewed South Korea, Japan, Pakistan and Sri Lanka. Indonesia accepted 167 out of 225 recommendations. It rejected the recommendations to investigate past human rights violations and to repeal blasphemy laws. In response to the UPR of May 2017, the Philippines rejected nearly every recommendation. It did not accept any of the 44 recommendations related to extra-judicial executions, 23 recommendations regarding the abolition of the death penalty, and 13 recommendations to protect human rights defenders and journalists. Countries such as France, Ghana and Germany requested a visit by the Special Rapporteur to examine the status of extra-judicial and arbitrary executions, which Indonesia also did not permit (Universal Periodic Review 2017). This rejection underlines President Duterte's resistance to international human rights standards. If the Philippines continues to avoid its international obligations, the Human Rights Council could take steps to demand accountability for all unlawful killings (Human Rights Watch 2017). In early 2018, this task was taken on by the International Criminal Court when it initiated a preliminary investigation of events in the 'War on Drugs'. India was urged during the UPR to ratify the Convention against Torture and its Protocol, to enact comprehensive reforms to address violence against women, and to define the forensic

procedures adopted for rape cases. Similarly, several recommendations were made to Sri Lanka, including the investigation and prosecution of all allegations of extra-judicial or arbitrary killings, the elimination of torture in prisons and detention centres, and the investigation of violations of children's rights. Pakistan was recommended to remove restrictions on freedom of religion and belief and to amend legislation that discriminates against persons belonging to minorities. Further, Pakistan was recommended to repeal the provisions of the *Haddood* Ordinance that criminalises non-marital consensual sex and does not recognise marital rape. The efficacy of these recommendations remains to be seen. At least, the UPR process requires states to publicly defend – or admit – the errors in their human rights conduct.

Several ratifications of international conventions and their protocols took place in 2017. The Optional Protocol to the Convention against Torture was ratified by Indonesia, Thailand, Australia and Sri Lanka. Myanmar ratified ICESCR in October; Singapore ratified the International Convention on the Elimination of all forms of Racial Discrimination (CERD); and Fiji ratified the Convention on the Rights of Persons with Disabilities. Furthermore, India ratified two core ILO Conventions, namely, the Minimum Age Convention (1973) and the Worst Forms of Child Labour Convention (1999).

In other areas there was active monitoring of rights in the Asia-Pacific region with the visit in November of the UN Special Rapporteur on the Human Rights to Safe Drinking Water and Sanitation, Leo Heller, to India. The Special Rapporteur called on the Indian government to incorporate the human rights perspective on water and sanitation into its national programmes. The Special Rapporteur on the Rights of Persons with Disabilities conducted an official visit to North Korea in May. This was the first visit by an expert from the Human Rights Council to North Korea. The CRC Committee started the review of North Korea's treaty obligations under the CRC, and in its list of issues noted concern about child labour, forced labour, and children in conflict with the law.⁹

6 Conclusion

The year 2017 will be remembered primarily for issues relating to refugees, continuing impunity, the rise of extremism, and the curtailment of freedom of expression. Treaty ratifications and acceptance of recommendations by some states in the region may be regarded as positive signs for human rights protection, leaving aside the question of future implementation. The fact that regional organisations such as ASEAN, SAARC and PIF have maintained their silence shows that they have done little for the protection and promotion of human rights. States are yet to demonstrate that they view the importance of 'humanness' by recognising that all humans deserve rights and protection, not only citizens or other special groups. Communities are yet to protect women, children and sexual minorities. Security agencies are yet to act to protect the citizens, but they rather exploit their power and abuse the fundamental freedoms of

9 See the list of issues in relation to the 5th periodic report of the Democratic People's Republic of Korea (CRC/C/PRK/Q/5).

the people they are supposed to protect. The small advances made in the Asia-Pacific region towards greater human rights protection is overshadowed by the overwhelming tragedy surrounding some unprotected groups such as refugees, LGBT persons, women, and political opposition figures.

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Regional perspectives on democratisation of Eastern Partnership countries

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Abstract: *Interest in studies and measurements of democracy and human rights in terms of globalisation and regional cooperation has extended beyond the academic context, reflecting the features of government policies and the development strategies of countries. Countries in a region with higher and closer levels of democracy have more opportunities for political and economic cooperation. From this point of view the assessment of democracy and human rights levels of Eastern Partnership member states such as Armenia, Georgia, Azerbaijan, Belarus, Ukraine and Moldova, is of special interest. Academic literature presents a great variety of theories and definitions of democracy. There are also various indices covering different aspects of democracy. Some of them emphasise the formal or institutional aspects of democracy, whereas others define its procedural features. Other indices measure the implementation of the level of declared rights and even consider democracy in terms of economic development. Thus, to measure and present the comparative analysis of democracy and human rights levels of Eastern Partnership countries, the article first provides the selection and description of democracy indices (proceeding from the differences in covering aspects of democracy). Then, based on the selected indices, a new aggregated index of democracy is calculated through the method for constructing composite indices for providing a multi-sided analysis of democracy and human rights of Eastern Partnership countries. Finally, drawing on the obtained and calculated data, I rank Armenia, Azerbaijan, Belarus, Georgia, Moldova and Ukraine by democracy levels, revealing regional perspectives on human rights and democratisation.*

Key words: *democracy; measurement; Eastern Partnership; democracy indices; aggregated democracy index*

1 Introduction

The Eastern Partnership (EaP) was launched in 2009 to encourage the closer cooperation of Armenia, Georgia, Azerbaijan, Belarus, Ukraine and Moldova with the European Union (EU). It mainly implies deeper integration into the EU's political and socio-economic systems.

In 2014, Moldova, Georgia and Ukraine officially ratified both economic and political chapters of the Association Agreement with the EU, strengthening the perspectives for the development of the European

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integration vector.¹ In contrast, Armenia declared its willingness to join the Eurasian Customs Union, and later a new integration project, the Eurasian Economic Union, initiated by Russia, Kazakhstan and Belarus. Thus, the Presidents of Russia, Kazakhstan and Belarus signed the Treaty on the Establishment of the Eurasian Economic Union on 29 May 2014,² and Armenia signed the Treaty on 10 October 2014.³ After these states had ratified it, the agreement entered into force on 1 January 2015.

In this regard, the Eurasian and European cooperation was revised in a new format with Armenia, while Belarus developed a concrete structure for economic cooperation. As far as Azerbaijan is concerned, the country has neither signed the Association Agreement nor joined the Eurasian Economic Union.

Taking into account the information provided above, the EaP countries were involved in diverse international and regional integration processes and different development projects, including economic and political cooperation.

In this sense, the research is aimed at disclosing not only individual but also general democratic developments in conditions of multidirectional trends.

The main issues and questions examined in this research are

- (i) whether the EaP countries, with diverse integration directions, have closely-related or largely differing democracy levels;
- (ii) whether the chosen integration vectors differently affect the democracy levels;
- (iii) what the regional perspectives on the issue of democratisation of these countries are.

Quantitative and qualitative research methods are used to study the democracy levels of the countries discussed. A comparative analysis of the democracy levels and the human rights norms of each country is done by way of studying their annual reports on human rights and democracy, and also by analysing the democracy indices of renowned international organisations. Therefore, on the one hand, I use well-known and already computed indices of democracy; on the other hand, I do my own calculations based on the methodology of some of those indices in order to obtain more recent data. Finally, I use the method for constructing composite indices (Mazziotta Pareto 2013) to create a new aggregate and comprehensive index of democracy based on well-known indices that cover various aspects and components of democracy.

1 European Commission MEMO on the EU's Association Agreements with Georgia, the Republic of Moldova and Ukraine, Brussels, Belgium, 23 June 2014, available at http://europa.eu/rapid/press-release_MEMO-14-430_en.htm (last visited 20 March 2018).

2 Treaty on the Eurasian Economic Union, ratified on 29 May 2014 in Astana, Kazakhstan, available at https://docs.eaeunion.org/docs/ru-ru/0013611/itia_05062014_doc.pdf (last visited 21 March 2018).

3 Treaty of Accession of the Republic of Armenia to the Treaty on the Eurasian Economic Union of 29 May 2014, signed on 10 October 2014, Minsk, Belarus.

2 Indices of democracy

Different indices cover various aspects of democracy within the frameworks of modern political science. Some scholars suggest indices that emphasise the formal or institutional aspects of democracy (for instance, Phillip Cutright's 'Index of Political Development'), while others (Kenneth Bollen, Robert Dahl and Tatu Vanhanen) specify their procedural features. Furthermore, it is important to mention that some indices measure the level of the implementation of declared rights ('Freedom in the World' of Freedom House). Other studies are ground on the close correlation of democracy with economic development (Rostow 1960; Lipset 1994; Przeworski et al 2000). Thus, within the framework of the method for constructing composite indices, I select the individual indicators of the research based on the above-mentioned theoretical approaches. To provide a multi-sided analysis of democracy and human rights of EaP countries, the indices that cover these aspects are as follows:

2.1 Cutright's 'Index of Political Development'

Cutright (1963) developed an 'Index of Political Development' based on the formation of executive and legislative bodies according to the principles of democracy. Cutright states that politically-developed nations have more complex national political structures than less developed countries. The rating scale of Cutright's Index (Cutright 1963: 256) comprises 0-3 points, in which the highest score means the highest level of development.

During the data normalisation in the research calculations, the highest accepted overall value (maximum) is 3, whereas the lowest value (minimum) is 0.

Table 1: Measuring parameters of Cutright's 'Index of Political Development'

| Points | Measuring Parameters |
|--------|--|
| | Legislative branch of government |
| 2 | The lower or the only chamber of parliament has representatives of two or more political parties and the minority party or parties have at least 30 per cent of all seats. |
| 1 | Members of Parliament are the representatives of one or more political parties, where the '30 per cent rule' is violated. |
| 0 | No parliament existed or the above-mentioned types of parliament were abolished or discarded by the executive power. Parliaments, whose members are not representatives of political parties and are not self-governing bodies (mock parliaments of colonial governments). |
| | Executive branch of government |
| 1 | The nation is ruled by a chief executive, who is in office by virtue of direct vote in an open election on the basis of a multi-party competition, while conditions necessary to receive 2 points on the legislative branch are supported. |

| | |
|-----|--|
| 0,5 | The executive is selected neither by virtue of his hereditary status nor by criteria necessary to attain 1 point on the executive branch (on the basis of a multi-party competition where the minority party or parties have at least 30 per cent of all seats). |
| 0 | The nation is governed by a hereditary ruler. |

Cutright's criteria were criticised for their formalism since the existence of democratic institutions not always indicates the effectiveness of their activity. Experts subsequently turned to the study of procedural aspects of the political development of countries, that is, to the analysis of the electoral process and its conditions. This shift was reflected in Vanhanen's 'Index of Democracy'.

2.2 Vanhanen's 'Index of Democracy'

Tatu Vanhanen (1997; 2000; 2003) developed and designed his index based on Dahl's concept (Dahl 1971). Dahl particularly examined two theoretical dimensions of democratisation, namely, the public contestation and the right to participate. Vanhanen called these dimensions 'competition' (C) and 'participation' (P): transforming them into two quantitative indicators. Competition is the proportion of votes won by smaller parties in parliamentary and/or presidential elections to indicate the degree of competition in a given political system. This figure is calculated by way of subtracting from the total (100 per cent) percentage of votes won by the largest political party.

Participation is the percentage of the population that actually voted in the elections. It should be noted that this percentage is calculated from the total population and not from the adult or enfranchised population. It is essential to distinguish between these two variables as they represent different dimensions of democratisation.

Therefore, an acceptable assumption would be that only the combination of these two suggests the most realistic and effective indicator of democratisation.

$C = 100 - \text{largest political party (\%)}$

$P = (\text{population voted in the elections} / \text{total population}) \times 100$

Democracy Index = $C * P / 100$

These indicators were used by Vanhanen (2000) to categorise political systems as democratic, semi-democratic or non-democratic. A democracy index scoring 5 and more defines a democratic system, whereas a democracy index scoring from 2 to 5 is a semi-democratic system. Overall, the lower scores mean that a political system is non-democratic.

During the data standardisation the highest accepted value (maximum) is 50 and the lowest value (minimum) is 0.⁴

4 The minimum and maximum values were based on Vanhanen's studies (Vanhanen (2002), while as the minimums and maximums were regarded as the average value of the three highest and lowest values of the countries surveyed. The maximum recorded value is 50 and the minimum 0.

It is worth mentioning that Vanhanen's Index of Democracy was criticised by some scholars as countries with compulsory voting systems received higher scores.

2.3 'Freedom in the World' of Freedom House

'Freedom in the World' by Freedom House (2016b; 2018a; 2018b) measures the levels of political rights and civil liberties. The 2018 index of 'Freedom in the World' includes the period from 1 January 1 to 31 December 2017. These calculations were based on developments occurring in 195 countries and 14 selected territories. Researchers and report evaluators use diverse sources of information, such as news topics, academic researches, analytical reports, as well as reports of non-governmental organisations (NGOs) and experts. The political rights indicator is based on a 10-point questionnaire and grouped into three subcategories, namely, electoral process (three questions); political pluralism and participation (four questions); and functioning of the government (three questions).

The civil liberties' questionnaire comprises 15 points, grouped into four sub-categories, namely, freedom of expression and belief (four questions); association and organisational rights (three questions); rule of law (four questions); and personal autonomy and individual rights (four questions). Scores are awarded to each of these questions on a scale of 0-4. The highest score that can be awarded to the political rights checklist is 40. The highest score that can be awarded to the civil liberties checklist is 60. The raw points are converted into a 1-7 point rating scale, where 1 point denotes the highest freedom indicator and, correspondingly, 7 points the lowest. These ratings, which are calculated based on the methodological process described above, determine whether or not a country is classified as free (1-2,5 points), partly free (3-5 points) or not free (5,5-7 points) by the use of survey (Freedom House 2016b). In this research, the standardised data is scaled as a maximum value of 1 point and a minimum value of 7 points.

The main criticism of Freedom in the World is that there is a certain degree of subjectivity and that it places much emphasis on individual rights and personal freedoms.

2.4 'Index of Economic Freedom'

The Heritage Foundation brings out the 'Index of Economic Freedom' (IEF) in partnership with the *Wall Street Journal*, where the rating system is 0-100 points. Here, 100 points indicate the highest level of Economic Freedom and 0 points the lowest level. Countries that scored below 50 are 'repressed'; those that scored 50-59,9 are considered 'mostly unfree' or 'moderately free'; those with a score of 60-69,9 are classified as 'mostly free' (70-79); and, finally, a designation of 'free' scores 80 or above. This scoring system is based on 12 specific categories (Heritage Foundation & Wall Street Journal 2018: 453-466). These categories are property rights; judicial effectiveness; government integrity; tax burden; government spending; fiscal health; business freedom; labour freedom; monetary freedom; trade freedom; investment freedom; and Financial freedom.

The calculations conducted in this work are based on the 2018 Index of Economic Freedom, since it involves indicators measured during the

period from 1 July 2016 to 30 June 2017. In general, IEF denotes the guarantee of the construction of legislative body and property rights and is also considered as one of the most important indicators of democracy. For this reason, the index is included in the model as a separate variable. In this model, the value of 100 points (maximum) is estimated as the highest indicator, whereas 0 points (minimum) is the lowest indicator of the rating scale. During the data standardisation analysis, the highest accepted value (maximum) is 100 and the lowest (minimum) is 0.

According to some experts, IEF focuses mainly on market development, which covers only one element of development.

3 Assessment and comparative analysis of democracy and human rights in countries of the Eastern Partnership

After the collapse of the Soviet Union, new independent countries were involved in the transformation processes, ranging from totalitarian to democratic regimes. The democratisation of post-Soviet Union countries was accompanied by the involvement of these countries in various projects, and membership of and cooperation with international organisations. Democratic developments in the post-Soviet area were not proportionate to and conditioned by nations' systems of values, religion and cultural differences, historical features and other factors.

One such democratic development that occurred in Armenia, Georgia, Azerbaijan, Belarus, Ukraine and Moldova was cooperation with the EU, within the ambit of the Eastern Partnership. However, the differences in developments in the sphere of democracy and human rights of these countries were not eradicated. Moreover, the recent deepening of integrating in various vectors is likely to further exacerbate differences in the levels of democracy and human rights in these countries.

In order to assess the levels of democracy and human rights of EaP countries, the calculations and analyses of democracy indices described above are set out as follows:

Table 2: Cutright's 'Index of Political Development' of EaP countries⁵

| Country | Legislative branch | Executive branch | Overall score |
|------------|--------------------|------------------|---------------|
| Moldova | 2 | 1 | 3 |
| Armenia | 2 | 1 | 3 |
| Georgia | 1 | 0.5 | 1.5 |
| Ukraine | 1 | 0.5 | 1.5 |
| Azerbaijan | 1 | 0.5 | 1.5 |
| Belarus | 1 | 0.5 | 1.5 |

Taking into account the calculated data stated above (Table 1, Table 2), Armenia scores 2 points for the legislative branch of government and

5 Source: calculations by the author on the methodology of Cutright's Index of Political Development (see Table 1).

1 point for the executive branch of government. Thus, after the 2017 parliamentary elections, the majority of allotted 105 seats in parliament went to the Republican Party of Armenia (58 seats). Other parties, the Tsarukyan Alliance, the YELK Alliance and the Armenian Revolutionary Federation parties were allotted 31, 9 and 7 seats respectively (OSCE/ODIHR 2017a: 27). The Republican Party of Armenia and the Armenian Revolutionary Federation formed a governing coalition.

Together with the data of the 2016 parliamentary elections of Georgia, the country scores 1 point for the legislative branch of government and 0,5 points for the executive branch of government. The reason for this is that the Georgian Dream-Democratic Georgia coalition won 115 of the 150 parliamentary seats, while the remaining 35 places (23,3 per cent of all seats) went to the United National Movement Party (with 27 seats); the Alliance of Patriots of Georgia, Industrials, Our Fatherland (with 1 seat) and 1 seat was won by an independent candidate (OSCE/ODIHR 2017b: 34-35). It is important to note that previous parliamentary elections held in 2012 were extraordinary because of the change in power in Georgia. This had been the first peaceful change accompanied by the preservation of democratic norms and constitutional procedures since its independence. In the results of the 2016 parliamentary elections, the Georgian Dream strengthened its position in parliament by achieving a constitutional majority in the highest legislative body.

According to the independent international NGO European Platform for Democratic Elections, many instances of political imprisonment, violations of freedom of assembly and other political rights took place in the 2015 parliamentary elections in Azerbaijan. Moreover, the elections were accompanied by limitations such as the absence of televised debates and total control over it (European Platform for Democratic Elections 2014; Freedom House 2016a; Hunanyan 2016: 84-85). As a result, members of the ruling New Azerbaijan Party occupy 71 of the 125 seats in Milli Mejlis; 42 are non-partisan; and the remaining 12 seats are distributed among 10 parties (the minority parties have 9,6 per cent) (European Forum for Democracy and Solidarity 2015; OSCE/ODIHR 2015a). Most importantly, the majority of independent members and smaller parties are under the control of the government (Guliyev 2015: 2-3). Thus, Azerbaijan scores 1 point for the legislative branch of government and 0,5 points for the executive branch of government, since the '30 per cent rule' has been violated (see Table 1, Table 2).

An unusual situation and distribution of seats occurred in the Parliament of the Republic of Belarus. While 94 of the 110 seats went to non-party members, the remaining 16 seats were distributed among five parties. As in the case of Azerbaijan, in Belarus the President also controls the majority of independent and non-independent Members of Parliament. The opposition parties actively participated in the elections. However, in reality they did not stand a chance of being elected or influencing the political agenda in Belarus (OSCE/ODIHR 2016: 33-35). Taking these factors into account, Belarus also scores 1 point for the legislative branch of government and 0,5 points for the executive branch of government, as the '30 per cent rule' was not supported (see Table 1, Table 2).

The 26 October parliamentary elections in Ukraine were extremely tense after the regime change in 2014. In this case, 29 political parties and blocs took part in the elections, but only 11 passed the 5 per cent

threshold. According to the election results, out of the 500 seats, the Petro Poroshenko Bloc Party received 132; the People's Front Political Party 82; the Samopomich Political Party 33; the Opposition Bloc 29; the Radical Party of Oleh Lyashko 22; and the Batkivshchyna All-Ukrainian Union Political Party 19. Another five parties received 10 seats with 96 non-parties, and there were two vacancies (OSCE/ODIHR 2014a: 35-36; Укрдержреєстр 2015; Aleksanyan 2016: 223-224). In order to make valid calculations, it is important to note that the Petro Poroshenko Bloc and the People's Front Political Party formed a government coalition, while the Samopomich moved to the opposition. Therefore, the minority parties in the Verkhovna Rada of Ukraine have 25 per cent, thus not conforming to Cutright's '30 per cent rule'. Accordingly, Ukraine scores 1 point for the legislative branch of government and 0,5 points for the executive branch of government, since the minority parties occupy more than 30 per cent of all seats in parliament (see Table 1, Table 2).

In Moldova, the last parliamentary elections were held on 30 November 2014. According to the OSCE /ODIHR reports, this election was well organised and a wide choice of political alternatives was provided. Here, the main rivalry was between two parties, namely, supporters of the Customs Union Integration, represented by the Socialist Party (25 seats) and the Communist Party (21 seats), and defenders of the ruling European Integration Coalition including the Liberal Democratic Party (23 seats), the Liberal Party (13 seats) and the Democratic Party of Moldova (19 seats). The Socialist Party, participating in the elections for the first time, unpredictably received 25 out of a total of 110 seats and was the winner of the elections (OSCE/ODIHR 2014b; Hunanyan 2016: 254-255). Although the Democratic Party of Moldova together with the Liberal Party and several ex-Communist members and ex-Liberal-Democrats formed the parliamentary majority, the '30 per cent rule' continued to be supported, according to Cutright's methodology (see Table 1, Table 2). In this way, 2 points for the legislative branch of government and 1 point for the executive branch of government were scored.

In order to evaluate the level of democracy of the EaP countries, I applied Vanhanen's Index of Democracy. In particular, I calculated the levels of competition and electoral participation in accordance with Vanhanen's methodology.

The calculations of EaP countries by Vanhanen's Index of Democracy are as follows:

ARMENIA, 2017 parliamentary elections (OSCE/ODIHR 2017a: 27)

$C = 100\% - 55.3\% = 44.7\%$

$P = (1,575,786 / 2,924,816) \times 100 = 53.9\%$

$Democracy\ Index_{ARMENIA} = (44.7 \times 53.9) / 100 = 24.1$

GEORGIA, 2016 parliamentary elections (OSCE/ODIHR 2017b: 34-35)

$C = 100 - 48.7\% = 51.3\%$

$P = (1,825,054 / 3,719,300) \times 100 = 49.1\%$

$Democracy\ Index_{GEORGIA} = (51.3 \times 49.1) / 100 = 25.2$

AZERBAIJAN^{6*}: 2015 parliamentary elections (European Forum for Democracy and Solidarity 2015)

$C = 100\% - 56.8\% = 43.2\%$

$P = (2,897,188 / 9,649,341) \times 100 = 30\%$

$Democracy\ Index /_{AZERBAIJAN} = (43.2 \times 30) / 100 = 13$

BELARUS: 2016 parliamentary elections^{7**} (OSCE/ODIHR 2016: 33-35)

$C = 100\% - 85\% = 15\%$

$P = (5,211,871 / 9,501,534) \times 100 = 54.9\%$

$Democracy\ Index /_{BELARUS} = (15 \times 54.9) / 100 = 8.2$

UKRAINE: 2014 parliamentary elections (OSCE/ODIHR 2014a: 35-36)

$C = 100\% - 22.14\% = 77.9\%$

$P = (16,052,228 / 45,362,900) \times 100 = 35.5\%$

$Democracy\ Index /_{UKRAINE} = (77.9 \times 35.5) / 100 = 27.7$

MOLDOVA: 2014 parliamentary elections (OSCE/ODIHR 2015b: 28)

$C = 100\% - 20.5\% = 79.5\%$

$P = (1,649,402 / 3,556,397) \times 100 = 46.4\%$

$Democracy\ Index /_{MOLDOVA} = (77.9 \times 46.4) / 100 = 36.1$

Table 3: Vanhanen's 'Index of Democracy' of EaP countries⁸

| Country | Competition (C) | Participation (P) | Democracy Index |
|------------|-----------------|-------------------|-----------------|
| Moldova | 79.5 | 46.4 | 36.1 |
| Ukraine | 77.9 | 35.5 | 27.7 |
| Georgia | 51.3 | 49.1 | 25.2 |
| Armenia | 44.7 | 53.9 | 24.1 |
| Azerbaijan | 43.2 | 30 | 13 |
| Belarus | 15 | 54.9 | 8.2 |

As is shown in Table 3, the lowest democracy indices are Belarus and Azerbaijan, while Moldova is the highest, which is conditioned with the highest value of competition. Belarus and Armenia reveal the best results of political participation, while Azerbaijan has the lowest indicator. An interesting and contradictory situation developed in Belarus. On the one hand, it has the highest result for participation because of a high turnout (74,7 per cent) in the parliamentary elections. On the other hand, Belarus has the lowest value for competition due to the fact that 94 out of 110 Members of Parliament are independents and totally controlled by the President.

6 Calculations for Azerbaijan were conducted based on the distribution of parliamentary seats due to the absence of a proportional system.

7 Calculations for Belarus were conducted taking into account the fact that 85% of the MPs are independents controlled by the President.

8 Source: calculations by the author on the methodology of Cutright's Index of Political Development (see Table 1).

Table 4: Freedom in the World, EaP countries (as of 2017)

| Country | Political rights | Civil liberties | Overall score | Category |
|------------|------------------|-----------------|---------------|-------------|
| Georgia | 3 | 3 | 3 | Partly Free |
| Ukraine | 3 | 3 | 3 | Partly Free |
| Moldova | 3 | 3 | 3 | Partly Free |
| Armenia | 5 | 4 | 4.5 | Partly Free |
| Belarus | 6 | 6 | 6 | Not Free |
| Azerbaijan | 7 | 6 | 6.5 | Not Free |

According to the Freedom House (2018a; 2018b) report (the 2018 report includes events of 2017), among countries studied, the best political rights and civil liberties indicators recorded Georgia (3); Moldova (3); and Ukraine (3). Hence, these countries are classified as 'partly free' and approaching the category of 'free' (see Table 4).

Although Armenia also counts among the 'partly-free' states, scoring 5 and 4 points in the categories of political rights and civil liberties respectively, it trails behind Central Asian and European countries. Meanwhile, EAEU member state evaluations reveal that Armenia and Kyrgyz Republic (5), the remaining states (Belarus (6), Russia (6) and Kazakhstan (5.5)), are also among 'not-free' countries (Freedom House 2018a; 2018b). According to Human Rights Watch, Belarus is the only country in Europe where capital punishment, false charges and arbitrary arrests, as well as the oppression of human rights defenders and civic activists, continue to take place (Human Rights Watch 2018).

Azerbaijan (6.5) attained the worst results in respect of the political rights and civil liberties indicators, also categorising the country as 'not free'. Experts of Freedom House continuously report an increased clamp-down on dissent, including the arrest of human rights defenders and journalists, as well as an increase in the number of political prisoners, repressions and various other restrictions on rights. Azerbaijan managed to avoid criticism by the democratic world because of its energy resources and cooperation in security issues (Freedom House 2015; 2016a; 2017).

Table 5: Index of Economic Freedom, EaP countries (2018 index involving period from 1 July 2016 to 30 June 2017)

| Country | IEF | Category |
|------------|------|-----------------|
| Georgia | 76.2 | mostly free |
| Armenia | 68.7 | moderately free |
| Azerbaijan | 64.3 | moderately free |
| Belarus | 58.1 | mostly unfree |
| Moldova | 57.4 | mostly unfree |
| Ukraine | 51.9 | mostly unfree |

The next index included in the research is the Index of Economic Freedom (IEF). In general, it should be mentioned that IEF is an important index for measuring democracy. A comparative analysis of the (IEF) reveals that the highest index is recorded in Georgia. Georgia (76,2) occupies the ninth position; Armenia (68,7) holds the twentieth position; while Ukraine (46,8) occupies the last place among European 44 states and is defined as ‘mostly unfree’. Moldova (57,4) and Belarus (58,1) are also among the last places in the region and are considered as ‘mostly unfree’ economies. Azerbaijan (64,3) is in the third place among the observed countries (Heritage Foundation & *Wall Street Journal* 2018: 70).

As mentioned before, Ukraine has the lowest indicator in IEF. The political events of previous years, particularly the Russian-Ukrainian tensions and military actions in Donbas and Lugansk, considerably deepened the economic crisis, with the result that Ukraine remains the region’s least economically-free economy. Inefficient management, political instability, the high level of corruption and a shadow economy are obstacles hampering the country’s development (Heritage Foundation & *Wall Street Journal* 2018: 46; Aleksanyan 2017: 264-265). Many organisations in Ukraine complain about high taxes and corruption (Heritage Foundation & *Wall Street Journal* (2016: 39). At the same time, because of attempts at avoiding high taxes, a shadow economy has developed which, according to International Monetary Fund (IMF) researches, is the highest in the world and composes approximately 50 per cent of gross domestic product (GDP) (The Economist 2014).

In order to have a better understanding of democratisation in EaP countries, and considering the aggregated democracy indices, I also made another calculation. In particular, I normalised (standardised) all the above-mentioned scores and converted them to a 0-10 scale, where high scores denote high democratic development. This step also allows one to make comparisons between spheres.

All variables are normalised by the following formula:

$$X' = \frac{x_i - \min\{x_i\}}{\max\{x_i\} - \min\{x_i\}} \times 10$$

$\min\{x_i\}$ and $\max\{x_i\}$ are the lowest and highest values, the variable x can attain the magnitude of descriptive indicator respectively.

The Aggregate Democracy Index is the weighted average of all composite indices. Although the indices of Cutright and Vanhanen reveal various sides of democracy, I took into account the fact that these variables partly coincide as calculations for competition (Vanhanen’s sub-index) and legislative branch (Cutright’s sub-index) were made according to parliamentary votes. To address this, the weight of Cutright and Vanhanen’s indices were lowered by doubling the weights of the civil liberties and political rights indicators and IEF.

Thus, the final calculations for the aggregated democracy index are as follows:

$$\text{Agg Dem index} = (\text{Cutright's Index} + \text{Vanhanen's Index} + 2 * \text{Civ.Lib\& Pol.R.} + 2 * \text{IEF}) / 6$$

*Table 6: The standardised values of democracy indices and overall scores for EaP countries, 2017 (0-10)*⁹

| Country | Cutright's Index | Vanhanen's Index | Civ Lib & Polit R | IEF | Aggregated Democracy Index |
|------------|------------------|------------------|-------------------|-----|----------------------------|
| Moldova | 10 | 7.2 | 6.7 | 5.7 | 7.0 |
| Georgia | 5 | 5 | 6.7 | 7.6 | 6.4 |
| Armenia | 10 | 4.8 | 4.2 | 6.9 | 6.2 |
| Ukraine | 5 | 5.5 | 6.7 | 5.2 | 5.7 |
| Azerbaijan | 5 | 2.6 | 0.8 | 6.4 | 3.7 |
| Belarus | 5 | 1.6 | 1.6 | 5.8 | 3.6 |

According to calculated data, Moldova has the highest aggregated democracy index (7), followed by Georgia (6,4) and Armenia (6,2). Ukraine is in the fourth place and scored 5,7 points, while Azerbaijan and Belarus are in the last places with 3,7 and 3,6 points respectively. According to the standardised data of Cutright's Index, Moldova and Armenia have more developed legislative and executive branches of government. Political participation and competition, civil liberties and political rights are the weakest sides of democracy in Azerbaijan. The development of the legislative and executive branches of government are imperfect in Azerbaijan and Belarus. Georgia also shows gaps in the sphere due to the fact that all decisions can easily be made only by one party in parliament as it has a constitutional majority. These three countries, together with Ukraine, do not meet the essential criteria of political development as the minority party or parties do not occupy at least 30 per cent of the seats in parliament. Ukraine has the lowest results in the sphere of economic freedom. However, Ukraine has the highest values in political rights and civil liberties together with Georgia and Moldova.

4 Conclusion

In conclusion, Moldova, Georgia and Armenia have comparable high scores in levels of democracy and human rights. As is known, Moldova and Georgia joined the Association Agreement and expressed their willingness to develop a European integration vector. The estimations prove that these two countries can collaborate more closely and productively, and their regional perspectives of development are higher. Closer levels of development in the spheres of democracy, human rights, political stability, political systems formation and civil society will provide more productive regional cooperation. At the same time, Ukraine's low values in the area of economic freedom may cause obstacles for regional

⁹ Source: calculations by the author.

economic cooperation and joint projects. Belarus and Azerbaijan also have close, almost equal (low) levels of Aggregate Democracy Index, but these are relatively different from the democracy levels of the other countries studied. This equality between Belarus and Azerbaijan is due largely to similarities in the political sphere. They share proportionate issues in the areas of violation of human rights and fundamental freedoms, as well as political pressures and restrictions.

With regard to Armenia, as mentioned, the country occupies a comparatively higher position together with Georgia and Moldova. Despite the fact that Armenia chose the Eurasian integration vector, this does not exclude Armenia's possible productive cooperation with regional countries of European integration as they have similar development levels as far as democracy is concerned. The best cooperation in the sphere of economy is foreseeable in the case of Georgia, due to its high and close Indices of Economic Freedom.

Taking into account the highest results of Moldova, Georgia and Ukraine in Vanhanen's Index and Freedom in the World indicators, it can be stated that the chosen vector of European integration positively affects the variables of democracy of these countries.

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