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The *Global Campus Human Rights Journal* (*GCHRJ*) is a peer-reviewed scholarly journal, published under the auspices of the Global Campus of Human Rights as an open-access on-line journal.

Aim: The *Global Campus Human Rights Journal* aims to serve as a forum for rigorous scholarly analysis, critical commentaries, and reports on recent developments pertaining to human rights and democratisation globally, particularly by adopting multi- and inter-disciplinary perspectives, and using comparative approaches. It also aims to serve as a forum for fostering interdisciplinary dialogue and collaboration between stakeholders, including academics, activists in human rights and democratisation, NGOs and civil society.

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The Global Campus of Human Rights is a unique network of one hundred participating universities around the world, seeking to advance human rights and democracy through regional and global cooperation for education and research. This global network is promoted through seven Regional Programmes:

- **European Master's in Human Rights and Democratisation (EMA)**
- **Master's in Human Rights and Democratisation in Africa (HRDA)**
- **European Master's Programme in Democracy and Human Rights in South East Europe (ERMA)**
- **Master's in Human Rights and Democratisation in Asia-Pacific (APMA)**
- **Master's in Human Rights and Democratisation in the Caucasus (CES)**
- **Master's in Human Rights and Democratisation in Latin American and the Caribbean (LATMA)**
- **Arab Master's in Democracy and Human Rights (ARMA)**

These Regional Programmes offer specialised post-graduate education and training in human rights and democracy from a regional perspective, with an interdisciplinary content as well as a multiplicity of research, publications, public events and outreach activities. The Global Campus integrates the educational activities of the Regional Programmes through the exchange of lecturers, researchers and students; the joint planning of curricula for attended and online courses; the promotion of global research projects and dissemination activities; the professional development of graduates through internships in inter-governmental organisations; and the strong focus of networking through the Global Campus Alumni Association, as well as support to the alumni associations of the Regional Programmes.

The wealth of human resources connected by global and regional alliances fostered by the Global Campus and its Regional Programmes, offer remarkable tools and opportunities to promote human rights and democracy worldwide.

The Global Campus of Human Rights develops its activities thanks to the significant support and co-funding of the European Union – through the *European Instrument for Democracy and Human Rights* and its partner universities around the world. The Global Campus equally boasts many joint institutional agreements and strategic alliances with inter-governmental, governmental and non-governmental organisations at the local, national and international level.

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Editorial

This volume of the *Global Campus Human Rights Journal* consists of three parts.

The first part, 'Special focus: Selected developments in the area of children's rights', is the first time the *Journal* devotes special attention to the rights of children. In 2019, a cooperation agreement was signed between the Global Campus of Human Rights and the Right Livelihood Foundation. Its purpose is to 'promote the acknowledgement and observance of human and child rights and to strengthen the participation of children in all matters affecting their lives in the present and in the future'. The Special focus is a product of this collaboration between the Global Campus of Human Rights and the Right Livelihood Foundation.

The Global Campus of Human Rights consists of the Global Campus Europe, South East Europe, Africa, Asia Pacific, Caucasus, Latin America and the Arab World, with the participation of post-graduate students from their respective Master's programmes in Human Rights and Democracy. The Right Livelihood Foundation is a Swedish charity, whose mission it is to honour and support courageous people solving global problems. The Foundation is a politically independent and non-ideological platform for the voices of its Laureates to be heard.

The editor of this 'special focus' part of the *Journal*, Chiara Altafin, Research Manager at the Global Campus of Human Rights, gives a separate editorial introduction, which explains how the six articles reflect selected developments in the area of children's rights.

The six articles have gone through a thorough and detailed editorial process, comprising double peer reviews and an arduous process of reworking articles. The Special Focus is the result of considerable teamwork involving Chiara and other staff of the Global Campus of Human Rights: George Ulrich, Academic Director (who provided valuable comments on the substance of articles), Reina-Marie Loader, Children's Rights Project Manager (who assisted with language reviews) and Angela Melchiorre, Online Programmes Manager (who helped with identifying and securing the availability of peer reviewers, and consistently provided advice and support).

In the second part, we publish a single article of a general bearing. In this article, Chofor Che finds the root causes for the ongoing political malaise in Cameroon in the failure of that state to effectively implement the decentralisation framework provided for under the 1996 Constitution of Cameroon. The 1996 Constitution aims to address some serious contemporary challenges to governance faced by the country. A 2019 national dialogue did little to address the resentment based on persisting perceptions of the colonially-linked marginalisation of the Anglophone community. Chofor Che identifies the need for a fundamental constitutional overhaul that would provide a more effective decentralised framework for administrative, political and fiscal decentralisation.

The third part contains a regular feature of the *Journal*, a discussion of 'recent developments' in the fields of human rights and democratisation in four of the regions covered by the Global Campus of Human Rights. In this issue, developments during 2019 in the following four regions are covered: Europe, sub-Saharan Africa, the 'Arab world' and the Asia Pacific. These contributions are collective endeavours, being based on the research and writing of academics or staff, and students or recent graduates of four of the regional Master's programmes forming part of the Global Campus of Human Rights.

Balnaves, Burkle, Erkan and Fischer scrutinise the results of the 2019 parliamentary elections for the European Parliament. They draw attention to the implications of the elections for human rights, and discuss tendencies towards increased 'European populism'. Nyawa, Nyemba, Nyokabi, Mathenge and White take under review a series of issues of importance and interest related to human rights and democratisation in sub-Saharan Africa during 2019. These issues include the withdrawal by Tanzania of its optional acceptance of the jurisdictional competence to the African Court on Human and Peoples' Rights to allow individuals and non-governmental organisations to submit cases directly to the African Court; judicial decisions on child marriage, and the monumental judgment nullifying presidential elections in Malawi. Iasmin Ait Youssef, Rana Alsheikh Ali, Elena Comaro, Elise Diana, Solène Lavigne Delville, Nouha Maaninou, Marta Pannunzio and Charlotte van der Werf paint a picture of contradictions within the Arab world during 2019: While mass mobilisations broke out throughout the Arab region and democratic consolidation took place in Tunisia, suggesting a 'second Arab Spring', authoritarian reactions and the use of different repression techniques against protesters, activists and civil society organisations also occurred. Beyond these two opposing dynamics, the socio-economic situation across the region deteriorated, thereby increasing the vulnerability women, children, stateless persons and refugees. Taking stock of developments in Asia Pacific over 2019, Ravi Prakash Vyas, Mike Hayes, Mmalinda Savirani and Pranjali Kanel conclude that, despite some promising developments,

on the whole the region has continually regressed from its democratic and human rights obligations due to the use of technology as a pretext of national security, restrictions on freedom of expression, assembly and association and an increase in mob violence and lynching. While there have been some positive developments, for example the increased number of Pacific Islands ratifying human rights treaties or the collective action against trafficking, the region also contains states undertaking serious human rights violations such as Myanmar, Philippines, and China.

The four articles on regional 'recent developments' demonstrate that 2019 was another year during which setbacks for human rights and democratisation increased around the globe.

C Altafin 'Editorial of special focus: Selected developments in the area of children's rights' (2020) 4 *Global Campus Human Rights Journal* 1-4
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Editorial of special focus: Selected developments in the area of children's rights

*Chiara Altafin**

The thirtieth anniversary of the United Nations Convention on the Rights of the Child (CRC) represented an occasion for many in the field to take stock, reflecting on achievements and challenges of children's rights advocacy and engagement with the CRC Committee. It also presented an opportunity to critically reflect on the extent to which the Convention has impacted on children's rights research, including in terms of empirical and conceptual approaches, methodological innovations and gaps. We chose to contribute to the debate generated by the anniversary celebration with this edition of the *Global Campus Human Rights Journal*, which provides insight into selected developments in the area of children's rights in different regions covered by the Global Campus of Human Rights. The articles presented under this special focus address the regional scope and impact of current developments by either examining a key theme in a specific country or region or by exploring a cross-cutting topic in different regional perspectives. In either case, the articles provide observations and lessons that can contribute to our understanding of related practices and challenges in other national and regional contexts. Several of the issues addressed in this special edition are of concern to children worldwide. The contributions are mainly multi-disciplinary in the sense that they combine legal analysis with social, historical, political, economic and other relevant dimensions. Importantly, in considering the CRC, each article provides considerations by which to assess the ongoing impact of the Convention and what it means to adopt a rights-based approach to matters involving children. The authors' consideration of further relevant instruments, such

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as the Third Optional Protocol to the CRC or regional sources, contributes to advancing such assessments. Also, the attention devoted to the work of the CRC Committee as well as other relevant monitoring bodies helps to weigh the impact of the Convention in relation to the selected developments. These concern language-based exclusion and punishment of children in education; health-related rights of children in a humanitarian policy context; children's rights in immigration policies; children's rights to privacy in relation to internet education technologies; children's rights budgeting and the key dimension of child participation in public decision-making; and, finally, the recognition of the *locus standi* in favour of the child and the operational relevance of the communications procedure.

Hurwitz and Kambel address the problem of language-based exclusion and punishment of children, and even their parents, in education. This is not about the right to be educated in and through one's mother tongue, but about the right of students (and their parents) not to be discriminated against, excluded, restricted or punished for using their mother tongue on school grounds, including in the classroom. While the former problem has caught the attention of children's rights advocates, the latter has been rather neglected. An overview of examples of such practice found in different sources and covering various parts of the world is given to show that it is widespread and damaging to the children's development. The human rights implications of such practice are considered by referring to the international instruments in force regarding children's rights in education, with a focus on the European context and its relevant framework. The approach proposed to tackle the issue, namely, the Language Friendly School initiative, can be inspiring for educators in schools worldwide.

Das Gupta, Zaman and Begum tackle a salient and timely issue in the area of children's rights, with a clear short and long-term impact in Southeast Asia. Combining a qualitative research methodology with a child rights-based approach, they discuss the safeguarding of Rohingya children's health-related rights in relation to the healthcare system available in one of the Bangladeshi camps where 54 per cent of the inhabitants are children. The results of the fieldwork conducted in September and October 2019 shed light on factors that impede children's ability to enjoy their rights. In parallel, the children's rights perspective advances the conceptual framework of analysis and, therefore, the understanding of health service accessibility and utilisation by Rohingya children and their families. This positively informs specific public health interventions for real change on the ground within a broader humanitarian policy context. It may also contribute to the evolving debate about measuring capacity in humanitarian response (in Bangladesh as well as in other countries) and how international, national and local stakeholders can harness such capacity and work together in complementarity.

Weizman explores some of the most pressing gaps in Canadian immigration policy in relation to three interconnected issues facing newcomer youths in Canada, namely, status, educational barriers and poverty. In contextualising these policy gaps in reference to an existing best practice, namely, the Real Me programme at the Centre for Newcomers, the author provides policy recommendations. During the last decade the situation of children and young migrants and other children in the context of migration (such as children born to migrant parents in host countries, or those that remain in countries of origin) increasingly has been a subject of attention in public policy discussions at national, regional and global levels. Weizman's article can contribute to these discussions and help to inform public policies in destination countries aiming at improving the conditions of migrants and their families, based on a children's rights approach. Indeed, the three issues chosen by the author are among the main themes to be studied when it comes to assessing integration policies and children/youths in migration-receiving countries. In every host country there will be both similarities with and differences from the Canadian case, but lessons learned from this case could contribute to understanding the realities, gaps, challenges and good practices in other countries.

Cendic presents a case study on the issue of children's rights in relation to internet education technologies. She investigates the right to privacy of children during the extended use of online applications and platforms in Serbia, which were put in place to minimise learning disruptions related to the COVID-19 pandemic. In doing so, she explores key emerging issues concerning online schooling in the country, also taking into account observations related to a lack of transparency and inconsistent security and privacy protection in the industry for applications utilised by many educational institutions worldwide and by children outside the classroom for learning purposes. The article makes a valuable contribution by applying relevant legal frameworks for the protection of a child's privacy and related rights in the digital environment to the Serbian case. It elaborates recommendations that are particularly useful in this context, also highlighting a pressing regional need to further research the issues recently documented.

Lundy, Orr and Marshall provide an interesting description of a consultation that gathered the views of 2 693 children in 71 national contexts across all five UN regions (Africa, Asia-Pacific, Eastern Europe, Latin America and Caribbean, Western Europe and others) and which informed the development of General Comment 19 by the CRC Committee. Special insights are given into how children in very different conditions think about the ways in which governments can and do allocate public funds for them and their families and how this may support or undermine the realisation of their rights. The joint authors identify obstacles to participatory budgeting for children, but challenge assumptions that

children are not capable to be or interested in being involved. It is suggested that in order to be effective for children, participatory budgeting will require bespoke forms of social accountability and a thought-provoking discussion about related mechanisms is elaborated.

Carletti provides a preliminary assessment of some of the (limited) cases handled by the CRC Committee and closely examines different categories of these cases in order to understand the operational relevance of the communications procedure under the Third Optional Protocol to the CRC. The countries involved in the considered inadmissible, discontinuous or admissible communications are Denmark, Spain, Germany, Belgium and Switzerland. Starting from the rights under examination and the recognition of the *locus standi* in favour of the child, the importance of the mechanism is assessed in terms of advanced guarantees as well as its capacity to consolidate the promotion and protection of children's rights, despite its difference from judicial reasoning. This makes for a very informative contribution, which conclusively highlights the substantive and formal significance of the CRC Committee's views in relation to some of the considered cases, but which also places the emphasis on the need to adapt the solutions expressed in some of its landmark positions for an effective impact at the national level.

DR Hurwitz & ER Kambel 'Redressing language-based exclusion and punishment in education and the Language Friendly School initiative' (2020) 4 *Global Campus Human Rights Journal* 5-24
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Redressing language-based exclusion and punishment in education and the Language Friendly School initiative

Deena R Hurwitz and Ellen-Rose Kambel***

Abstract: *Despite decades of scientific literature showing the benefits of multilingual programmes that allow children to learn through their mother tongue, millions of children around the world continue to be denied the right to be educated through a language they understand. Not only are home languages largely excluded from the official curriculum, but children belonging to ethnolinguistic minorities often are also prohibited and sometimes even punished for speaking their mother tongue on the school grounds. Contrary to what is generally believed by educators, preventing children from using their home language does not improve their educational performance, but rather has harmful social and emotional effects. After presenting examples of these practices in various countries, this article examines the human rights implications when students are banned from using their home language at school, by referring to the international instruments in force regarding children's rights in education, with a focus on the European context and its relevant framework. We find that such practices violate the right to education, freedom of speech, and the right to be protected against direct and indirect racial and language-based discrimination. The Language Friendly School is introduced as a new initiative with the explicit aim of ending language-based punishment in education by 2030, the 'deadline' of the Sustainable Development Goals. While schools are the primary location where these practices take place, tackling the deep inequalities in education cannot be left to schools alone. We end our analysis with a call to action on governments to redress these violations of children's rights, and to human rights educators, advocates and lawyers to hold them accountable.*

Key words: *right to education; language-based exclusion and punishment; ethnolinguistic minorities; racial discrimination; mother tongue education; multilingual education*

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1 Introduction

In every part of the world, children belonging to indigenous groups, linguistic minorities and migrant communities have been and continue to be prohibited from and punished for using their mother tongue in classes or on school grounds. Punishments may be physical, including beatings, being placed outside the classroom or made to wear a sign around the neck indicating the transgression. They may also be psychological, for example rewarding children for not speaking their mother tongue.

Although quantitative data is lacking, there are strong indications that the practice of prohibiting students (and their parents) from speaking their home language[1] in classrooms, in school hallways, on school playgrounds, when dropping off and picking up children, or conversing with other parents, is widespread. The Rutu Foundation has undertaken qualitative research, collecting anecdotal, scholarly and legal evidence – current and historical. We believe that the suppression of home languages, at best, is internalised due to the persistent belief that 'forgetting' one's mother tongue and speaking the dominant language is the only way to achieve economic and social success. At worst, it is a manifestation of contemporary colonialism. In all cases, it is a form of discrimination. Children's rights to education, identity and language on the basis of non-discrimination and equality are protected under multiple international instruments.

When children are discriminated against at school, humiliated by teachers and bullies, or regularly punished, their social, economic, cognitive and emotional development is greatly hindered. They feel greater shame for who they are, and feel even more like outsiders at school. A Belgian study found that they also perform worse academically than children in schools where such practices do not occur (Agirdag 2017: 44-52). These students drop out at higher rates, or sometimes are even literally forced out of educational institutions. This significantly reduces their future earning potential, and deepens the inequities between dominant and minority groups.

By using French to teach literacy to children who speak only Kreyòl, Haitian schools for example have created generations that cannot read fluently and who have been accustomed to being silenced from their first day in school. Research shows that among ten Haitian children who enter

1 In this article 'home language' and 'mother tongue' are used interchangeably. The extensive literature and debates on the terminology, particularly around 'mother tongue', are acknowledged, but we agree with Skutnabb-Kangas & Heugh (2012: xvii) that the term 'mother tongue' is used broadly by ordinary people in most parts of the world and that it is important to work with 'practical notions of what languages are and how they function inside educational institutions and how they may be used to facilitate the best possible access to quality education'.

the first grade, only one of them (10 per cent) will finish school (DeGraff 2016: 2-3).

Literacy levels for linguistically minoritised children often are lower than average. These students are disadvantaged when entrance examinations for higher education are only in the national language, which is relatively common. As a consequence, fewer minorities progress to higher education, resulting in a cycle of socio-economic disadvantage, including in education for the next generation.

Decades of academic research across continents support findings that multilingual programmes that encourage the development of students' mother tongue as part of their learning experience improves their well-being as well as their academic performance. Among the outcomes are that students complete more years of education; they repeat classes less often; they feel more comfortable and more confident; and they learn better and faster, including the dominant language (Collier & Thomas 2017; Herzog-Punzenberger, Le Pichon-Vorstman & Siarova 2017; UNESCO 2016; Skutnabb-Kangas & Heugh 2012; Cummins 2001 and 2019).

The right to be educated in and through one's mother tongue is fundamental to the enjoyment of the right to education. The United Nations Educational, Scientific and Cultural Organisation (UNESCO) has stated that without mother tongue-based multilingual education neither Sustainable Development Goal 4 on Quality Education nor any of the other 16 goals will be achievable (UNESCO 2017). However, in this article we consider the right to be educated in a minoritised language a related but separate matter. Here we examine the right of students (and their parents) not to be discriminated against, excluded, restricted or punished for using their mother tongue on school grounds, including in the classroom, an issue that has received far less attention from language and education experts or children's rights advocates.

Using examples from around the world, we first discuss the concept of language-based exclusion and punishment in education: what it is, when it occurs and what the impacts are. We then address the human rights implications when students are banned from using their home language at school, by referring to the international instruments in force regarding children's rights in education. In this regard, we focus on the European context as it provides the most extensive framework of protection of linguistic rights. Finally, we present the Language Friendly School, a new initiative explicitly designed to create language-friendly learning environments for all children, and to ban the practice of punishing children for using their mother tongue at school by 2030, the 'deadline' of the Sustainable Development Goals. While schools are the primary location where these practices take place, tackling the deep inequalities in education cannot be left to schools alone. We end our analysis with a call

to action on governments to redress these problems, and to human rights educators, advocates and lawyers to hold them accountable.

2 What is language-based punishment and exclusion in education?

All children run around and release tension on playgrounds, in lunch rooms and other places on school grounds using the language that is most comfortable and familiar to them. Yet, indigenous and minoritised children are routinely singled out and punished for speaking their home language to their friends. In this part we discuss some examples from different parts of the world.

Miranda Washinawatok, a 12 year-old member of the Menominee Tribe in Wisconsin, USA, was harshly reprimanded by a teacher for using her native language at school. She had translated the words 'hello', 'I love you', and 'thank you' when talking to two girls in class. The teacher 'slammed her hands on the desk and stated: 'You are not to speak like that. How do I know you're not saying something bad? How would you like if I spoke in Polish and you didn't understand?' The girl was benched from a basketball game later that day for having 'an attitude problem'. Her mother explained that this issue 'is sensitive, because tribal members used to be beaten for speaking their language in schools, which is part of the reason they are losing their language' (NY Daily News 2012).

In 2012, Belgian children were reportedly punished with detention and language lessons if caught speaking French rather than Dutch on the playground of Sint-Pieters college, a primary school in a Dutch-speaking suburb of Brussels. One father attacked the policy 'because it threatened to punish children, too young to choose their mother tongue, for a conflict being fought out between French and Dutch-speaking adults tussling for political control of Belgium' (Waterford 2012).

In Haitian classrooms Kreyòl-speaking students are punished and humiliated, and even expelled for speaking Kreyòl – outside of the few classes where they are taught about Kreyòl. Ironically, 'Haiti stands out as one of the rare nations in which there is one language spoken by all citizens, yet the school system, by and large, does not use that language as the main language of instruction and examination' (DeGraff 2016: 2).

As recently as 2016 the students of a Catholic school in Assam (India) were barred from having their lunch and made to stand for 90 minutes for breaking the institution's rule of speaking only in English (Karmakar 2016). Elsewhere in India, teachers at a Catholic school put a board around the neck of students violating a standing order to 'speak only in

English in the school'. The board read 'I never speak in Telugu' (India Study Channel 2009).

This does not apply only to students. In The Netherlands parents are also told not to speak their home language with their children when they come to school. They may not speak the dominant language well or at all, yet these adults must refrain from communicating with their children in their mother tongue – even if they need them to interpret what the teachers are saying.

Dr Emmanuelle Le Pichon-Vorstman, a French national, completed her doctoral thesis in The Netherlands on plurilingual children in international schools, measuring the benefits on their intellectual, emotional and social health. In 2011 she was an assistant professor at the University of Utrecht, and leading a project on children with a migration background. One day, picking her children up from school, a teacher at the Dutch school asked her with some embarrassment not to speak French to them in the school yard or classroom. When Dr Le Pichon-Vorstman enquired as to the reason, the teacher hesitantly said that the same request was being made of the Moroccan parents. They felt it was unfair that they could not speak their language to their children if she was allowed to speak French. The school administration told her: 'You are the guests, we are the hosts. You have to abide by our rules' (Rutu Foundation 2020: 7-8).

Other examples of parents being told not to speak their home language to their children at school include a Turkish-speaking parent 'who [after participating in a bilingual education programme] felt welcome at the school, being allowed to use her own language, which had not been the case in the past' (Kambel 2019: 21). Also, a case cited by Smits (2018: 57):

> Teacher Marianne mentioned that … the parents of the children with an ethnolinguistic diverse background speak a different language than Dutch at school. She mentioned the lunch committee, [which consists] of Turkish women, as an example. She asked the women to talk Dutch with the children at school ... This means that even parents should obey the rule when they are at school.

Inside the classroom, linguistically minoritised children may be lost or confused. School books, lessons, homework are all in the dominant language, and children are expected to catch up quickly. If they do not, they are treated as if they are stupid or lazy for not keeping up. In fact, schools expect minoritised children to fall behind if they speak in their mother tongue.

Born in Guerrero, Mexico, the author Reyna Grande came to the United States as an undocumented child immigrant. On her first day at school in 1985, realising that she did not speak a word of English, the fifth-grade

teacher pointed to the farthest corner of her classroom and sent her there. She ignored Grande for the rest of the year. Grande (2019) said:

> The message I received was that if I wanted to be seen and heard, I'd have to speak English. As I sat in that corner day after day, invisible, the trauma of realising that I spoke the "wrong" language weighed on me and my head swam with debilitating thoughts: I am broken. I am wrong. I am not enough.

Schools use various techniques of humiliation, restriction, or exclusion to pressure children to forget their mother tongue language and assimilate. In Haiti the punishment for children caught speaking Kreyòl is called a 'symbol'. Students must affix a symbolic item such as a tag on their shirt or hang something around their neck. A student who is given the 'symbol' will then have to catch another student speaking Kreyòl, and pass it to the next victim. This practice was inherited from the French who used it in the nineteenth and twentieth centuries in various regions to eliminate local languages, such as Basque, Provençal, Breton and Occitan (DeGraff 2016: 3).

In Uganda punishment included putting children outside wearing dirt sacks, sometimes filled with dead animals. As in Haiti, children will have to find someone else speaking their mother tongue and pass the sack to them. They are also tasked with compiling lists of fellow pupils speaking in their mother tongue for the teacher to punish (Bwesigye bwa Mwesigire 2014).

Stories of harsh beatings are common from indigenous residential schools in, for instance, Canada, the United States and Australia. Among others, in Fournier & Crey (1997: 62):

> Sister Marie Baptiste had a supply of sticks as long and thick as pool cues. When she heard me speak my language, she'd lift up her hands and bring the stick down on me. I've still got bumps and scars on my hands. I have to wear special gloves because the cold weather really hurts my hands. I tried very hard not to cry when I was being beaten and I can still just turn off my feelings. And I'm lucky. Many of the men my age, they either didn't make it, committed suicide or died violent deaths, or alcohol got them. And it wasn't just my generation. My grandmother, who's in her late nineties, to this day it's too painful for her to talk about what happened to her at the school (Musqueam Nation former chief George Guerin, Kuper Island school).

Unfortunately, corporal punishment is not a relic of the past, but continues in several countries.

Bwesigye bwa Mwesigire (2014) from Uganda related that 'whenever Evas Kwarisiima, 13, speaks Runyankole, her native language, at school, she's forced to lie down while a teacher beats her backside'. 'I feel sad when that happens, and I cry', says the student at Mbarara Mixed Primary School. 'But I also know that I have broken the school rules, so I try to speak

English, but sometimes I slip into Runyankole because [it] comes easily to my tongue'. 'Such punishments occur because the school wants students to have a good understanding of English, especially as they prepare to be tested in the language', says Esau Gariyo, a teacher at Mbarara Mixed Primary School.

Children may even be expelled from school (DeGraff 2016: 3). In 2013 a high school student in The Netherlands was expelled for hanging up an invitation to a party in the Turkish language, and for speaking Turkish at school. The student filed a lawsuit, invoking the prohibition of discrimination contained in the Constitution and in international human rights law. The school argued that allowing students to use their home language would result in closed groups, which would harm the social cohesion of the school. Fostering mutual respect within the school community, according to the school, means 'that one communicates as much as possible in the language that everyone knows … Only in this way, contradictions can be bridged, differences can be grasped, and this is how different cultures actually come into contact with each other' (Amsterdam District Court 2013: para 3.3). The Court agreed with the school that, given its vision of world citizenship, 'it is essential that pupils use Dutch as a language both inside and outside the classroom so that there is as little seclusion as possible by origin. At a school with many pupils with different origins this is to be seen as a legitimate interest' (Amsterdam District Court 2013: para 3.3). According to the Court, the right of each person to speak their mother tongue should, in principle, weigh heavily. 'However, this does not mean that it is an absolute right to do so under all circumstances, certainly not at school where education is taught in Dutch' (para 4.5). The Rutu Foundation (2020: 9-10) has provided a more extended discussion of the case. Having won the case, the school in question currently maintains its official policy that only Dutch is allowed to be spoken 'in the school building, in the schoolyard and near the school' (Rutu Foundation 2020: 10).

Restrictions on speaking minoritised languages inside school buildings may be by explicit fiat, for instance, that notifications must be in official school languages only. Or, they may be passive, for example, where no other language is visible anywhere, and it is not questioned – regardless of the number of minoritised speakers in the school community.

Another example of passive discrimination is the lack of interpretation provided to parents during parent-teacher meetings. In some cases, teachers even prohibit parents from translating for each other (Bezcioglu-Göktolga & Yagmur 2018: 10):

> Most parents are critical that teachers are intolerant of parents who have poor Dutch skills. They do not want Turkish parents to interact in Turkish among themselves, not even to translate what the teacher says; as a result,

> the possibility of parental involvement decreases. One mother … criticised teachers because they 'turn to English easily when somebody does not understand them, but they do not let me do Turkish translations when a mother does not understand what the teacher says.

Finally, a more pernicious form of language-based exclusion, restriction and punishment in education occurs in the curriculum, for instance, with textbooks that ignore the other languages spoken by students; when students are not permitted to discuss subject matter amongst one another in their home language, or when they are denied access to translation tools, for example during mathematics or science classes.

Despite the lack of data showing the extent to which these practices occur, language-based exclusion, restriction and punishment in education are far more common than schools will admit. A recent study about teacher beliefs and attitudes on multilingualism in three Dutch cities found that 'the vast majority of teachers would not allow their pupils to speak their mother tongues in class' (Di Maio 2019: 37). Even where it is illegal, the state often does not intervene, and state actors are rarely penalised. There is little or no recognition of the human rights issues at play.

Policies behind language exclusion are not necessarily motivated by an intent to annihilate cultural identity. The policy is often pursued in the purported best interests of the child. There is a persistent belief among educators, policy makers, as well as many parents, that immersion in the dominant language and 'forgetting' one's mother tongue is the only way to achieve economic and social success. Leaving aside the inherent biases in this view, as mentioned in the introduction, research simply does not support this position. Indeed, studies consistently reveal the opposite. Students who are allowed to learn through their mother tongue in multilingual education programmes better understand academic concepts, possess greater confidence, and have improved learning outcomes.

3 Rights of the child and aims of education

Looking at the international instruments in force regarding children's rights in education, the United Nations Convention on the Rights of the Child (CRC) is a source of legal obligations for the vast majority of states (with 196 state parties, except the United States). It encompasses four core principles under articles 2, 3, 6, 12 respectively: non-discrimination; the best interests of the child; the right to life, survival and development; and the right to express one's views and have them count. The right to education on the basis of equality is fundamentally protected under article 28, and similar safeguards are to be found in several other core human rights treaties as well as other international instruments. In particular, article 26 of the Universal Declaration of Human Rights (Universal Declaration);

article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR); article 5(e)(v) of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD); article 10 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); and the UNESCO Convention Against Discrimination in Education (CADE).

The aims of education – expressly articulated in article 29(1) of CRC and in other treaties (for instance, article 13(1) of ICESCR) – are directed to the holistic development of the child's full potential. Specifically, article 29(1)(c) provides that education shall be directed to developing 'respect for the child's parents, his or her own cultural identity, *language* and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilisations different from his or her own' (emphasis added). Rooted in the mentioned four core principles, the aims of education complement and reinforce various other rights, including the rights and responsibilities of parents (articles 29(1)(c), 5 and 18 of CRC); freedom of expression (article 13 of CRC; article 5(d)(viii) in conjunction with articles 1 and 7 of CERD; article 19 of the International Covenant on Civil and Political Rights (ICCPR); and the linguistic and cultural rights of children belonging to indigenous and minority groups (article 30 of CRC).[2]

According to the United Nations (UN) Committee on the Rights of the Child, the aims of education must be 'child-centred, child-friendly and empowering' and 'educational processes must be based upon the very principles enunciate[d] in the CRC' (CRC/GC/2001/1: para 2).[3] Inasmuch as

> [t]he goal is to empower the child by developing his or her skills, learning and other capacities, human dignity, self-esteem and self-confidence, '[e]ducation … goes far beyond formal schooling to embrace the broad range of life experiences and learning processes which enable children, individually and collectively, to develop their personalities, talents and abilities and to live a full and satisfying life within society' (CRC/GC/2001/1: para. 2).

CRC acknowledges that linguistically minoritised and indigenous children face significant challenges in exercising their rights. Article 30, thus, makes it clear that a child belonging to a linguistic minority or indigenous group has the right 'to enjoy his or her own culture, to profess and practice his or her own religion or to use his or her own language', and requires states

2 See also CRC/GC/2001/1, paras 6 & 11; CRC/C/GC/11, paras 48 & 67.
3 See also E/C 12/1999/10, on the aims of education under art 13(1) of ICESCR.

to ensure that this right is protected against denial or violation (CRC/C/GC/11: para 17).[4]

To be meaningful, effective, and consistent with international human rights law, education has to be comprehensible to the child. To fulfil the right to an education of good quality without discrimination of any kind, the state must ensure that the learning environment, as well as the teaching and learning processes, are consistent with human rights (CRC/GC/2001/1: para 22). Children have a right to be heard, have their views respected, and be consulted on matters affecting them (CRC/C/GC/11: paras 38 and 39). The UN Special Rapporteur on Minority Issues, Fernand de Varennes, has noted that 'teaching children in a language other than their own is not education of the same quality as that of children who are taught in their mother tongue' (De Varennes 2020: para 48). These disadvantages constitute direct discrimination on the ground of language, or indirect discrimination on the grounds of ethnicity or race (De Varennes 2020: para 53). Likewise, prohibiting the use of home languages anywhere on school grounds constitutes both direct and indirect forms of discrimination.

4 European context and its legal framework regarding language-based exclusion in schools

The European context provides the most extensive framework for the protection of minority languages in education. Unfortunately, as discussed below, none of the instruments directly addresses language-based exclusion in schools. When it comes to education, the focus is on the right of minorities to receive instruction in their own languages.

Most of the regional instruments and policy directives that constitute the core of this framework derive from the Council of Europe (CoE), whose mission is to promote human rights, democracy and the rule of law and to develop common responses to political, social, cultural and legal challenges in its member states. Within this system, the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) (European Convention) can play a relevant role. Additionally, core instruments of the CoE relating to language rights of minoritised students include the (Revised) European Social Charter (1996); the European Charter for Regional or Minority Languages (1992); the Framework Convention for the Protection of National Minorities (1994); and the European Convention on the Legal Status of Migrant Workers (2007).

It should be noted that there is a dichotomy between protections that apply to migrants and those that apply to national or historical minorities

4 Noting also the similarities with art 27 of ICCPR, CCPR/C/21/Rev.1/Add.5, paras 6.1 & 6.2; and CRC/C/GC/11, para 18, A/52/18, annex V.

(including, for example, Roma and Sinti). McDermott (2017: 605) has written about the 'remarkable lack of engagement with the position and status of immigrant languages' in Europe. The nature of this disparity has been framed in terms of 'tolerance oriented rights' (of migrants) versus 'promotion oriented rights' (of national minorities) (McDermott 2017: 608).

Focusing on the European Convention, the European Court of Human Rights has been more active than any other regional human rights body regarding language-related cases, and has a significant number of opinions relating to minority language instruction (Paz 2013: 157-218). While language rights are not explicit in the European Convention, general principles of non-discrimination on the basis of language are safeguarded under article 14 and also, for example, under articles 8, 9, 10 and 11. As such, language rights have been discussed in connection with the prohibition of discrimination, the right to respect for private and family life, freedom of expression, freedom of thought, freedom of assembly, the right to education, and the right to a fair trial (Schmalz 2020: 20 101-119). Nonetheless, describing 'a regime of linguistic tolerance' that focuses on civic, and not cultural, rights, McDermott (2017: 610) identifies the greatest flaw in the European Convention, namely, that '[i]t takes the majority culture, including the linguistic culture, of each signatory state as a given "norm" and fails to engage adequately with the role that cultural and linguistic exclusion can have on an individual's ability to contribute to wider civil and political life'.

The European Charter for Regional or Minority Languages (ECRML) provides the legal protection of languages and multilingualism as cultural heritage, and was the first document to approach language as a human rights issue in itself. It openly supports the elimination of any distinction, exclusion, restriction or preference intended to discourage or endanger the maintenance or development of a regional or minority language (article 7(2)). Article 8 calls for state parties to make available at all levels education in the relevant regional or minority languages, to train teachers, and to establish monitoring bodies to supervise and track progress towards these undertakings, and to draft public reports. The ECRML, however, expressly excludes the languages of migrants (article 1(a)); thus, having a historical tie to the territory is the criteria for recognition as a minority (McDermott 2017: 611). It also requires states, upon ratification, to declare the languages that they recognise and the level of support for each. This sets up 'a pecking order of minority languages within states' (McDermott 2017: 611).

The Framework Convention for the Protection of National Minorities (FCPNM) promotes the rights of national minorities, and expressly recognises the right to use one's mother tongue in public and private life

(article 10). Despite its limitations (its lack of a core definition leads to confusion as to who it is designed to protect, and its 'claw-back clauses' – for instance, article 12 which promotes the fostering of education and research on minority cultures and languages, to be provided 'where appropriate'), McDermott considers the FCPNM the most effective of the three instruments thus far discussed, because it has opened the space for gradual recognition of migrants' languages (2017: 614, 616). While he notes that the related Advisory Committee has been reluctant to comment explicitly on the status of minority languages (McDermott 2017: 615), it has published two relevant Commentaries, one in 2006 on Education and the other in 2014 on Language Rights.

Finally, the European Convention on the Legal Status of Migrant Workers (ECSMW) has a strong provision on teaching migrant workers' children in their mother tongue (article 15), requiring state parties to 'take actions by common accord to arrange, so far as practicable … special courses', although this Convention is limited to migrant workers from CoE member states.

In addition to these regional instruments, there are various policy directives and recommendations, issued by the CoE's constitutive bodies or in the context of the European Union (EU), which are relevant to linguistic rights in education.[5] In the context of the Organisation for Security and Cooperation in Europe (OSCE), the High Commissioner of National Minorities does important work to promote the preservation of national minority languages, *inter alia*, through multilingual education projects. In particular, we note the Hague Recommendations Regarding the Education Rights of National Minorities (1996) and the Oslo Recommendations Regarding the Linguistic Rights of National Minorities (1998).

These are all constructive in urging states to call attention to inequalities and disparate treatment of minoritised language groups, and to enhance measures to improve language learning in and the teaching of minority languages (even if non-European migrant languages are largely excluded). None, however, specifically addresses the problem of language-based exclusion or punishment in education.

5 CoE Parliamentary Assembly Recommendation 1740 (2006) on the place of mother tongue in school education. CoE Recommendation CM/Rec(2014)5 on the importance of competences in the language(s) of schooling for equity and quality in education and for educational success. EU Council Directive 77/486/EEC on the education of migrant children (1977). EU Council Directive 2000/43/EC on implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (2000). European Commission, Green Paper, Migration & Mobility: Challenges and Opportunities for EU Education System (2008). EU Council Recommendation (2019/C 189/03) on a comprehensive approach to the teaching and learning of languages (adopted on 22 May 2019).

5 Relevant state obligations under international human rights law

Accessibility in education is recognised as a critical element of the right to education. The first UN Special Rapporteur on the Right to Education (1998-2004), Katarina Tomaševski, emphasised that the challenge of access from a rights-based policy perspective 'requires halting and reversing exclusionary policies and practices, not only countering their effects' (Klees & Thapliyal 2007: 497-510). Also, the third UN Special Rapporteur on the Right to Education (2010-2016), Kishor Singh, highlighted that '[c]oncerns relating to equality of opportunity in education are understood as relating both to guaranteeing equal opportunities in access to different levels of education as established by human rights norms, as well as equal opportunities to evolve within education systems' (Singh 2011: para 8).

Under international human rights law, states have the freedom to designate their national language, to put in place policies aimed at teaching all students the national language(s) and ensuring education in that language. Nonetheless, as highlighted by the former UN Special Rapporteur on Minority Issues, Rita Izsák-Ndiaye, a

> human rights approach focuses on the differences in treatment between individuals, not languages. It is therefore the potential negative impacts, such as disadvantage or exclusion, on individuals rather than languages that are considered in assessing the reasonableness of any language preference in the policies, support or services provided at all levels by State authorities and actions (Izsák 2017: 13).

For the most part, unfortunately, states have failed to address the critical role that the suppression of home languages plays in the perpetuation of these disparities in education. International (human rights as well as historical peace) treaties and norms recognise that respecting language rights is key to promoting equality and non-discrimination, identity, dignity and the development of the child's full potential (Izsák 2017: 4, 6, 18; De Varennes 2020: paras 34-40). Yet, it has been estimated that 200 million children are educated in a language that they do not understand (UNESCO 2016). In the context of the EU, only six European countries provide mother tongue education to newly-arrived migrant children (European Commission 2017: 12) and countless others are prohibited from speaking their home language on a daily basis, instilling lifelong shame and embarrassment for what, in fact, is an advantage and an enrichment.

Article 4 of CRC requires states to adopt positive measures for the implementation of the rights enshrined in the Convention. In relation to the non-discrimination obligation, the Committee on the Rights of the Child has highlighted, in particular, the need for the collection of disaggregated data that identifies vulnerable children (individually and in groups) and discrimination or potential discrimination (CRC/C/GC/11: para 24).

Moreover, the UN Sustainable Development Goals Thematic Indicator 4.5.18 calls on states to report on the percentage of primary school pupils who speak the school's language of instruction as their first language or mother tongue (UNESCO Institute for Statistics 2016). It is worth noting that statistical data obtained by the People's Ombudsperson's Office on the number of Roma and non-Roma children in four schools was an important piece of evidence and key to the decision of the European Court of Human Rights in *Oršuš & Others v Croatia* (European Commission Network of Legal Experts in Gender Equality and Non-Discrimination 2020: 69).

Therefore, one action that states should take immediately is to collect data on the linguistic demography of their populations. With such data, states will not as easily ignore the sizeable linguistic communities in policy decisions, and will be better able to identify and plan for the needs of particular language communities (McDermott 2017: 618). Further, and more importantly, states must collect data on the *lived experiences* of linguistic minoritised groups – including national minorities, indigenous peoples, and migrants – in the education system. This is an important means of identifying *de facto* discrimination: acts and patterns of exclusion, and prevention and punishment of linguistic minorities who speak their mother tongue on school grounds.

6 Changing the tide: The Language Friendly School initiative

The Language Friendly School was initiated by the Rutu Foundation and developed in collaboration with Dr Emmanuelle Le Pichon-Vorstman (University of Toronto) in 2019. Its dual objectives are to (a) eradicate the practice of punishing school children for using their home language at school and (b) create language-friendly learning environments for all children.[6] Because language exclusion and suppression is so widespread globally, a concept was developed that could be applied to all types of schools, regardless of their geographic location, pedagogic strategy, (religious) affiliation, or status as a public or private school.

The Language Friendly School is a whole school approach requiring the active participation of all school community members: students, parents and staff. Within a Language Friendly School, everyone welcomes and values all languages spoken by the students, the parents, teachers, teacher assistants and administrators, including the supporting staff. Schools are free to decide how they want to reach this goal. At the very minimum, Language Friendly Schools commit to not punishing children who speak their mother tongue. For some schools this may already be a significant step. By connecting with other Language Friendly Schools, educators

6 See https://languagefriendlyschool.org

can share good practices and teachers can be inspired to take a next step forward (see Le Pichon-Vorstman, Siarova & Szőnyi 2020: 40) on the Language Friendly School and other examples of cross-border school networks to build and sustain innovative learning environments).

After signing up for the Language Friendly School label, schools have two years to develop, implement and evaluate their language-friendly school plan. Relevant steps are suggested to the schools in this regard, including making an inventory of the languages spoken at school and appointing a language policy coordinator. Also, an optional menu of strategies and approaches is provided in the form of a Language Friendly School Roadmap. As of June 2020, there are three schools that have formally received the Language Friendly label (two in The Netherlands and one in Canada) while 12 other schools are in the process of becoming Language Friendly Schools. They include small schools in culturally diverse neighbourhoods; elite international schools; large public schools, both primary and secondary education. What all have in common are school leaders who recognise the importance of creating inclusive schools where all children with their full identities are welcomed. As one principal stated, 'I may not understand everything about multilingual education, but I just look at the kids. When I see how they radiate when they are asked to say something in their mother tongue, I know enough.'[7]

7 Conclusion

The exclusion of mother tongue languages is rationalised on various grounds. One is that it hinders students' integration into mainstream society. Another is that competition between languages and continuing to use the mother tongue language in school or at home reduces students' exposure to the school language. There is no validity in these theories, according to Jim Cummins, renowned expert on literacy development in multilingual school contexts (Cummins 2019: 1):

> In a large number of contexts, schools … systematically and intentionally undermine the potential of immigrant-background and minoritised students to develop multilingual abilities. This undermining of multilingualism operates either by explicitly prohibiting students from using their home languages within the school, or through ignoring the languages that students bring to school (benign neglect).

Cummins argues that the research reveals no consistent relationship between minoritised students' academic achievement in the dominant/school language and use of their mother tongue in the home or in the school. On the contrary, 'several research syntheses have highlighted the

7 Statement of Jan Bakker, Principal, St. Janschool, Amsterdam (2019) 14 November, at the formal ceremony to become the first Language Friendly School together with the DENISE school.

positive academic outcomes of bilingual programs for minoritised students, as well as the feasibility of implementing multilingual or translanguaging pedagogies in the mainstream classroom' (Cummins 2019: 1).

Another rationalisation for mother tongue exclusion is that, in the interests of national identity and citizenship, multilingualism and civism are at odds, mutually exclusive (May 2014: 222-223). Civic education focusing on diversity, democratic values and the rule of law, as enshrined in national constitutions and international human rights instruments, is highly important. However, civic integration is sometimes used as a justification against inclusion. Schools and states have an ideological blind spot in failing to understand how the emphasis on a dominant national language to the exclusion of all other mother tongues ultimately undermines the very objective of integration.

If children are ostracised, excluded or punished because they have not fully learned the dominant language, they internalise the notion that they are slow or poor learners. It is well settled that children learn best in their home language and, when allowed to do so, can more easily learn other languages and subjects. The UN Special Rapporteur on Minority Issues, Fernand de Varennes (2020: para 52), has emphasised just this point in a recent report:

> If persons belonging to linguistic minorities have a responsibility to integrate into the wider society, then it would seem that this can be best achieved through effectively teaching them in their own language because of generally better outcomes from education in one's language, even in acquiring fluency in the official language.

One of the impediments to realising this in education policy is that the practices are so ingrained that parents and students have come to believe this is the 'normal' way of doing things at school. The impacted group, of course, is either newly arrived, or part of severely marginalised communities, who lack information and lack the language tools to express themselves. Parents especially may feel helpless to take action, fearing retaliation from teachers or the school administration. Because parents do not notify institutions (state and civil society) charged with protecting children's and minorities' rights, these organisations and state agencies may be unaware that such practices occur. Parents generally have little knowledge of states' legal obligations to pursue policies and take concrete measures to ensure the development and protection of all persons against language-based punishment and exclusion in education.

Unfortunately, there also is little awareness among teachers and school administrators that such incursions of the rights of students and their parents may inflict harm. Many teachers are genuinely convinced that they are acting in the best interests of the child.

Language-based exclusion has a long history. It is deeply rooted in colonialism and nation building on the basis of notions of class and racial superiority. This continues today, but remains unrecognised as a human rights problem. The Language Friendly School initiative has emerged as a way to redress the deep inequalities in education and help bringing the Sustainable Development Goals a little closer. However, this cannot be left only to schools. Governments need to fulfil their international human rights obligations, and human rights advocates need to hold them accountable.

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Rohingya children in Bangladesh: Safeguarding their health-related rights in relation to the available healthcare system

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Abstract: *As at March 2020 Bangladesh hosted approximately 859 160 Rohingya people of which 54 per cent were children. The magnitude of their health problems is undeniable and uncertainty about the consequences of these health issues persists. Although Bangladesh is not a state party to key treaties in international refugee law, several human rights treaties to which Bangladesh is party (and some provisions of its Constitution) entail that the state should safeguard the basic human rights of the Rohingya people in its territory. This includes special protection for Rohingya children, particularly in relation to access to essential services. This article analyses whether the healthcare services and provision in one of the 34 camps set up in the Cox's Bazar district are sufficient to safeguard the health-related rights of Rohingya children. The article employs a qualitative research methodology, on the basis of field work conducted in September and October 2019. In parallel, the authors look at the healthcare system available for Rohingya children from a human rights-based approach, which should inform possible public health interventions. Their analysis illustrates that for different reasons the existing system struggles to provide adequate protection of the health-related rights of these children. In exposing the critical situation related to the ability of Rohingya children to enjoy their rights on Bangladeshi territory, the article suggests that sustainable solutions to safeguard these rights can be found only if the relief distribution, healthcare services, healthcare procedures and related conditions work concurrently in an effective way as they are all interrelated. If a single component does not function well, the affected rights cannot be secured and children's unhealthy living conditions in the camps are exacerbated.*

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Key words: *Rohingya; children; camp; health care; human rights*

1 Introduction

The global refugee crisis has taken a sharp turn due to a dramatic increase in the amount of forcibly-displaced populations in recent years, shifting from 65,6 million people in 2016 to 70,8 million refugees in 2018 (UNHCR 2016; UNHCR 2018a). In the midst of this crisis the Rohingya refugee crisis has become a particular matter of global and regional concern. The term 'Rohingya' has been used to introduce an ethnic minority Muslim community that for centuries has lived in the Rakhine State of Myanmar. Over the years they have faced brutal oppression based on their religious and social identity. They have essentially become a 'stateless' community, because the government of Myanmar denies them citizenship on the basis of the country's nationality law of 1982 (Ahmed 2010; BROUK 2014). In this regard, an estimated 300 000 'undocumented Myanmar nationals' have been living in Bangladesh for three decades. In addition to this, in August 2017 massive attacks on the Rohingya people, led by the military of Myanmar, have resulted in another mass exodus (UNHCR 2018b). As at March 2020 approximately 859 160 Rohingya people have taken shelter in the camps of Coxs Bazar district, Bangladesh (UNHCR 2020c); 54 per cent of these are children (UNHCR 2020c) and a staggering 4 per cent of households are headed by children (ACAPAS 2019). After these arrivals, it has been challenging for the Bangladesh government and the relevant non-governmental organisations (NGOs) to cope with the enormous and acute humanitarian needs of these people.

In order to manage such an emergency, the government of Bangladesh has built some of the world's biggest refugee camps (Première Urgence Internationale 2018). Thirty-four camps have been set up in the Cox's Bazar district in Bangladesh in order to host Rohingya people (UNHCR 2020a). Camp 4, situated in Ukhia Upazilla, is one of these camps where the proportion of men, women, children and the elderly respectively is 48 per cent, 5 per cent, 54 per cent and 4 per cent. The total area of Camp 4 is 1 155 140 square kilometres with approximately 7 014 houses providing shelter for around 29 823 individuals. The total population density is 29 per person per square kilometre. In this camp the authorities (supported by 37 partner organisations) provide services in the areas of site management, protection, shelter/site infrastructure, access to water, sanitation and hygiene (WASH), nutrition, food security, health, education, energy and environment. In the child protection and health sector, a total of 14 partner organisations work along with the camp authorities (UNHCR 2020b). In total, 132 health posts are run by the partners in Camp 4. Furthermore, 29 out of 32 primary health centres run 24/7 services. Additional health facilities are under construction or planned in order to address the gaps existing in healthcare. From 1 January to 30 April

2019 more than 2 million outpatient consultations (35 per cent for males and 65 per cent for females) were reported to the health sector, and more than 30 implementing partners provided services to people in the camp. Significantly, healthcare services were provided to 69 per cent of adults and children of five years and over. The final 31 per cent who received health care were children younger than five years. Overall, field hospitals, diarrhoea treatment centres, specialised SRH delivery facilities, and other specialised health facilities, including eyecare facilities, rehabilitation facilities, and age-friendly centres, were run by the health sector partners.

However, specialised health services have not been widely available for everyone in need in these camps (Health Sector Cox's Bazar 2019), including Camp 4. Bangladesh authorities have established the *Majhi* system as an emergency response arrangement to handle the sudden and large influx of people since August 2017. The *Majhi* has been appointed primarily to estimate the population, identifying immediate survival needs and linking Rohingya refugees with emergency assistance from various providers. However, the *Majhi* system has not been established with the participation of Rohingya communities and thus lacks representation and recognition of accountability towards the refugees. Moreover, from the Rohingyas' perspective this system is deemed unreliable for the distribution of humanitarian aid, mostly because the needs of people and the respect for minimum humanitarian standards such as representation, impartiality, transparency and accountability have not been properly adhered to in the past (Protection Sector Working Group Cox's Bazar 2018).

It is worth highlighting that Rohingya people should receive the status of 'refugees' after arriving in Bangladesh. In fact, they have taken shelter in the country due to the fact that they faced grave human rights violations in Myanmar. They were forced to flee due to discrimination, persecution and violence because of their religious, cultural and social group identity. This certainly falls under the broader definition of 'refugee' that has been expanded by state practice (Harvey 2013), if not also in the narrow definition set forth in article 1 of the 1951 Convention Relating to the Status of Refugees. Nonetheless, Bangladesh authorities have formally identified them as 'forcibly-displaced Myanmar nationals' (FDMN), because Bangladesh has not yet acceded to the 1951 Convention or its 1967 Protocol (UNHCR 2019b). Serious gaps in assistance have thus emerged, as these refugees lack formal legal status and face restrictions on movement. However, as a corollary of the customary nature of the principle of *non-refoulement* embodied in article 33(1) of the 1951 Convention, all states (including Bangladesh) are prohibited from denying temporary asylum to refugees who arrive at their borders, and from sending them back to their country of origin until the threats they face there have ceased (Kaur

2016: 8-9).[1] Notably, Bangladesh recently underlined that, although it is not a state party to the 1951 Refugee Convention, it 'has long been hosting refugees and forcibly displaced Rohingyas from Myanmar with full respect to international protection regime' (UNHRC 2018b: para 125). Moreover, Bangladesh is neither a state party to the 1954 Convention relating to the Status of Stateless Persons nor to the 1961 Convention on the Reduction of Statelessness. Its accession to these two conventions, however, would set up 'a framework to prevent and reduce statelessness and avoid the detrimental effects of statelessness on individuals and society by ensuring minimum standards of treatment for stateless persons' (UNHCR 2012: 5). The Rohingya people have been coming to Bangladesh since 1970 (Tompson 2005), but have been exposed to severe risks and human rights abuses due to the absence of national legal and administrative frameworks for refugee and asylum seekers or stateless persons. Certain constitutional provisions apply to everyone inhabiting in the territory of Bangladesh (Aktarul 2018: 59-60; Banerjee 2019), but there is no specific domestic mechanism safeguarding the rights of refugees in statutory law or state policy.

In the context of the Universal Periodic Review (UPR) of 2012, the United Nations High Commissioner for Refugees (UNHCR) indeed addressed the need to create 'a refugee protection framework' in the country, with a clearer basis to provide international protection to refugees, recommending Bangladesh to accede to the 1951 Convention and its 1967 Protocol, while also taking concrete steps towards the adoption of national refugee legislation (UNHCR 2012: 3). For the UNHCR, this would have been an official acknowledgment of the hospitality and solidarity Bangladesh for decades has shown towards Rohingya people. It would also have underscored the significance of being committed, together with the international community, to find solutions to the struggles faced by refugees. It would have finally allowed the government to deal with asylum issues in a structured manner, thus complementing its obligations stemming from binding international human rights instruments and the provisions of its own Constitution (UNHCR 2012: 3). It is also worth noting that article 23 of the 1951 Convention guarantees to all refugees lawfully staying in a state's territory the same rights to public relief and assistance as is accorded to nationals of the host country; it is meant as the same material benefits with the same minimum of delay (Commentary 1997, citing E/AC.32/SR.38: 5). Although the right to health care is not mentioned in the Convention, article 23 has been given a wide interpretation, covering areas such as medical assistance and hospital treatment, emergency relief, and relief for those who are blind, unemployed, suffering from physical or

1 According to the principle of non-refoulement a state cannot expel or return refugees in any manner whatsoever to countries or territories where their life and freedom may be threatened because of their race, religion, nationality, membership of a particular social group or political opinion.

mental disease, incapable of earning a livelihoods for themselves and their families, and also children without support (Commentary 1997, citing E/AC.32/2: 39; E/AC.32/SR.15: 5-8).

It must be highlighted that Bangladesh is a state party to various core international human rights treaties, such as the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); the Convention Against Torture and other Cruel Inhuman or Degrading Treatment or Punishment (CAT); the Convention on the Rights of the Child (CRC); the Convention on the Rights of Persons with Disabilities (CRPD) and its Optional Protocol; and the Convention on the Rights of Migrant Workers and Their Families (CRMW). These entail that the state should safeguard the rights of Rohingya people while they are sheltered on Bangladeshi territory. The state is bound to respect their basic rights, especially by guaranteeing equal benefits and protection under the law as well as access to essential services. Moreover, Rohingya children are specifically entitled to special protection under some of these treaties.

Despite these key considerations, ensuring these rights has been a real challenge for Bangladesh and in many cases there have been social, political, economic and managerial shortcomings, which tested the humanitarian aspirations of the state regarding the management of refugee children (Lawrence et al 2019). The inadequacy of the services provided is particularly apparent with respect to health care for the Rohingya children from birth up to the age of 17, who in total make up around 298 700 of the population in all camps in Bangladesh (UNHCR 2020b). On this basis, this article analyses whether the healthcare services and provision in the aforementioned Camp 4 are sufficient to safeguard the health-related rights of Rohingya children. Since the welfare of children entirely depends on such services, investigating the state of the healthcare system is indicative of the critical human rights situation these children are facing. Inadequate health care provided to Rohingya people, especially to children, can determine violations of the rights concerned.

After explaining the qualitative inquiry followed as main methodology, we elaborate preliminary considerations in relation to the CRC in order to question the healthcare system available to Rohingya children also from a human rights-based approach. Our subsequent analysis provides insights into the existing situation. We illustrate that in the process and procedure of relief distribution in Camp 4 Rohingya people struggle to meet their basic needs such as food needs, of which the proper supply is functional to safeguard children's health-related rights. We then discuss the healthcare services, procedure and condition separately, also addressing their direct connection to children's rights. We argue that the effective combination and practice of these three components of health care has the potential

to ensure the rights of Rohingya children living in Bangladesh. After looking at pertinent positions expressed by the state concerned as well as international monitoring bodies, we make some concluding remarks.

2 Research methodology

For 23 days in September and October 2019, we carried out qualitative research to investigate the Rohingya children and parents' healthcare-seeking process in Camp 4, Ukhia, Cox's Bazar, and its relationship with the health-related rights of these children. Our research departs from the CRC definition of a child (namely, an individual under 18 years of age) and takes into consideration children up to 17 years only. In fact, in Camp 4 we selected block C (out of seven blocks) for the field work, since there the availability of children is high. We found a high concentration of 17 year-old children. This is why the Rohingya children from birth to 17 years and their parents were selected. In order to understand the notion of the healthcare-seeking process and their perception in this regard, it was done on the basis of existing healthcare programmes implemented by governmental and non-governmental organisations. A purposive sampling strategy was used to select the 24 potential participants. A total of 16 in-depth interviews with Rohingya children and their parents were conducted, combined with eight key informant interviews of healthcare service providers from governmental and non-governmental organisations. In particular, we conducted 10 in-depth interviews with the parents of children from birth to 12 years; six in-depth interviews with 13 to 17 year-old children; a further three key informant interviews with doctors and health officials; two key informant interviews with community health workers; three key informant interviews with health officials from NGOs. Qualitative tools for in-depth and key informant interviews, based on the WHO guideline, were used for data collection (Dawson et al 1993). Relevant literature, including journals, books, reports and news reports, was reviewed to collect data from secondary resources. Our inquiry adopted Neuman's three-phase coding system to analyse the qualitative data (Neuman 2003).

3 Preliminary considerations in relation to the Convention on the Rights of the Child

The four guiding principles (non-discrimination; the best interests of the child; the right to life, survival and development; the right to be heard) as enshrined in articles 2, 3, 6 and 12, provide specific safeguards for all children, including those seeking international protection such as the Rohingya children on Bangladeshi territory. A particularly relevant provision for our study is article 22. Article 22(1) requires Bangladesh to take legislative, administrative or other measures to effectively ensure

that refugee children and children seeking refugee status (whether unaccompanied or accompanied) receive '*appropriate* protection and humanitarian assistance in the enjoyment of applicable rights' (emphasis added). This entails to consider measures that are tailored to specific vulnerabilities and developmental needs of the intended beneficiaries in order to make them able to actually enjoy their rights in the existing circumstances. The textual reference to both 'protection' and 'assistance' means that the state not only has to refrain from acts that hinder children's capacity to enjoy their rights, but also that the state has to take steps to secure their enjoyment (Pobjoy 2019: 836-838). In this regard, the aforementioned guiding principles should inform the measures required as well as the content of proper levels of protection and humanitarian assistance to which these children are entitled. Article 22(2) also enjoins the state to provide cooperation in any efforts by the United Nations (UN) and other competent organisations to protect and assist all these children, as well as to trace family members of any child refugee in order to gather information needed for reunification. If this is not possible, the child should be accorded the same protection as any other child permanently or temporarily deprived of family environment. Children (with or without parents or family members) who have left their country of origin to escape war, persecution or natural disasters have to undergo a very helpless situation as a child and as a 'refugee' (Vaghri, Tessier & Whalen 2019).

Another provision of critical importance for our study is article 24. The right of the child to the highest attainable standards of health care and to access to facilities for the treatment of illness and rehabilitation must be respected during all periods of displacement. The state has to make every effort 'to ensure that no child is deprived of his or her right of access to such health care services'. For the related implementation, article 24(2) expressly requires the state to take 'appropriate measures' to reduce infant and child mortality; to guarantee the provision of necessary medical assistance and health care to all children (with the emphasis on the development of primary health care); to combat disease and malnutrition (through, *inter alia*, the provision of clean drinking water, adequate nutritious food and a clean environment); to ensure proper pre-natal and post-natal health care for mothers; to ensure (in particular for parents and children) information, access to education and support in the use of essential knowledge of child health and nutrition, hygiene and environmental sanitation; and to develop preventive healthcare services. The UN Committee on the Rights of the Child (CRC Committee) has elaborated on the normative content of these obligations in its General Comment 15, and some points are particularly relevant for our study. In terms of article 24(2)(a) state parties should take effective interventions such as community-based treatments which include 'attention to still births, pre-term birth complications, birth asphyxia, low birth weight, mother-to-child transmission of HIV and other sexually-transmitted infections, neonatal infections, pneumonia,

diarrhoea, measles, under- and malnutrition, malaria, accidents, violence, suicide and adolescent maternal morbidity and mortality'; 'strengthening health systems to provide such interventions to all children in the context of the continuum of care for reproductive, maternal, new-born and children's health' are also recommended (CRC/C/GC/15: para 34). According to article 24(2)(b) priority should be given to universal access for children to primary healthcare services to be provided in community settings (para 36). In terms of article 24(2)(c) state parties have to take, according to the specific context, necessary steps to guarantee access to nutritionally adequate, culturally appropriate and safe food and to combat malnutrition (para 43). According to article 24(2)(e) children need information and education on all aspects of health to permit them to make informed choices about their access to health services (para 59). According to article 24(2)(f) preventive healthcare strategies should address communicable and non-communicable diseases and incorporate a combination of biomedical, behavioural and structural interventions (para 62).

In line with a joint reading of articles 22 and 24, supplementary healthcare services may be needed for refugee children and children seeking refugee status, due to the heightened health risks that they may face, including rehabilitation services to promote their physical and psychological recovery and social reintegration under article 39 (Pobjoy 2019: 846). Moreover, in situations of limited resources and facilities, especially in connection with large-scale influxes such as in the case at issue, the state must consent and support the assistance offered by the UNHCR, the United Nations Children's Fund (UNICEF) and other relevant agencies to fulfil the healthcare needs of these children. The level of cooperation is left to the discretion of state parties under article 22(2), but it must be performed in good faith.

4 Relief distribution among Rohingya people

Rohingya people have entered into Bangladesh for having been forcefully displaced from Myanmar. They did not have any kind of belongings to meet up their basic needs. The government, with the aid of the UNHCR and other national or international organisations, has given shelter and undertaken many projects under the programmes Food Security and Nutrition, WASH, Shelter and Non-Food Items, Health and Education to support them, providing humanitarian aid to meet their basic needs. According to one of the interviewed humanitarian workers, 'the distribution of humanitarian aid to this kind of vulnerable people, considering the children, is very crucial because it is very tough to ensure that every Rohingya family has got their basic relief or not'. The lack of manpower, relief, a proper relief distribution system, and a management system for maintaining such a huge influx are the main reasons behind the mismanagement in the delivery of humanitarian aid. Critically, a shortage

of basic relief and a lack of clarity in relief distribution represent the main problems that hinder Rohingyas' ability to enjoy their basic rights. According to one of the interviewed humanitarian workers, 'delivering relief properly to this large population is becoming difficult day by day, because, on the one hand, the amount of relief is decreasing continuously, and, on the other hand, corruption is happening in the relief distribution'.

Humanitarian aid in the form of relief distribution has been supplied through the *Majhi* which is considered the representative of Rohingya people. The *Majhi* stands for the total population of a block of around 120 to 130 families. The *Majhi* takes the responsibility of delivering relief to every family of that block. However, the Rohingya people have expressed some complaints against the *Majhi* as well as the humanitarian workers, since they do not properly receive the relief. The father of one Rohingya child aged three years stated:

> The *Majhi* misuses his power to distribute relief. He gives priority to people known or close at the time of relief distribution. In many cases, some portion of the relief is sold outside. They even sell the milk powder and nutritional food of the babies from the relief.

This clearly is not in line with the aforementioned obligations stemming from article 22 of CRC. Moreover, it must be emphasised that under article 3(2) of CRC state parties 'undertake to ensure the child such protection and care as is necessary for his or her wellbeing … and, to this end, shall take all appropriate legislative and administrative measures'. Importantly, article 3(3) of CRC also requires states to 'ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision'. Accordingly, in the case at issue, in order to ensure child safety, the care and protection of Rohingya children need to be safeguarded through the appropriate supervision of collaborating staff. However, in the case of camp management the adequacy of staff is limited. In fact, the *Majhi* is in charge of distributing all the powdered milk or nutrients that come as relief or nutritious food, especially for children. Around 120 to 130 families live in each block and one *Majhi* is assigned by the camp authority to each block, with the responsibility to deliver the relief to the families of the block. A system is in place to monitor whether these components are properly distributed, but this is not functioning correctly. As a result, corruption is on the rise and the children increasingly become the sufferers. Children are being deprived of care and protection from camp authorities, although the state is bound to ensure protection and humanitarian assistance through adequate staffing and proper supervision so as to enable children to effectively enjoy their health-related rights.

5 Healthcare services in the Rohingya camp

As a consequence of the deprivation of basic needs due to corruption and shortage of relief, Rohingyas have become so vulnerable that they have to think only about food, shelter and safety. Thinking about health issues seems to them to be a luxury. An interviewed mother of a seven year-old child stated:

> We have to fight to manage our food daily. The environment we live in and the ration we get from the authority is not suitable for us. Our children do not get proper food and that is why they are suffering from malnutrition, which leads them to many sicknesses. Medical treatment cannot cure this health problem of our children.

In this regard two main considerations may be highlighted.

First, the situation in Camp 4 illustrates that the food and nutrition needs of children have not been sufficiently met, with implications for their health-related rights, because the degree of relief that has been provided by the camp authority is not sufficient, which means that the available resources are not being used properly. This is not in line with article 4 of CRC, which enjoins the state to undertake appropriate (legislative, administrative and other) measures to implement the rights enshrined in the Convention, to the maximum extent of its available resources, and even taking actions at the national level within the framework of international cooperation. In this regard, the CRC Committee has agreed that 'even where the available resources are demonstrably inadequate, the obligation remains for a state party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances' (CRC/GC/2003/5: para 8). Some of the preliminary considerations that we made on articles 22 and 24(2) are also relevant in this respect.

Second, healthcare services are crucially important to address nutritional and health risks faced by the Rohingya people, especially the children, in such a situation of protracted displacement. The Ministry of Health and Family Welfare of Bangladesh, *Médecins Sans Frontières* (*MSF*) and other NGOs have provided such services in Camp 4 through a range of collaborative medical assistances. In this regard, national and international organisations – such as Research, Training and Management International (RTMI); Humanity and Inclusion (HI); Partners in Health Development (PHD); Gonoshasthaya Kendra (GK); OBAT Helpers; and HOPE foundation – work to provide these services to Rohingya people. Nonetheless, one of the health service providers stated that '[w]hen it comes to medical treatment, it is very difficult for doctors to provide a good check-up to every patient because the pressure of patients remains very high and we doctors are very few in number'. The pressure on healthcare providers to give treatment to Rohingya people, especially the children, regularly increases, also resulting in a drop in quality standards

in healthcare services. The scarcity of available doctors is evident in Camp 4 and is not in line with the reasonable implementation of articles 22 and 24 of CRC, even in light of article 4 of CRC.

6 Healthcare procedures in the Rohingya camp

In Camp 4 there is a hospital named 'Refugee Health Care Centre', which is jointly run by the government of Bangladesh and the RTMI. In this hospital there is a medical team composed by one leader, two medical officers, one medical assistant, one health advisor, one EPI health assistant, a pharmacist and community health workers, who have been appointed to provide health services to Rohingyas. The community health workers have the duty to disseminate the information and knowledge about primary health care and hygiene (as provided from this centre) among Rohingya people as well as to motivate them to take treatment from this centre. The other members of the medical team provide services to Rohingyas on a shift basis. There also is a specialised delivery sector that is run by some NGOs. However, according to the interviewed health officials, the manpower is not adequate to serve the existing enormous population and there is no child care specialist for the treatment of Rohingya children. The latter suffer from many diseases such as diarrhoea and diphtheria because of their unfortified situation, and are infected with some communicable diseases which can turn into an epidemic situation.

According to one of the interviewed health service providers, 'the Rohingya people live in a very congested shanty and in crowded living conditions, and because of that they are so much unprotected to water and airborne diseases. They have come from Myanmar with lots of health complications that are contagious as well.' He added: 'Children are the most sufferers of these diseases and remain unprotected from them, which is why they are susceptible to new diseases and has been kept separated from the local people, and also their movement is being restricted into the camp.' In recent times chickenpox and diphtheria outbreaks have occurred in the Rohingya camps, which have raised public health concerns in the region. One of the interviewed health service providers in the government hospital stated:

> Recent health problems which the Rohingya people are suffering from are diphtheria and chickenpox. Rohingya children are the main sufferers. The parents come with their children who are suffering from these two diseases daily in a large number. We are facing tough situations to treat the patients properly.

Rohingya children are the pivotal victims and have been advised to remain at home and not to go outside. An interviewed 14 year-old Rohingya boy said:

> When the chickenpox outbreak happened, then the community health worker came to us and provided some suggestions to be aware of the chickenpox. I behaved according to those suggestions and I have not faced any problems. But my friends did not follow the suggestions and three of them have been affected with chickenpox.

They were seen as 'untouchables' by the health service providers and even by their community members. One of the interviewed Rohingya parents of a five year-old child stated:

> When my baby was affected with chickenpox, I took her to the hospital. The doctors did not seem helpful, and examined my baby with a behaviour that was not good. My baby and I were treated like we come from a very dirty place or the doctors will be affected with chickenpox.

In compliance with articles 22 and 24(2) of CRC the state is bound to take 'appropriate measures' to combat disease and malnutrition (for instance, through access to clean drinking water and adequate nutritious food), also possibly developing and/or supporting programmes to ensure general immunisation and primary health care. In the case at issue, however, Rohingya people, especially the children, have come to this country with many health complications. The camp authorities have taken the necessary steps to support them in such a protracted displacement crisis by providing humanitarian assistance, but these steps have not been proven sufficient. Regarding the procedure for the delivery of health care services and the healthcare-seeking process, the community health workers have been selected from the Rohingya community so that they can make their own people aware about health concerns, because Rohingyas were not introduced to the medical facilities and often did not know such facilities, nor the process of treatment, while they were in Myanmar (where they depended on their traditional healing). One of the interviewed healthcare providers stated that '[t]he parents are not conscious about the management of diseases and health, and for this reason, they are unable to take care of their children's health'. Their inexperience continued after arrival in Bangladesh and the current situation has made them and their children even more vulnerable. As they are not familiar with the healthcare facilities, they have to adapt to such processes and gain awareness about health issues, especially children's health. One of the interviewed doctors stated: 'Rohingya parents do not have enough knowledge about the health of children. They do not want to come to us when their children become sick. They come to us when the situation becomes worse. The lack of awareness harms them a lot'. A further serious matter for concern is that there is only one community health worker available to provide services to approximately 650 Rohingya people in Camp 4.

7 Condition of healthcare services in the Rohingya camp

The scarcity of healthcare service providers and the pressure for the large number of patients in the healthcare centre have made the situation even more critical. According to the interviewed health officials, this pressure has increased day by day, with the result that it has become difficult to manage it and to provide the patients with proper services. Rohingya people have expressed objections regarding healthcare services. They have to wait a long time for check-ups, but when they get their appointment to go for a check-up, the doctors do not dedicate proper time to it, even when examining the children. In emergency cases they also have to ask permission from several authorities. The Rohingya father of an eight year-old child stated that, when his daughter had a sudden onset of severe pain in her stomach, he took her to the camp hospital for treatment and, after a 20-minute delay the doctor did the examination on her and provided a prescription in which the possibility of appendicitis was mentioned, advising him to take her to the district hospital by the name of Cox's Bazar government hospital. To get his daughter to the district hospital he asked permission from the CIC office, security forces and the camp management authority, a process that required much time in such a critical situation. He also faced two check posts on the way to Cox's Bazar, which took more time, and in the meantime his daughter fainted. After all f these formalities, when he reached the district hospital the doctors and nurses took a long time to start the treatment because of his identity as Rohingya. Although his daughter recovered from the appendicitis, they faced many problems to obtain the treatment.

This example reflects a practice in Camp 4 where the security process and the permission of the camp management – rather than the children's health protection – are the main concerns. This means that the Rohingya children's best interests in health care are not primarily considered in every decision or action regarding them, which is not in line with article 3(1) of CRC. As highlighted by the CRC Committee, to determine and assess the best interests of the child, the perspectives and views of the child should be taken into account along with the specific circumstances, including any vulnerabilities or protection needs that the child may have (CRC/C/GC/14: paras 48, 75). A child suffering from a certain medical condition or a disability is an example. A further critical point is that, after maintaining all processes and rules of admitting patients to the hospital, their medical services are being interrupted or delayed because of the identity of these children, who were introduced as 'Rohingya children'. As a result, their health conditions gradually deteriorate, while the state is bound to supervise the service providers, the staff, and also the suitability of the organisations that are supposed to offer health care, in compliance with article 3(3) of CRC. In practice, these children are deprived of

healthcare services and security due to the lack of proper action and/or supervision by the state.

Moreover, basic healthcare services are provided by international and national non-governmental organisations in the camps according to the system of referral to government hospitals in cases of emergency. However, government healthcare officials do not encourage formal or regular access by Rohingya refugees to the public healthcare system of Bangladesh. One of the interviewed officials stated: 'We do not want to refer them to the district hospital as they have to face several issues to get proper treatment in that hospital. We try our best to provide treatment within the camp.' Informational mistakes regarding treatment have also been discovered in the medical reports or prescriptions issued by the doctors of the healthcare centre in Camp 4. The interviewed health officials informed us that these types of errors were caused by the pressure due to the large numbers of patients as they have limited manpower and resources.

Therefore, it has become very difficult to provide healthcare services to Rohingyas in Bangladesh. One of the interviewed health officials stated:

> The Ministry of Health and Family Welfare, with the support from WHO, IOM, UNFPA, UNHCR and UNICEF, have done a mapping of the distribution of health services in the Rohingya camps. Around 210 health facilities have been identified in Cox's Bazar Refugee Camps. In this mapping, primary health centres, health posts and hospital for completeness and to assist in referrals planning have been mainly included. We have found that the distribution of health services result to be far from equitable due to limited land availability and poor road access, as well as that the health services provided to Rohingya people are not standardised.

8 Upholding the health-related rights of Rohingya children in view of the positions by Bangladesh, international monitoring bodies or other stakeholders

Interviewed health officials have identified some common physical health conditions of the Rohingya children, namely, high pervasive malnutrition and chronic malnutrition or stunting, prevalent among 60 per cent of the Rohingya refugee children in Bangladesh (Prodip 2017; Milton et al 2017; Mahmood et al 2017). New-born Rohingya babies suffer from low birth weight and poor nourishment, which continues throughout the lives of infants. Rohingya children suffer from poor nutrition and anaemia as a result of the lack of food diversity and proper counselling on nutrition by healthcare service providers (Prodip 2017; Tanabe et al 2017). Because of the inadequate coverage of vaccination, malnutrition, overcrowding, unsanitary conditions and lack of access to safe water, the prevalence of infectious and communicable diseases, such as respiratory tract infections, diarrhoea, skin diseases, measles and water-borne diseases, are high

among Rohingya children in Bangladesh (Hossain et al 2019). There are also psychological and social effects of the emergency, with thousands of children in need of urgent psychosocial care, the lack of which can impair a child's emotional, mental, social, and physical development (Word Vision 2018).

Our qualitative inquiry into Camp 4 illustrates that, for different reasons, the existing healthcare system does not ensure adequate protection of the health-related rights of Rohingya children. The standard of services has been questioned, as it is not adequate, also due to the lack of a child-care specialist. The system has been found to be a complicated process when Rohingya parents go for the treatment of their children. In addition, the lack of health information management and awareness among Rohingya parents and children during the whole treatment procedure hinders their health-related rights. Furthermore, Rohingya children and their families have to face the problem of identity at the time of their treatment in both the camp hospitals and district hospitals.

Our findings shed light on some health-related challenges from the perspective of children or their parents. Rohingya people, especially parents, generally are not aware of the health and health care of the children, including possible medical treatment, assistance and medicines, and cannot generate awareness among their own children. The factors behind this are the continuous displacement, the poor living circumstances, the limited access to healthcare services and system, which have resulted in poor health outcomes and violations of their rights. These factors work together interdependently, with basic policy and rights issues and, therefore, healthcare service accessibility and utilisation by Rohingya children and their families are exacerbated.

We previously addressed how under international law Bangladesh is bound to respect and protect the rights of asylum-seeking and refugee children, especially as a state party to CRC and ICESCR. In this context, it is worth considering the positions expressed by the CRC Committee and other UN bodies or relevant organisations as well as by the state, in dealing with the health-related rights of Rohingya children on its territory.

In its fifth periodic report submitted to the CRC Committee under article 44 of CRC in 2012, Bangladesh specifically referred to Rohingya refugee children by underlining, among other things, the following relevant aspects: children born in refugee camps were registered (14 867 children residing there at that time); all children aged between six to 23 months were brought under a blanket feeding programme; special care for improving the nutrition and therapeutic feeding programmes; children and their families had easy access to healthcare services inside the camps, also in the local and secondary medical facilities; community management and protection against violence was strengthened through

special management; regular awareness-building sessions were conducted to develop their understanding on the consequences of violence (CRC/C/BGD/5: para 286). However, in the context of the UPR of 2012, the UNHCR addressed the large number of Rohingyas living in Bangladesh without access to asylum procedures and refugee status determination, recommending to the state to consider the establishment of such procedures to identify those genuinely in need of international protection. The UNHCR further supported previous recommendations by the CRC Committee that Bangladesh provide the unregistered population from Rakhine State with 'at minimum, legal status, birth registration, security and access to education and health care services' (UNHCR 2012: 3-4). In its Concluding Observations of 2015, the CRC Committee welcomed the adoption in 2013 of a national strategy on Myanmar refugees and undocumented Myanmar nationals, which for the first time acknowledged that undocumented Rohingyas (many of whom are children) who are in Bangladesh have fled persecution and need humanitarian assistance. However, despite the decision to provide birth certificates to children born inside two refugee camps, the Committee expressed concern that refugee children born outside the camps did not have birth certificates and had limited access to basic services, recommending to the state to 'provide birth registration and access to basic rights, such as to health and education … irrespective of their legal status' (CRC/C/BGD/CO/5: paras 70-71). Regarding respect for the views of the child, it was also recommended that Bangladesh guarantee the active involvement of children in vulnerable situations, such as minority children and refugee children, in the preparation and implementation of laws, policies and programmes affecting them and have to give proper attention to the active involvement of refugee children (CRC/C/BGD/CO/5: para 33(b)).

In its 2018 national report submitted for the UPR, Bangladesh underlined that the realisation of its 'human rights commitments faced setbacks in the face of sudden influx of nearly one million forcibly displaced Myanmar nationals (Rohingyas) to Bangladesh' (UNHRC 2018a: para 3). As recently acknowledged by Professor Yanghee Lee (Special Rapporteur on the Situation in Myanmar), 'the people of Bangladesh have shown the world the definition of humanity as they continue, despite their own hardships, to host the Rohingya people'. Bangladesh also specified that its government 'has allocated 4 707 acres of land including forest areas to build the shelters for the Rohingyas' and has provided them with 'food, medical and WASH facilities, and other basic services'. It has also established '11 additional police check posts' to ensure the smooth distribution of relief and to maintain security of the Rohingyas. It has further deployed 'more than 1 200 law enforcement officials and 1 700 military personnel' in Cox's Bazar, besides building roads and other infrastructures in the district in order to facilitate timely delivery of humanitarian assistance to the Rohingyas (UNHRC 2018a: para 126). Bangladesh reportedly

conducted the biometric registration of all displaced Rohingyas living in its territory, also planning to issue documentation to the Rohingya children born in the country. It has provided full access to all international partners and agencies including UN, INGOs, humanitarian actors, the media and other civil society organisations to work in Cox's Bazar and support the Rohingyas. In this context, the government openly affirmed remaining 'sensitised about the rights of the Rohingyas', primarily the right to safe, dignified, voluntary return to their homes in Myanmar, and to that end concluded bilateral arrangements of return (UNHRC 2018a: para 127). Being mindful of the critical conditions for safe return, it negotiated 'to include *voluntariness, non-criminalisation, livelihood, resettlement, reintegration* and other universal elements of human rights in the bilateral return arrangements' and involved UN agencies (particularly the UNHCR) in the return process.

Nonetheless, critical considerations are included in the 2018 summary of 29 stakeholders' submissions on Bangladesh to the UPR. STEPS was concerned with 'the limited access to health for many Rohingya women and girls living with HIV/AIDS', and JS15 reported that 'many Rohingya new-born babies will perish if no action is urgently taken to ensure access to better hygienic conditions' (UNHRC 2018b: para 54). In addition, JS7, AI and NHRC reported that 'more than 500 000 Rohingya refugees live in Bangladesh without any protection, and are considered to be illegal immigrants'.[2] JS6 reported that since 25 August 2016 more than 60 per cent of the Rohingya refugees are children under 18, recommending to ensure that unaccompanied and separated children are reunited with their families, and to provide assistance to all vulnerable children in need.[3] In this case, JS7 urged the support of the international community (UNHRC 2018b: para 74). In the 2018 report prepared for the UPR by the Office of the United Nations High Commissioner for Human Rights, the UNHCR commended Bangladesh for its continuing efforts in view of the fact that as at 28 September 2017, more than half a million Rohingya refugees had arrived in Bangladesh and that the massive influx of people seeking safety had outpaced response capacities. Noting the lack of an 'institutionalised approach' for addressing the protection needs of asylum seekers and refugees, it recommended that Bangladesh develop a national asylum mechanism and enact national refugee legislation (UNHRC 2018c: paras 69, 72). The significant percentage of children in the Rohingya population that had fled to Bangladesh and the challenges in ensuring their rights have led to the recommendation that the state appoint an ombudsperson

2 Joint submission 7 (JS7) of the Institute on Statelessness and Inclusion (Eindhoven, The Netherlands), the Statelessness Network Asia Pacific (Selangor, Malaysia), Amnesty International (London, UK) and the National Human Rights Commission (Dhaka, Bangladesh).

3 Joint Submission 6 (JS6) of the Child Rights Advocacy Coalition in Bangladesh (CRAC, B), Dhaka (Bangladesh), Actionaid, Dhaka (Bangladesh), and Save the Children, London (UK).

for children (para 56). Moreover, children are more exposed to HIV if their parents are HIV positive, and the organisations must ensure children's health safety without showing any disparity, by removing the social stigma or the superstition. To eradicate the disparities in the process of health services, Bangladesh has to develop and implement policies to elevate health infrastructures (UNHRC 2018c: para 47).

As far as specifically ICESCR is concerned, in 2018 the UN Committee on Economic, Social and Cultural Rights (ESCR Committee) expressed deep concern for the fact that Rohingyas do not have legal status in Bangladesh, which limits their movement outside of the camps to access healthcare services and other basic services. It was also concerned about the safety and habitability of the shelters in the camps (such as Kutupalong and Nayapara) where the risks of landslides and flooding are high, and about possible outbreaks of diseases such as diphtheria and cholera, particularly in light of the imminent monsoon season (E/C.12/BGD/CO/1: para 27, citing articles 2(2) and 11 of ICESCR). In this regard, it was recommended that Bangladesh take effective measures to recognise the legal status of the Rohingya in order to guarantee 'their access to livelihoods, healthcare, particularly emergency medical treatment, education and other basic services provided outside of the camps'. Bangladesh was also advised to take necessary steps (with the humanitarian assistance of the international community) to ensure their safety and to protect against possible outbreaks of diseases such as diphtheria and cholera (E/C.12/BGD/CO/1: para 28). Further concern was expressed about the low birth registration rate, despite significant improvement, because it has had the effect of limiting the access of refugee children to healthcare services, social security benefits and other basic services. In this regard, Bangladesh was recommended to intensify its efforts to register the Rohingya refugee children born and living in the country (E/C.12/BGD/CO/1: paras 47-48, citing articles 9-14 of ICESCR).

9 Concluding remarks

In the current world, Rohingyas are among the most oppressed and ill-treated minority communities. They have had to take shelter in the makeshift camps of Bangladesh to escape discrimination, violence and persecution in Myanmar. Due to such displacement, they are living a life without any ray of hope. Bangladesh should seriously consider acceding to the 1951 Convention and its 1967 Protocol, and urgently elaborate a national legal and institutional framework to advance an effective and adequate protection mechanism for coping with the multiple issues (including healthcare issues) affecting them, also clarifying the functions and responsibilities of national actors (that is, government, the judiciary, the National Refugee Commission, the Human Rights Commission, and so forth) as well as coordination and cooperation with international and

regional actors. In any case, as party to several human rights treaties, Bangladesh is already bound to safeguard the basic rights and dignity of the Rohingya people residing in the camps in its territory. In particular, CRC enjoins it to ensure appropriate protection and humanitarian assistance to Rohingya children, with measures to be tailored to their specific vulnerabilities and developmental needs, in order to enable them to enjoy their rights in the existing circumstances of critical health, safety and security.

Healthcare services and benefits are crucial for every human being, particularly for children, but, like other factors, there are many conditions involved in providing and receiving such services. Our analysis of Camp 4 illustrates that for different reasons the existing system struggles to secure Rohingya children's ability to enjoy their health-related rights. In this regard, regrettably the concepts of 'nation', 'state' and 'identity' have acquired relevance: when providing emergency medical assistance and healthcare, the origins and identity by which they are known (such as 'forcibly-displaced Myanmar nationals', 'Rohingya', 'refugee', 'inhabitants of Rakhaine State') have been specifically considered, and such an approach has been undertaken in and outside the camp.

Arrangements have certainly been made for health services along with other basic needs when Rohingya people came out of their country of origin with empty hands. Since their movement has been strongly restricted, everything has been arranged inside the camp concerned. In the case of health care, doctors and medical staff provide services inside the camp, but there is no arrangement to provide emergency and necessary services apart from a few pre-determined services. Similarly, there is no specialist doctor for children. If they have to go to the government hospital in the case of critical medical conditions, they have to undergo several fixed referral arrangements, which is complex in nature. No matter how severe the conditions may be, the process does not allow any exceptions.

Although the Bangladesh government, along with the support of the UNHCR and other partner organisations, has tried to provide necessary assistance in the healthcare sector for Rohingya children, they have been suffering from a lack of funds and resources as well as coordination. The health-related rights of these children have been compromised mainly because of the complex healthcare system in place and Rohingyas' lack of knowledge about health and health care. We suggest that sustainable solutions to safeguard them can be found only if the relief system, healthcare services, healthcare procedures and related conditions work together effectively, because they are all interrelated. If a single component does not function well, then the affected rights cannot be secured and children's unhealthy living conditions in the camps are aggravated. In this vein, healthcare services should be intensified and be more accessible.

Community health workers should be effectively trained to guarantee adequate health and hygiene promotion, also undertaking home visits. Information should be amply provided to these children and their parents or other relevant caregivers; mental health service in primary health care settings should be increased. A prompt response against disease outbreaks is needed and reliable health statistics are vital, and therefore organisations should give more consideration to data collection and dissemination. At the same time, more collaboration among the government, private sectors and partner organisations is needed.

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A Weizman 'Procedural precarity: An examination of Canadian immigration policy and practice in relation to immigrant youth' (2020) 4 *Global Campus Human Rights Journal* 48-67
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Procedural precarity: An examination of Canadian immigration policy and practice in relation to immigrant youth

*Aviva Weizman**

Abstract: *All newcomers, regardless of age, face a compounded variety of barriers, risks and challenges that are exacerbated by their immigrant status. However, newcomer youths face some of these same issues with heightened vulnerability, often with a lower level of visibility or opportunity to reap the benefits bestowed by immigration policies or federally-funded programming. The Centre for Newcomers, an immigrant-serving organisation that has for more than 30 years been providing services to Calgarian newcomers, has identified several substantial gaps within these parameters. This article explores some of the most pressing gaps in Canadian immigration policy in relation to the following inter-connected and fundamental issues facing newcomer youth in Canada: protracted and ongoing status issues; educational barriers; and poverty. The article then contextualises these policy gaps with reference to CFN's Real Me programme, which has recently been recognised as a best practice by Immigration, Refugees and Citizenship Canada, to provide evidence- and practice-based policy recommendations.*

Keywords: *Canada; youth; immigration; Centre for Newcomers; Real Me; gaps; poverty; education; Calgary*

1 Introduction

All newcomers, regardless of age, face a compounded variety of barriers, risks and challenges that are exacerbated by their immigrant status. However, newcomer youths may face these same issues with heightened vulnerability, even within the context of Canada. Studies suggest that vulnerabilities among newcomers are determined by absolute or relative

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material/emotional deprivations or their inability to utilise their assets due to existing economic, social, cultural and political constraints (Alysa-Lastra & Cachon 2015). However, many of the federally and provincially-funded programmes in Canada have been designed to address these compounding effects in respect to newcomer adults. When the lens is refocused upon immigrant youth, it becomes apparent that these vulnerabilities, combined with systemic issues surrounding racism, social exclusion, isolation and poverty, have increasingly long-lasting and dramatic effects, manifesting in heightened marginalisation, disenchantment and feelings of a lack of belonging within the Canadian environment (Cooper & Cooper 2008; Berns-McGown 2013).

Nonetheless, Canada is considered a desirable destination country for immigrants and refugees alike and, for these reasons, the multi-faceted and decentralised nature of the Canadian immigration policy may be perceived as both a blessing and a curse. For example, provincial governments are able to 'nominate' immigrants through express entry streams; citizens are able to privately sponsor refugees outside of government sponsorship; and individuals/employers can apply for temporary-foreign worker permits (Government of Canada 2020A). However, each type of immigration application, therefore, can be processed through a variety of different vetting systems and institutional or governing bodies, resulting in a plethora of opportunities for approval or, conversely, equally as many chances to fall through the cracks of bureaucracy (Falconer 2019A).

Regardless of Canada being lauded as a champion of 'multiculturalism', particularly since the 1971 'Multiculturalism Policy', issues relating to integration and assistance for immigrant youth still run counter to this narrative. In fact, some have argued that this pivot was 'largely a symbolic recognition of diversity rather than a substantive change in government policy' (Li 1999: 152) and, ultimately, this cognitive dissonance has sowed the seeds for Canadian immigration policies to date. This is evident in the current and federally-mandated Immigration, Refugees and Citizenship Canada (IRCC) plan, which is projected to welcome approximately one million new permanent residents to Canada between 2020 and 2022, with the unsurprising focus being primarily upon economic stream immigrants, with importance of reuniting families and upholding Canada's humanitarian tradition as corollary (Government of Canada 2020B).

With this legislated adherence to the economic viability of newcomers, it is not surprising that there is a lack of focus upon provisional supports to dependants of economic stream immigrants. However, given that currently we are in the wake of the refugee crises, where almost 71 million persons are displaced and more than half of all refugees are under 18 years of age (UNHCR 2020), a vested interest in programming for newcomer youths is even more crucial. This need is further underscored in the Canadian

context as Canada is known to be one of the highest receiving countries of resettled refugees from the UNHCR (Falconer 2019B). Moreover,

> in 2016, close to 2,2 million children under the age of 15, or 37.5% of the total population of children had at least one foreign-born parent … and children with an immigrant background could represent between 39% and 49% of the total population of children in 2036 (StatCan 2017A).

Therefore, it is imperative for the immigrant youths of today, as well as those of the future, that Canadian politicians and policy makers, as well as other stakeholders, re-centre the needs of both refugee and immigrant youth within their policies and practices.

Calgary, a city in the province of Alberta, has steadily gained popularity as resettlement destination for newcomers and their families in recent years. According to StatCan, 'over the past 15 years, the share of immigrants in the Prairie provinces has more than doubled. The percentage of new immigrants living in Alberta rose from 6.9% in 2001 to 17.1% in 2016, a higher share than in British Columbia' (StatCan 2017B). Further, as of the most recent Canadian census, just over 28 per cent of Calgarians are foreign-born, with 33,7 per cent belonging to visible minority groups (Calgary Economic Development 2020), with just over 640 000 identifying as immigrants under the age of 19 (LIPdata 2020).

For all of these reasons, the purpose of this article is to explore the procedural pitfalls of Canadian immigration policy in relation to youth. While the scope of data will rely upon Canadian data, and utilise best-practice examples from the Calgary-specific programming of the Centre for Newcomers (CFN), these learnings may be applicable to immigration policies beyond the confines of the Canadian context. That said, the three most fundamental and interconnected gaps that will be developed are the following: protracted and ongoing status issues; educational barriers; and poverty.

Each of these barriers falls within the social determinants of health framework, by which marginalised groups, including newcomers, are more likely to be affected by than their Canadian-born counterparts (Mikkonen & Raphael 2010). Being impoverished, lacking equitable access to education, or facing barriers to services due to a precarious immigration status have tenable and exacerbating effects on a person's stress levels. This in turn can lead to compounding physical and mental health issues for anyone, but even more so for newcomer families and youths. Furthermore, each of these issues is critical to the overall development, health and well-being of immigrant youths and can be found within the scope of, and often at odds with the United Nations Convention on the Rights of the Child (CRC), particularly in the context of international migration (CMW/C/GC/3-CRC/C/GC/22; CMW/C/GC/4-CRC/C/GC/23). Due to the fact that Canada has been party to CRC for almost 30 years (Canada CRC 2019)

and prides itself on being a nation built on diversity, a renewed focus on the rights of immigrant youths is urgently required.

Thus, in August 2014 CFN, the University of Calgary and other community partners created a collaborative intervention programme called Real Me, for immigrant youths between the ages of 12 and 24 in Calgary. Real Me was the first programme of its kind in Canada, as it targeted immigrant youths who were disproportionately at risk of gang involvement or ideation through an Identity-Based Wraparound Intervention (IBWI) model. The IBWI methodology may be attributed to more than a decade of work led by Hieu van Ngo, an associate professor in the Faculty of Social Work at the University of Calgary. Van Ngo's pioneering research highlighted the linkages between crises in identity development for immigrant youth and their subsequent susceptibility towards gang-related behaviours in Canada. His work refocused the centrality of relational accountability for participants, families and the broader community within an ecological and culturally competent support system. This type of multi-stakeholder accountability was considered crucial, as Real Me participants were consistently known (and continue to do so) to have experienced obstacles in 'accessing services and support in the social services, education and justice arenas' (Dunbar 2017: 13). Since its inception Real Me has directly serviced 311 youths.

While the Real Me programme continues to focus on the most vulnerable, low-income and at-risk immigrant youth populations in Calgary, research suggests that investing in youths, particularly those that are considered the most disadvantaged, will have the highest return on investment (Sylva et al 2004; Heckman 2006; Rees, Chai & Anthony 2012). Furthermore, focusing on youths that are considered the most vulnerable has been seen to have positive impacts for ***all youths*** (Toczydlowska & D'Costa 2017). Therefore, this article will utilise some evidence and practice-based learnings gleaned from CFN's 30-year background with newcomer populations in Calgary, coupled with their experience in the facilitation of the Real Me programme, to address ongoing policy and practice issues and provide recommendations that have the potential to foster positive outcomes for immigrant youths beyond the Calgarian context.

It is crucial to highlight the resiliency and ability of young immigrants; it is equally important to demystify the compounded effects of degenerative politics, and procedural precarities they may face. Ultimately, even though immigrant youths are assumed to have a higher capacity and speed in their integration processes than their adult counterparts, ample supports to enable this process remain absent.

2 Protracted/ongoing immigration issues

The issues currently surrounding the immigration status of youths often run parallel to the status of their parents and families. While 'family reunification' is considered the second of the three fundamental grounds for admission to Canada (StatCan 2017B) the budget for the Family Reunification and Discretionary Immigration programme has seen demonstrable cuts over the years due to its 'costly' nature (IRCC 2018; Government of Canada 2015). In terms of logistical eligibility, the very concept of 'family reunification' is marked by a number of legal qualifiers, such as definitive proof of marriage, or familial relation, which in themselves are documents that may be difficult for potential immigrants to obtain. Furthermore, in order for a child to fall under the jurisdiction of reunification, they must be within the age bracket that indiscriminately renders them a dependent; otherwise immigrant youths would have to apply for immigrant status separately, potentially rendering the immigration claim of a non-dependant youth into precarity.

However, who is considered a 'youth', a 'child' or a 'dependent' is highly inconsistent, as international conventions and domestic immigration law, as well as linguistic volatility, can hold enormous weight. While CRC defines a 'child' as an individual under the age of 18, a 'youth' or 'child' has a more reflexive definition in the context of Canadian migration policy. Prior to 2017 there was a period when the age cut-off for a child or youth who was considered a 'dependant' was ***lowered*** to 'under 19' (Bender 2014). While this issue was particularly daunting for refugee claimants, who were subjected to lengthy delays or processing times and wished to reunify with their families in Canada, the tremors of this impact could also be felt by those who were applying for family reunification through economic or family class migratory streams. Many principal applicants, in any of these streams, had to face the possibility of having their children age out of the allocated age of dependency during processing periods which, in turn, would potentially compromise the possibility of the entirety of their family's reunification on Canadian soil. While the age cut-off for immigrant dependants has once again been raised to include youths who are 'under 22' (CCR 2017), the methods of Canadian immigration and refugee vetting may not be in stride with article 10 of CRC, which states that 'applications by a child of his or her parents to enter or leave a state party for the purpose of family reunification shall be dealt with by state parties in a positive, ***humane and expeditious manner***' (UNGA, 1989, article 10(1); emphasis added).

To add insult to injury, issues surrounding status and immigration class have ongoing detrimental outcomes for immigrant youths, as these policies exacerbate not only a youth's own individual precarity, but also that of their family. The psycho-social effects of familial estrangement

coupled with a loss of cultural identity may lead to heightened feelings of isolation for immigrants, and even more so for immigrant youth and by proxy, resulting in participation in gang activities. Studies relating to gang ideation have identified that the promotion of meaningful connections with peers, adults or family members can mitigate anti-social behaviours that may lead to future gang involvement (Rossiter & Rossiter 2009; Sersli, Salazar & Lozano 2010). However, when a youth (and their family) has a precarious immigration status, they may be less likely to develop meaningful relationships due to the notion that their residency has an expiry date. Additionally, unresolved status may also foster a tension or disconnect between identity and belonging to both the country of origin and its cultural leanings against those of their new-found homes. Without ample support to navigate such stressors, immigrant youths can find themselves even more at odds with their evolving transnational Canadian identity, their receiving communities and the institutional frameworks that accompany it. These challenges may only be exacerbated by the declining intergenerational relationships when the number of successful family reunifications has been reduced (Sheilds & Lujan 2018: 4). Lastly, researchers have found that immigrant youths with unstable families are 'less likely to prosper scholastically and are more likely to become delinquent' (Beiser, Shik & Curyk 1999).

From CFN's Real Me programme as well as other youth-related data, we have found that there is a substantial gap regarding services to youths who remain permanent residents beyond the federally-funded landing threshold (which is capped at three years, typically). Our data suggests that more than 60 per cent of participants in the Real Me programme have outstanding issues regarding the immigrant status of family members. In fact, many of the participants of the Real Me programme, along with their families, have no status, have lost their status or have for protracted periods been permanent residents, rendering them no longer eligible to access federally-funded support services. Fortunately, the funding streams attributed to Real Me are not required to follow the same regulations, as the programme is not dependent upon federal funds. However, this solidifies the assumption that protracted immigration issues are salient among immigrant communities in Calgary and Canada, on the whole; pointing towards a federal funding blind-spot regarding those with heightened vulnerabilities due to their longstanding undetermined immigration status.

Thus, while decentralisation and multiple avenues for migration are available, the inconsistency in eligibility criteria and governance creates an accountability vacuum – thrusting immigrants and refugees into precarity. This type of inconsistency and decentralisation is evident at all levels of the immigration process, even within the innocuous semantics of who is considered to be a 'child'. For example, the multiple governing bodies overseeing the migratory and asylum processes in Canada, such

as Immigration, Refugees and Citizenship Canada, the Immigration and Refugee Board and the Canada Border Services Agency, maintain seemingly ever-changing involvement in the intake, approval, triaging and appeal processes (Falconer 2019A). This convoluted division of labour is mirrored in the ways in which international, federal, provincial and municipal legislative responsibilities to immigrants are applied in Canada.

3 Educational barriers

Education poses yet another barrier for immigrant youths in Canada and has far-reaching implications for future integration and belonging in the Canadian context. While the general right to childhood education is enshrined in article 28 of CRC, many of its caveats are not met at the necessary level of immediacy. It has been widely reported that at the international level, educational rights for children are followed with the least degree of dedication and often are the first to lose their financial backing (HRW 2016; Global Education Monitoring Report Team 2011). These sentiments manifest upon Canadian soil as well, as domestic English-as-a-Second-Language (ESL) programming capacities, where the majority of students with immigrant backgrounds are placed, are often chronically under-resourced (Shields et al 2019). Further, there have been numerous studies indicating that newcomer youths, particularly those who belong to visible minority groups, often are put into grades or language classes that are well below their educational capacity (Bedri, Chatterjee & Cortez 2009; Baffoe 2011; Taylor & Krahn 2013), with notable implications for educational completion. Even in the context of Calgary, approximately 74 per cent of students attending ESL classes did not complete high school or earn a diploma (Watt & Roessingh 1994).

The lack of operationality and cohesive commitment to education for immigrant youths in provincial legislation was further underscored in Bejan and Sidhu's 2010 study of the Toronto Catholic District School Board. There was found to be not only a lack of dedication to CRC calls regarding indiscriminate education, but also a marked inconsistency with article 49.1 of the Ontario Ministry of Education Act (Ontario Ministry of Education 1990), which reiterated the universal right to education for all children, regardless of immigration status. In fact, Bejan and Sidhu found that

> only 31 schools (15.4%) indicated that they would enrol a child who lacked immigration status, 57 schools (28.4%) completely denied admission for non-status children and 113 schools (56.2%) did not know if a child without immigration status could be registered at their school (Bejan & Sidhu 2010: 1).

Another 13 schools alluded that all non-status students would have to pay an additional fee to access education, similar to international students.

However, since this fee was relatively high, at $10 000 to $12 000 per annum, it would effectively bar newcomer children without residency status from schooling (Bejan & Sidhu 2010: 12).

This lack of dedication to the educational rights of immigrant youths can be doubly damning. Newcomer youths not only are given less opportunity to academically excel, but they are also subjected to the more insidious, compounding effects that may have long-term detrimental outcomes to their self-confidence and self-actualisation. Practices that denigrate the academic ability of newcomer (and refugee) children reinforce negative conceptions of self-worth, creating a feedback loop which is only exacerbated by discriminatory behaviour on behalf of other Canadian-born students, teachers and also the broader Canadian context. However, this sense of estrangement within scholastics is not only applicable to youths who have their abilities consistently downplayed. Studies have shown that some newcomer youths who are given the opportunity to participate in programming at an age-appropriate grade level have also experienced feelings of alienation within Canadian pedagogy. Immigrant students namely have posited that the Eurocentric curricula and exercises often largely exclude the contributions and histories of minority groups – not only in the context of Canadian colonialist narratives, but also those of the international stage (Li 2009; Kayaalp 2014).

Data gleaned from CFN's Real Me programme evaluation further demonstrates the gaps that exist between other highly vulnerable, at-risk immigrant youths and their educational attainment. This is demonstrable through the fact that educational needs were reported as the primary purpose of contact in the general logs, with more than 1 800 claims (Gyun Cooper Research Associates Ltd 2018: 20) during the first five years of the programme. While schools were initially sceptical about working collaboratively with the Real Me practitioners to ease participants' navigation in education, the positive impact of the IBWI methods on education was most often mentioned (Gyun Cooper Research Associates Ltd 2018: 42). However, the participants' self-evaluation commentary yielded conflicting data points. Many participants became more aware of the discriminatory practices they had faced or were continuing to face in an academic setting and themselves posited little improvement within their own educational abilities (Gyun Cooper Research Associates Ltd 2018: 70). Thus, they reported a smaller improvement in their own educational progress than the progress reported by educational institutions/teachers as well as the Real Me practitioners. Additionally, through interviews with both participants and their families, it became apparent that supports necessary for success in the Calgarian education system were also lacking at the level of the family unit. Many families were not well-versed in how the education system worked, the specificities necessary for continued

learning at a post-secondary level, nor were they given the baseline knowledge to effectively advocate for themselves.

Ultimately, the educational experiences of immigrant youths may be understood as reflective of the experience of many adult immigrants with the Canadian labour market. Immigrant children and youths, much like their parents, are exposed to a system engrained with biases and, thus, have difficulty obtaining recognition of their skills or achievements. While there is policy-related and institutional virtue signalling towards educational and economic equity for newcomers, the means by which immigrant adults and youths are able to reach their potential often is overshadowed by discriminatory, ***laissez-faire*** practices. This once again is evident through the government of Alberta's Bill 11 (Fair Registration Practices Act). While other provinces already have in place similar legislation to remedy barriers to credential recognition, Alberta has yet to make Bill 11 actionable (Government of Alberta 2020). Much like issues borne out of cognitive dissonance between policy and practice in immigration status, education and employment-related policies could be better operationalised with an increased coordination and accountability between all levels of governance.

4 Poverty

As in the case of education, poverty has been identified as one of the most relevant indicators within the social determinants of the health framework. However, the concept of 'poverty' among newcomer families often serves as a marker of, or an amplifying factor to, other underlying issues or precarities, such as service accessibility, mental and physical health needs, language barriers and educational/professional credential recognition. In recent years there has been a substantial increase in evidence indicating that visible minorities have sizably lower economic returns than that of their Canadian-born, Caucasian counterparts (Li 1998; Pendakur & Pendakur 1996; Hou & Picot 2003; Turcotte 2019).

Since the late 1980s there have only been marginal increases in economic gain for recent newcomer populations on Canadian soil (Li 1988; Picot, Hou & Coulombe 2007; Evra & Kazemipur 2019). Calgary's data is consistent with this statement, as 17,3 per cent of people who have immigrated since 2011 are ***still*** living in poverty, accounting for more than 16 000 individuals (StatCan 2016). This percentage is almost a full 10 per cent higher than that of the non-immigrant Calgarian population (StatCan 2016). For newcomers that are under the age of 17, almost 26 per cent are considered to be living in low-income scenarios, which differs drastically from the 10,6 per cent of non-immigrant youths who are part of the same economic category (StatCan 2016). Ultimately, the poverty

rates associated with newcomer children and their families can only be understood as simply unacceptable in a country such as Canada.

Through the inconsistencies between the legal instruments that Canada has ratified and how they operate in practice, it once again is apparent that there are issues regarding the actionability of federal policies and international conventions, even in the vocabulary used. For instance, according to articles 18 and 27 of CRC Canada is legally bound to render 'appropriate assistance' to parents, to ensure healthy childhood development through institutional means as well as to ensure the right to provide material assistance and support programs within the realm of a child's development (UNGA 1989, article 18(2-3), article 27(3-4)). While the federal government does allocate funds to various settlement agencies, there is a significant gap in children's services in the context of federally-funded immigration programming, particularly within settlement providers that are considered to be the first contact points for newcomer populations. Furthermore, while this is a common trope within international legalese, what is deemed 'appropriate' or within the scope of Canadian 'national conditions and within their means' (UNGA 1989, article 27(3)) is arguably not met with consistent vigour, as the poverty levels among immigrant families and the lack of equitable credential recognition streams/programming embedded in the immigration policy demonstrates a lack of effective, or 'appropriate' measures to ensure that immigrant children are not impoverished.

However, 'appropriate' as a signifier is also used in a converse manner, which is identifiable via the accessibility of affordable child-minding for immigrant parents. According to the 2017 Early Childhood Education Report, many Canadian families have difficulties accessing affordable healthcare. While more than half (54 per cent) of children between the ages of two and four are able to attend some kind of accredited early childhood education programme, this does not take into account the variances in early childcare accessibility/affordability between Canada's provinces and territories (Akbari & McCuaig 2017). Further, this data is not disaggregated along the lines of immigration status. Within the context of CFN, these gaps are highlighted through a variety of means. First, in accordance with federal funding, only certain clients who meet programme-specific eligibility[1] criteria can access CFN's limited in-house child-minding services (38 openings). The majority of the places (34) are only available to individuals enrolled in CFN's language courses (LINC) and the remaining four are allocated as 'drop-in'. While the waiting list

1 Eligibility criteria for CFN's child-minding are as follows: (i) At least one parent must be enrolled in CFN's LINC programming – where Permanent Residency, and a CLB level under 4 is a requirement. (ii) The child care service hours must align with the hours/class schedule of the parent. (iii) The child enrolled must be between the ages of 19 months and 5 years.

for child-care is contingent upon scheduling and time slots of LINC programming (that is, morning, afternoon or evening); those needing child care during the least popular time slot are expected to be on the waiting list for at least one month. LINC students who are enrolled in the most popular time slots (part-time morning) typically face a six-month to one-year waiting list. Furthermore, once immigrants have passed LINC level 4, their ability to access federally-funded child care is waived, as this is considered an 'appropriate' level of language competence to enter the Canadian job market. Thus, newcomer parents have to reduce their language-learning or working hours to mind their children, ask their older children to take care of their siblings at the potential expense of their educational development or integration, or pay a portion of their wages to access childcare services, perpetuating the cycle of poverty. While childcare services were made to be more affordable ($25 per diem) to low-income families under Alberta's previous New Democratic Party (NDP) provincial governance, the capacity of these day care centres was consistently capped. This is expected to continue under the current United Conservative Party (UCP) provincial governance and funding for low-income and affordable child care is likely to be slashed in the next fiscal quarter (Hudes 2020).

The Community-Based Care for Newcomer Children (CBCNC) programme,[2] aimed at finding subsidised and affordable childcare services for the children of LINC students beyond the confines of CFN, reported that of the 57 day care centres with which they were affiliated in the past two years, only 22 fell into the $25 per diem category. Seven (all YMCA-affiliated) of these 22 were no longer accepting additions to their waiting lists, while another programme partner reported that their waiting lists were also capped, at 50 children for each available age cohort (19 months, 19 months to three years and three to five years old). Additionally, before the outbreak of COVID-19, the CBCNC waiting list stood at 36 children, due to a lack of funding. This is alarming due to the fact that referrals to this programme require that one should already have been on a waiting list through other LINC schools for three months. Through these examples it becomes apparent that 'appropriate' support to immigrant youths and their families through provincial and federal means cannot be construed as ample.

However, investments in youths, particularly those who are consistently seen as the most vulnerable, is of inherent import to the greater good of

2 Criteria for low-income child minding through the CBCNC programme is as follows: (1) Household income must be less than 50K (both parents, together). Proven by tax documents (line 150) or through calculation of all earnings from the time landed in Canada, providing pay stubs. (2) Both parents must be working, in school, or looking for work (which is only applicable for four months and all job applications must be proven). (3) One parent must have either a PR card or be citizen. PR paper, landing papers, conventional refugees are not accepted. (4) Children must be in attendance of the daycare for 100 hours every month to maintain subsidy funding. (5) At least one parent must have a language level of less than 4 CLB.

Canadian society. Numerous studies have been conducted that demonstrate that making investments in childhood developmental programmes and initiatives can have an enormous impact. For instance, according to the United Nations Children's Fund (UNICEF):

> Alongside addressing family and community needs, public investments at an early stage of human development are justified on purely economic and social grounds due to expected wider benefits to individuals and society at large. In the context of developed countries, investments in children are often seen as the most cost-effective way to break the cycle of disadvantage and promote social mobility (European Commission 2013) or as a vehicle for strong and inclusive growth (OECD 2016) (Bruckauf & Cook 2017: 9).

Further, another UNICEF report explicitly indicated that

> tackling socio-economic inequalities experiences by migrant and refugee children has the potential to improve the position of all children as well as to reduce "bottom-end inequality" as this group is overrepresented in the lowest income decile. Migrant and refugee children are often affected by income inequality to a greater extent than other children/migration decisions affect the entire course of a child's life, which might be more positive on the whole depending on the child's access to education, labour market and health care and her or his overall wellbeing (Toczydlowska & D'Costa 2017: 6).

It is, thus, for the reasons of remedying outcomes for some of the most vulnerable immigrant youths that the Real Me programme was implemented. Real Me was explicitly tailored to the needs of Calgarian immigrant youths who were at the highest risk of gang-ideation, who were almost entirely from lower-income households and neighbourhoods. Additionally, CFN had previously created a bridging programme for the Real Me graduates to access, called the Youth Possibilities Project (YPP), which was funded by Service Canada. YPP aimed to increase employment opportunities and provide skill-building activities to break through cycles of poverty; effectively arming immigrant youths with the confidence to succeed in the Canadian labour market. However, similar to the fate of educational programming for immigrant youths, funding for this programme was inconsistent and lacked continuity.

5 Analysis of Real Me and discussion

Given the previous discussion on the topics of poverty, education and protracted immigration status, particularly when viewed through the social determinants of health framework, it is apparent that there is a need for more resources to be allocated towards immigrant youths. All these issues, coupled with the discriminatory practices and the subsequent lack of coordination, responsibility and actionability between all levels of governance, highlight the systemic pitfalls in procedural aspects of immigration policies. However, CFN's Real Me programme recently showcased as a 'promising practice' of how to earnestly work towards

practical, productive and effective outcomes for immigrant youths who are impoverished, face barriers to education and experience immigration issues in the Canadian context (Pathways to Prosperity 2020). The adaptability of Real Me in evolving alongside the needs and gaps identified by its participants underscores its transformative force for youths, their communities and policy on multiple levels, beyond the traditional scope of strict federal funding allocation.

Real Me's results were powerful for many reasons, beyond the explicit goal of reducing gang-ideation and criminal offences within its at-risk cohort. For all data points collected throughout the final evaluation documents, the employment of the identity-based wraparound intervention model may be understood as a key contributor to Real Me's success. The fundamental points of service embedded within the wraparound methodology were 'individualised intervention; positive mentorship; academic support; employment and skills support; pro-social activities; and support for family functioning' (Gyun Cooper Research Associate Ltd 2018: 3) which intentionally included educated and empowered multiple stakeholders in a participant's life, such as the family unit, teachers, justice officials, employers and mentors, to promote the positive development of high-risk immigrant youths through an ecological approach. Through the engagement of multiple actors, including those that are typically governed by municipal and provincial legislation, Real Me was able to permeate the silo of responsibility for immigration-related matters beyond their traditional scope. Further, through the buttressing of holistic, natural and individualised support models, which emphasised accountability as a relational and multi-faceted venture, participants were able to build their self-confidence through interpersonal and community-based means in a more organic fashion. Lastly, Real Me's success may be attributed to its quasi-experimental nature and diverse funding sources. Since the programme was not funded through typical federal streams, which have strict regulations regarding the immigration status or longevity of permanent residency, Real Me was able to work with those who have consistently fallen through the cracks embedded in Canadian immigration policy.

The Real Me programme and its evaluation also highlighted a number of other interesting areas, which could inform and improve future policy and its actionability. First, the IBWI methodology spurred a marked increase in positive family functioning (Gyun Cooper Research Associate Ltd 2018: 43, 55). While this should not be surprising due to the extensive family involvement that is embedded within Real Me and IBWI, it points towards the notion that shifting programming and policy to serve clients through an ecological model based upon coordinated and multi-stakeholder accountability can yield tremendous results for social cohesion. Second, through the incorporation of culturally-competent and

appropriate facilitators and mentors, Real Me participants were noted to have an improved sense of self-confidence. This is of particular importance as studies indicate that positive association with one's own cultural/ethnic identity has been proven to reduce depressive behaviour among immigrant youths (Nguyen, Jennine & Flora 2011). Thus, the emphasis on positive cultural and ethno-racial identity development within programming outcomes and intentionally staffing the programme with 'successful adult role models who were themselves integrated immigrants and members of ethno-racial minority groups' (Nguyen, Jennine & Flora 2011: viii) had measurable results (Nguyen, Jennine & Flora 2011: 47-49). Finally, as mentioned, needs relating to education were one of the highest mentions within Real Me's contact logs (Gyun Cooper Research Associate Ltd 2018: 24). However, there was a significant inconsistency between the reported improvement in educational attainment for immigrant youths on behalf of teachers and practitioners and self-reported educational improvements for the participants themselves. In fact, the majority of youth facilitators reported marked improvements in participants in the context of education, while only 22 per cent of programme completers indicated that they felt such improvements in their relationships to school (Gyun Cooper Research Associate Ltd 2018: 70). While there may be many variables leading to this discrepancy, the participants' increased understanding of engrained, systemic discriminatory practices embedded in the Canadian education system ought to be addressed procedurally (Gyun Cooper Research Associate Ltd 2018: 71).

In conclusion, while the Real Me programme was created for the specific needs of at-risk immigrant youths in Calgary, its techniques can be tailored to bridge the gaps that immigrant youths in other locales may face, in Canada and abroad. While adopting an IBWI methodology that honours an individual's cultural background and fosters an interpersonal vision of accountability is no easy task, it can provide a foundation for collaborative programming, practices as well as transformative policies.

6 Policy recommendations

Based on the research conducted for this article, in conjunction with findings sourced from CFN programming and the Real Me evaluation, a number of recommendations towards procedural policy and actionability improvements can be made.

Above all, it is necessary to rethink eligibility criteria for, and access to, services in Canadian immigration policies, particularly with reference to highly-vulnerable newcomers. A restructuring of this nature not only would reinforce the longstanding humanitarian sentiments embedded in federal immigration policies, but could also legitimise these underpinnings through intentionally providing services to those who face the most precarious

livelihoods. For example, allowing immigrants and refugees to access child care, settlement or employment services, regardless of immigration status/documentation, and/or ensuring that families experiencing highly-precarious living situations are able to access necessary support services for themselves, their families and their children, regardless of 'aging out' of the three-year, federally-mandated eligibility timeline, would reinforce alignment with CMW/C/GC/3-CRC/C/GC/22, paragraphs 6 & 18.

Second, increasing and coordinating the number of cultural, ethnic, linguistic and age-appropriate staff in the writing of federal immigration policy and programming would further increase alignment to both CRC (article 12) as well as the more recent General Comments highlighting the context of migration (CMW/C/GC/3-CRC/C/GC/22 & CMW/C/GC/4-CRC/C/GC/23). Additionally, increasing opportunities to meaningfully engage in skill-building workshops relating to culturally-diverse knowledges/practices/traditions for all individuals who may be affiliated with immigration, in both policy-writing and practice (that is, personnel in the fields of governance, medicine, education, justice and settlement) would further embed and actualise the concepts outlined in CRC, in the 2017 joint General Comments more meaningfully.

Third, it would be beneficial for the federal immigration policy to be reassessed in relation to the needs of immigrant youths, particularly through realignment with CRC (to which Canada has been a state party for just over 30 years) in addition to the joint General Comments mentioned above. For instance, ensuring that schools have ample funding and resources for ESL programming could be one of many potential routes towards establishing alignment with CMW/C/GC/3-CRC/C/GC/22 paragraph 18. Additionally, ensuring that schools are dedicated to providing education to every child, regardless of their own or their family's immigration status would fit the parameters outlined in CMW/C/GC/4-CRC/C/GC/23, paragraphs 59 & 62, in practice. Another means of aligning the procedural integration of these international instruments beyond the confines of policy could include a culturally-competent restructuring of pedagogy and curricula for the youth – which could prove to be proactive in negating future discriminatory or xenophobic ideation (CMW/C/GC/4-CRC/C/GC/23, paragraph 63). Furthermore, in accordance with article 10(1) of CRC, the promotion of a more cohesive, coordinated and appropriately-staffed immigration system to enforce 'expeditious' timelines for citizenship or migrant status (Falconer 2019A) could improve the likelihood of success in family reunification for those who have teenaged dependants. Building off this previous point, to maintain allegiance to the central theme of 'family unification' in the context of Canada's immigration policy – promoting programming that makes an explicitly holistic focus upon the entire family unit, rather than individuals – could also prove to be beneficial, as we have seen through the analysis of the Real Me programme. Lastly, a more

thorough investment, at all levels of government, in resources allocated towards credential recognition for all immigrants (CMW/C/GC/4-CRC/C/GC/23, paragraph 61), regardless of age, could provide fertile ground for newcomers to break through the cycles of poverty with greater ease.

Fourth, a concrete shift towards acknowledging the politicised nature of migration through the promotion of historically-aware research could lead to the production of more transformative immigration policies and practical operationalisation. Some ways in which this shift could occur are through an increased and ethically-minded effort to collect disaggregated data, especially for exceptionally vulnerable immigrant populations; increased investment in understanding the residual effects of cross-generational trauma on immigrants and their families; increased investment and concentration upon indigenous ways of knowing and decolonising methods, in the context of immigration; and in alignment with decolonial methods – creating, funding and applying recommendations of advisory groups made up of immigrants, refugees and youths that come from diverse backgrounds at all levels of policy and practice.

7 Conclusion

Given the fact that the number of immigrant youths is projected to increase over the coming years, revisions in policies relating to the youth and their subsequent operationality is required. In order for Canada to adequately and 'appropriately' portray itself as a champion of diversity and multiculturalism, the needs of immigrants, particularly immigrant youths, ought to be addressed more thoroughly at all levels of governance. However, the challenges that immigrant youths and families face may not be entirely contingent upon policy. Rather, the means by which immigration policies are operationalised, prioritised and embedded in Canadian collective consciousness also require a cognitive leap. While it is obvious that turning a blind eye to the needs of immigrant youths, particularly those that are highly vulnerable, exacerbates their precarity, developing practices that highlight relational accountability and foster community-centred ideals can be transformative. Ultimately, as long as immigration policies are understood as a 'federal construct' and provincial or municipal institutions do not actively engage or coordinate their policies, practices or resources to support newcomer youths, these gaps will continue to widen.

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Children's rights to privacy in times of emergency: The case of Serbia in relation to internet education technologies

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Abstract: *In the digital era the privacy of children has become an issue of particular importance. With the spread of COVID-19 many schools turned to online education, causing this vulnerable group of internet users to be more and more engaged in the digital sphere. It has thus become questionable whether children are protected enough when education systems increasingly turn to online teaching. When Serbia declared a state of emergency in an attempt to contain the new virus in March 2020, the national educational system also implemented online schooling. Since there have been severe privacy breaches in Serbia even before this pandemic, a basic question arises as to whether the right to privacy of children was adequately respected and protected when the students were required to use a number of programmes, networks and applications in order to attend classes. This article investigates the right to privacy of children during the recent application of online teaching/learning technologies and platforms in Serbia, exploring key emerging issues concerning online schooling and identifying further research on problems pertaining to this right that will inevitably appear in the years to come.*

Key words: *privacy of children; digital rights; online education; state of emergency; Serbia*

1 Introduction

Due to changes brought about by new technologies, the notion of digital rights has come into the spotlight. Digital rights encompass human rights

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in terms of people's access to and use of electronic devices and networks, thus including the right to freedom of expression, the right to freedom of assembly and the right to privacy. Indeed, if there ever was a dividing line between 'digital rights and human rights, it has blurred to the point of irrelevance' (Jansen Reventlow 2017). Digital rights have acquired particular importance when societies shifted their activities into the online sphere due to the COVID-19 pandemic. Notably, even in times of public emergency human rights must be respected, and emergency powers should be exercised within the parameters provided under international human rights law: The derogation of certain rights can be allowed only in situations threatening the life of the nation; limitations on certain rights must fulfil the requirements of legality, necessity and proportionality, and be non-discriminatory, and can be introduced only for reasons of national security or public order or for the protection of the rights and freedoms of others. However, across the world many government agencies have been collecting and analysing personal information about large numbers of identifiable people, and as our society struggles with how best to minimise the spread of the coronavirus disease, we also analyse 'the way that "big data" containment tools impact our digital liberties' (Electronic Frontier Foundation 2020). As warned by the European Digital Rights association, some of the emergency-related policy initiatives risk the abuse of sensitive personal data even while attempting to safeguard public health, which has 'significant repercussions for privacy and other rights both today and tomorrow' (EDRi 2020).

In the recent emergency context, many schools around the world explored and used technological solutions to ensure continuity in students' educational experiences and also relied on video-conferencing technologies. They 'faced choices about how to rapidly move into online platforms and services that are quick to implement, can accommodate lots of students and are user-friendly' (Bailey et al 2020). In this regard, in March 2020 the United Nations Educational, Scientific and Cultural Organisation (UNESCO) shared relevant recommendations. In particular, schools were encouraged to 'protect data privacy and data security' in the online sphere (i) by assessing 'data security when uploading data or educational resources to web spaces, as well as when sharing them with other organisations or individuals', and (ii) by ensuring 'that the use of applications and platforms does not violate students' data privacy' (UNESCO 2020). Schools were also recommended to 'blend appropriate approaches and limit the number of applications and platforms' (i) by combining 'tools or media that are available for most students, both for synchronous communication and lessons, and for asynchronous learning' and (ii) by avoiding 'overloading students and parents by asking them to download and test too many applications or platforms'. Nonetheless, experts have found 'widespread lack of transparency and inconsistent privacy and security practices in the industry for educational software and other applications used in schools

and by children outside the classroom for learning' (Strauss 2020). In fact, the digital safety of children has become a matter of concern regarding online schooling because some online portals may not have been put behind strong filters, and even before this period 'security breaches with online learning were not uncommon' (Strauss 2020).

During the pandemic digital rights have faced critical limitations and infringements in South-East and Central Europe, where 'in the semi-democracies of the region, dominated by regimes with elements of authoritarianism, there is legitimate concern about disproportionate interference in citizens' personal data' (Ristić 2020). In the case of Serbia, it has become clear that problems of data protection have caused serious breaches of citizens' rights to privacy, leading to legal uncertainty that threatens democracy (Ristić 2020). According to a research on data flow in the 'COVID-19 Information System' (Krivokapić & Adamović 2020), the current systems and registries of the country find it difficult to respond to existing needs and challenges regarding data protection and hence privacy. One of these registries is the electronic teachers' book (introduced in 2017 and applied in all Serbian schools since 2019), which contains a variety of data about students, thus posing privacy challenges. Moreover, as in the case of over 160 states that closed national schools due to the pandemic, Serbia abruptly shifted the teaching activities online, with the result that its schools had to broaden the use of technology to minimise learning disruptions related to COVID-19. However, one may wonder whether children's rights to privacy were adequately respected and protected when the students were required to use several programmes, networks and applications to attend classes. As clearly stressed by one scholar, in general 'educational technology has long posed serious privacy and equality problems, and these problems are now reaching a boiling point', and 'hasty choices now could have long-term impacts' (Han 2020).

In order to examine the right to privacy of children during this unexpected application of internet education technologies in Serbia, this article first considers relevant international, regional and domestic legal frameworks. Relevant literature on online schooling by Livingstone, Boyd, Krivokapić et al is then taken into account, giving an overview of global trends and issues progressively posed on how digital technologies impact children's safety and privacy. The specific situation in Serbia is subsequently examined by referring to the most recent studies on privacy as undertaken by SHARE Foundation, Balkan Insight, Balkan Investigative Reporting Network and others. After reflecting on the main privacy matters existing in Serbia to illustrate the setting in which schools operate, the article focuses on key emerging issues concerning online teaching and learning tools as applied due to the COVID-19 outbreak. It considers how these have affected children's privacy in Serbia, exploring what improvements could protect them in future online teaching exercises and provide safe

access to platforms, as well as pointing at possible problems about this right in the years to come.

2 Legal frameworks for the protection of a child's privacy and related rights in the digital environment

In many countries digital technologies have changed legal landscapes. States are attempting to adopt new internet-oriented laws, or to amend existing ones to make them compliant to the online sphere. These attempts have been more or less successful in different parts of the world, but what many hardly take into account are the rights of children on the internet. As highlighted by some scholars (Lievens et al 2019: 489), 'while international bodies as well as governments are actively promoting ICT access and investment so that businesses can innovate and compete in the global economy and society benefits from informational, civic, educational, and other opportunities' (UN Human Rights Council 2016), some organisations are alert to the child rights issues that arise', among others also protecting children's privacy online. In this context scholars have started to reconsider many of the articles of the Convention on the Rights of the Child (CRC) in light of their possible 'digital dimension'.

It must be emphasised that the four guiding principles as embodied in articles 2, 3, 6 and 12 of CRC are extremely important for children in the digital environment and for the purposes of our inquiry. Specifically, article 3 requires that the best interests of the child are a primary consideration 'in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies'. Accordingly, every action with a potential impact on children's rights (such as privacy and freedom of expression) in the digital environment should take into account their best interests, the balanced assessment of which should be central in policy-making and decision-making practices (Lievens et al 2019: 492). Notably, even though article 3(1) entails an individual assessment (CRC/C/GC/14 2013: para 22), the UN Committee on the Rights of the Child (CRC Committee) has also affirmed that states have to assess and take as a primary consideration the best interests of children *as a group* or *in general*, for example, in their legislative actions or policy making (CRC/C/GC/14 2013: para 23). This entails a children's rights impact assessment that considers children's views as well as protection versus empowerment aspects (CRC/C/GC/14 2013: para 35). States also have to ensure that the assessment is undertaken in the actions by private actors (CRC/C/GC/14 2013: para 13), such as technology companies and platform providers. Focusing on article 2, the right to non-discrimination certainly entails the equality of children's access to the digital environment. In this regard, 'internet access is becoming ever more taken for granted as a means of ensuring child rights, and in consequence, lack of (sufficient or reliable) access is a pressing problem for large groups

of children across the world' (Lievens et al 2019: 491). In this regard states should support and widen policies that can overcome digital exclusion in its various forms, especially pursuing policy objectives that apply to all children and thus really are non-discriminatory. Regarding article 6 and the holistic concept of development as interpreted by the CRC Committee (CRC/GC/2003/5), in the era of new technologies a child's development has gained more and more importance, and is closely connected with education. In this vein, the goal of education is 'the development of the child's personality, talents and mental and physical abilities to their fullest potential' (article 29). Finally, article 12, which enshrines children's rights to freely express their views in all matters affecting them and have these views count in accordance with their age and maturity, has significance even in the digital context and related state policies should be created through decision-making processes that effectively include children's participation.

One of the rights particularly relevant for the purposes of our analysis is a child's right to privacy and its related dimensions under article 16 of CRC. The first paragraph requires states to ensure the protection of a child's privacy, family, home, correspondence, honour and reputation against arbitrary or unlawful attacks or interference with these rights; and the second paragraph also emphasises that children have a right to protection of the law from all relevant forms of interference or attacks. This is connected to protecting the privacy of children in the online sphere as they do not have sufficient awareness of the possible consequences of posting and revealing their personal information on the internet (OECD 2011). However, it is important to achieve a balance between the child's right to privacy and other rights relevant in the online sphere (such as freedom of expression and association). In fact, 'privacy is a fundamental component of participation, and accordingly, children should be given a voice in the policymaking process, and their perceptions of privacy should be duly taken into account' (Lievens et al 2019: 497). Moreover, article 13 of CRC recognises a child's right to 'seek, receive and impart information and ideas of all kinds' as part of the right to freedom of expression. There is the abundance of means of communication today and this right has a broad scope of application. For example, children can express their views and connect with others on blogs and social networking sites, as well as seek information on topics that are significant to them (Lievens et al 2019: 494). Equally relevant is the right to freedom of association under article 15 of CRC, as children associate in the digital environment. What is very risky for them are 'the digital traces that online expression and participation leave, especially since these tend to be automatically kept by the companies that provide platforms for social networking and their records can, under certain conditions, be demanded by States' (Lievens et al 2019: 496).

It is worth considering that in its statement on COVID-19 made in April 2020, the CRC Committee explicitly referred to 'online learning' (para 3) by calling on states to ensure that such a specific modality 'does not exacerbate existing inequalities or replace student-teacher interaction'. In highlighting the fact that this is 'a creative alternative to classroom learning but poses challenges for children who have limited or no access to technology or the Internet or do not have adequate parental support', the CRC Committee has explicitly stated that 'alternative solutions should be available for such children to benefit from the guidance and support provided by teachers'. However, it has not addressed any challenges to the right to privacy in relation to online schooling.

Importantly, the CRC Committee is drafting a General Comment on the rights of children in relation to the digital environment. In this regard Serbia submitted its remarks on the proposal of the concept of such a General Comment, recalling that in 2016 its government adopted the Regulation on Children Safety and Protection in the Use of Information and Communication Technologies. This provides for 'preventive measures' for protection and safety on the internet, which are supposed to be implemented through informing and educating children, parents and teachers, as well as through establishing a place for offering advice and receiving applications related to harmful, inappropriate, illegal content and behaviour online. In this vein, a National Contact Centre for Child Safety on the Internet was established in 2017. Serbia also recalled that the Ministry of Trade, Tourism and Telecommunications has reached agreements with international and non-governmental organisations (NGOs) (The United Nations Children's Fund (UNICEF), Save the Children, UNITES, Red Cross of the Republic of Serbia, Institute of Social Sciences, Foundation Tijana Jurić) on joint cooperation in order to increase awareness about a developing information society and the safety of children on the internet, as well as the availability of information on children's safety online. Additionally, ongoing initiatives include a draft General Protocol for the Protection of Children against Violence, a draft Strategy for the Prevention and Protection of Children against Violence, and the Draft Law on the Rights of the Child and the Protector of the Rights of the Child. However, it remains unknown as to which stage these processes have actually reached and to what extent they would deal with the exposure of children's privacy in the digital space.

Critically, on several occasions Serbia has been urged to make its legislative framework regarding the rights of children compliant with the existing international standards and to take a number of actions for enhancing its capability to ensure adequate safeguards of these rights, including privacy (UNICEF Serbia 2020). In its Concluding Observations on the combined second and third periodic reports of Serbia in 2017, the CRC Committee urged Serbia to adequately harmonise its legislation regarding children's rights, stressing the absence of a comprehensive

children's Act and noting that 'the reluctance to enact such an act poses a significant challenge to advancing children's rights in the State party' (CRC/C/SRB/CO/2-3: para 6). Concerns were also expressed over the fact that the national plan of action for children expired without any further action to produce a similar policy framework (para 8). Moreover, the Council for Child Rights of the government of Serbia, which is supposed to be the coordinating body on children's rights, has had only an advisory role with inconsistent performance of its duties. Even 'the oversight function of the committee on child rights of the National Assembly has been limited in relation to mainstreaming children's rights in national legislation' (para 10). Notably, the EU Progress Report on child-related issues and Index indicators gave Serbia a zero result (not complying at all) with envisaged standards (Child Pact 2017).

Focusing on the regional level, the Council of Europe 2016-2021 strategy for children's rights and its fifth priority area on digital environment rights have been reinforced by the Recommendation CM/Rec(2018)7 of the Committee of Ministers to member states on the Guidelines to respect, protect and fulfil the rights of the child in the digital environment. They aim to ensure children's interaction by addressing, among other aspects, privacy and data protection (paras 26-39); the right to education with specific reference to 'digital literacy' and 'educational programmes and resources' (paras 40-49); and the right to protection and safety (paras 50-66). Moreover, regionally the privacy-related legal framework has changed significantly since the adoption of the General Data Protection Regulation (EU) 2016/679 (GDPR), which superseded the Data Protection Directive 95/46/EC and which entered into force on 25 May 2018, with direct effect in the European Union (EU) and the European Economic Area. The new regulation has approached the protection of personal data and called on EU member states to harmonise data privacy laws. It has placed the emphasis on such protection and the respect of individuals' rights regarding personal data, so as not to allow commercial interests to trump the human right to privacy. The GDPR explicitly refers to children's personal data and highlights the importance of transparency and accountability when collecting and processing children's data, particularly in the online sphere. It provides guidance to those who offer online services in terms of privacy notices, and especially refers to children in article 8, stating the conditions applicable to a child's consent in relation to information society services, including that 'the processing of the personal data of a child shall be lawful where the child is at least 16 years old'. EU member states may stipulate a lower age for this purpose in their national laws, but not lower than the age of 13 years. Notably, its Recital 38 refers to the 'specific protection' of children's personal data, recognising that they may be less aware of the risks, consequences and safeguards concerned and of their rights in relation to the processing of personal data. It also stipulates that such protection should particularly apply to 'the use of personal data

of children for the purposes of marketing or creating personality or user profiles and the collection of personal data with regard to children when using services offered directly to a child'.

It must be highlighted that the GDPR was taken over almost ***verbatim*** when Serbia enacted a new Law on Protection of Personal Data on 9 November 2018. Although this law appears to be a translation of the GDPR, regrettably it has omitted to establish that the citizens' rights related to insight, deletion, change and other measures of control over the processing of their data 'may be restricted by law' in cases such as: protection of national security, defence, public safety, rights and freedoms of others, and so forth. This means that the institutions and organisations processing personal data of Serbian citizens may restrict their rights arbitrarily and without any explicit legal authorisation. Such an omission is contrary to the Serbian Constitution of which article 42(2) establishes that '[e]veryone shall have the right to be informed about personal data collected about them, in accordance with the law, and the right to court protection in case of their abuse'. Nonetheless, this new Law entered into force on 21 August 2019, and there was a short time for public and private entities as well as citizens to familiarise themselves with this Law and introduce new practices. Even the national Commissioner for Information of Public Importance and Personal Data Protection urged Parliament to postpone the application of this Law as society was unprepared, but such postponement was not granted. In fact, based on the Commissioner's 2019 Annual Report, statistics show more than 7 000 cases of which the majority result from unintentional abuse and display a lack of knowledge in the field and that privacy-related awareness of citizens is low. In any case, under the new Law all entities in the public, civil and private sectors that collect, process and store personal data of Serbian citizens have various new obligations in relation to data, especially information security of all citizens, including children (Krivokapić et al 2018). In particular, article 16 refers to consent regarding the usage of information society services in Serbia: a child above 15 years of age can independently give consent for personal data processing when using these services; if the child has not turned 15, data processing is connected with the consent of a parent or another legal representative; and the controller must take reasonable measures to determine whether the consent came from one of them, taking into account available technologies. Notably, article 15 provides that the controller shall take appropriate measures to deliver (in writing or by other means) any information and communication on the processing of the data subject in a transparent, concise, intelligible and easily accessible form, utilising simple and clear language, particularly any information addressed specifically to a child. In addition, Serbian data protection legislation includes a Decision of 2019 under which assessment of the ***impact*** on personal data protection shall be performed by the controller (and require the opinion from the Commissioner) in case of processing of personal

data of children for the purpose of profiling, automated deciding or for marketing purposes; the assessment shall be done before the initiation of such processing. However, much of the relevant national laws and policies are either in their draft stage or have not yet been properly implemented. Despite the fact that some pertinent instruments are in force, in Serbia there are no adequate guidelines on their application, and institutions (including schools) lack both staff and training in matters of personal data protection.

3 Global trends on how digital technologies impact children's safety and privacy

Digital technologies have required several changes in international and national legislative frameworks, but have also 'changed the social conditions in which people speak' (Balkin 2003: 2). As we increasingly turn to online communication we must not forget that it 'is covered by notions of privacy and correspondence, as are other similar forms of telecommunication, eg voice or video calls or chats over the internet' (Milovanovic 2014: 67). Numerous 'websites, blogs, applications social networks for interaction and expression encompassed our everyday lives, but perhaps no area holds more potential for such transformation than education' (McGeveran & Fisher 2005: 7). In fact, digital learning 'extends beyond formal and traditional institutions to involve everyone with Internet access' (McGeveran & Fisher 2005: 9). Many states have attempted to achieve a balance between guaranteeing the rights of children and protecting them from online risks (Dutton 2010: 53). Nonetheless, although we have increasingly focused on the issues of access to internet (Shah 2015: 11), one scholar has rightly stressed that the children also 'need support, advice, and orientation so technology can empower them to be change-makers in their own communities' (Urbina 2015: 15). In times when the schools increasingly are switching to the online sphere, one may wonder whether children, as a vulnerable group, are sufficiently protected. It has been pointed out that 'the more children use the internet they gain more knowledge and digital skills, thus turning their presence in the online sphere into an advantage', but 'it is also important to remember that not all internet use practices bring them equal benefits' (Livingstone 2015).

Related to this, most research so far has focused on cyber-bullying and the risks that children face in such a context. There have also been studies on parental involvement in online safety of children and whether children have 'a legal or moral right to control their own digital footprint' (Steinberg 2015: 840). In fact, children seem to consider technology as another part of their everyday life (Boyd 2014: 14). One research conducted by Microsoft's Online Safety explored the negative behaviours that children encounter online, and it turned out that the vast majority of children do

the right thing in the digital space, by behaving civilly and appropriately (Beauchere 2015). Although this was a rather positive finding, online safety not only entails children being safe from cyber-bullying, but also includes being safe from any intrusion into their privacy and the protection of their personal data. Freedom of information and public interest sometimes place restrictions on individuals' right to privacy, and concerns 'our reputational information – information about an actor's past performance that helps predict the actor's future ability to perform or to satisfy the decision-maker's preferences' (Goldman 2010: 294). On the other hand, children and the youth usually are unaware of the differences between 'networked publics and other publics they belong to and it is challenging to distinguish between the online and offline versions of themselves' (Palfrey & Gasser 2008). However, it is also their personal data that is endangered while children are online, because they may be free to be collected and processed by third parties, including being used for the creation of 'reputational information' (Krivokapic 2015: 35). Although there are very few situations in which public or private interests require the collection of personal data of children and their processing, the need remains to place restrictions on such data collection and processing for the purpose of child protection against risks to their well-being and rights.

As the demand to use the internet in education has increased daily, scholars have started to stress that 'data protection in schools needs to be closely examined and evaluated' (Kuzeci 2015: 40). In particular, this entails applying not only privacy and data protection principles (such as processing fairly and lawfully; being collected for legitimate, explicit and specific purposes; being relevant, adequate, and not disproportionate in relation to the purposes for which they are collected; being kept for no longer than is necessary for such purposes), but also certain specific conditions for children (Kuzeci 2015: 40). A primary reason for this is that children are still developing and have not yet reached the psychological and physical maturity of adults, which is why they require special attention and care when it comes to protecting privacy and data. Such safeguards comprise internet access limitations, authorisation to give consent and/or the amount of data that would be collected. This was already highlighted by Article 29 Data Protection Working Party in 2008. According to this body, data protection questions regarding children are closely connected to schools as they may 'require forms, containing personal data, to be completed for the purpose of creating student files, computerised or others' (para I). As schools gather such data, they are also required to inform data subjects 'that their personal data will be collected, processed, and for what purpose, who are the controllers, and how the rights of access and correction can be exercised' as well as 'to whom these data may be disclosed' (para III). It seems very clear that, even though schools turn to digital technologies to provide more opportunities to children, 'the risks to children's safety, privacy, mental health, and well-being are equally

wide-ranging' (OECD 2011). However, applications/platforms recently developed and employed for online education seem to pose even more challenges, as demonstrated in the case of Serbia.

4 Background on technology-related privacy issues in Serbia

Over the years there have been major privacy breaches in Serbia. The most common violations refer to the illegal personal data processing, technical measures of data protection and inadequate relation to citizens' data, the illegal interception of electronic communications and publishing information about private life, whereas there have not been so many cases of unauthorised access or unauthorised alterations and insertions of content, as well as computer frauds and other types of violations (Perkov et al 2020). Critically, personal information on many occasions has found its way into public sphere.

For example, one of the biggest privacy problems occurred in 2014, when the website of the Privatisation Agency publicly made available personal data, such as names and unique master citizen numbers, of more than five million people, that is, practically the whole adult population of Serbia (SHARE Foundation 2014). However, even in such a significant case of violation of the right to privacy there was no determined legal accountability due to the statute of limitations. This was the most severe privacy breach of citizens in Serbia and the biggest security oversight in terms of personal data protection. In 2018 the protection of personal data was particularly problematic, because both public and private actors caused relevant violations (Perkov et al 2020). The most important cases were the collection of sensitive personal data via the application 'Selected Doctor', as promoted by the Ministry of Health, and the illegal processing of sensitive data by several social welfare centres in some Serbian cities (SHARE Foundation 2019). Public authorities avoided accepting their responsibility for such events, and this turned out to be a practice when it comes to privacy and personal data breaches. Moreover, in Serbia there was an illegal database of political and economic profiles of 400 000 people, which contained descriptions of citizens and for whom they vote (Perkov et al 2020). Unlike data leaking from the website of the Privatisation Agency three years earlier, where the data was legally collected, this database was created in violation of citizens' constitutional rights. In early 2019 the Minister of the Interior and the Police Director of Serbia announced that Belgrade would receive more than a thousand cutting-edge surveillance cameras with facial recognition capabilities supplied by Huawei, as part of the 'Safe Society' project (SHARE Foundation 2019).

The situation worsened with the introduction of the state of emergency, which was declared on 15 March 2020 (a few days after the first COVID-19 case had been registered) because the pandemic 'highlighted the challenges

in this area in finding the right balance between health care and respect for the confidentiality of personal health data and the right to privacy of citizens' (European Western Balkans 2020). Recently, an extremely serious privacy issue occurred when state bodies published sensitive data about the conditions of citizens who died from complications caused by the coronavirus, and one municipality even published on its official website the initials, age, workplace and street address of infected persons (SHARE Foundation 2020). The most serious case was the incident when login credentials for the COVID-19 Information System, used to process sensitive health data of citizens in connection with the pandemic, were publicly available on a website of one healthcare institution for eight days, which is enough to be indexed by Google and searchable (SHARE Foundation 2020). This has showed a severe breach of protection of the most sensitive data (health data), illustrating the disrespect for privacy and the low level of personal data protection in Serbia.

When the educational system abruptly turned to the digital sphere during the pandemic, the personal data of children came online even more. The Serbian Ministry of Education stated that classes would be held via distance learning through the programme of public broadcasters, as well as through online learning platforms. Such a type of schooling organisation, therefore, has forced students to create profiles on numerous platforms and share their private information, also forcing teachers to more than usually enter information about students into the electronic teacher's book. Crucial questions thus arise in relation to the right to privacy of children and are explored below: Were relevant and appropriate online learning/teaching tools used? Was there enough awareness of the potential risks to children's data as well as their privacy in such a digital environment?

5 Emerging issues in online schooling (technology) applied in Serbia and the effects on children's privacy

In looking at the recent and unexpected practice of schools in Serbia, which had to switch to different kinds of equipment, digital learning platforms, video lessons, broadcasting through radio and television and so forth, basic questions arise as to whether or not schools properly limited the number of ways used for the learning experience and whether they chose adequate platforms for children. In this regard several considerations may be elaborated.

First, a large number of different platforms made it difficult for students to follow some lessons such as mathematics, which has proven to be the biggest challenge for the students to understand and follow (BBC News, Serbia 2020). In Serbia the students primarily relied on Facebook groups, Messenger, Skype, Google Classroom, Viber, WhatsApp,

Moodle, Edmondo, Zoom, Microsoft Teams, their gmail accounts, and many more. Notably, even Google recently was said to be 'using its services to create face templates and "voiceprints" of children ... through a program in which the search giant provides school districts [across California] ... free access to G Suite for Education apps' (Nieva 2020). Zoom and Skype were the most popular video-conferencing platforms for communicating in Serbian schools. However, the problem is that these platforms 'collect a great deal of personal information about students', which can lead to 'long-term risks to student privacy and autonomy' (Bailey et al 2020). For instance, according to Zoom's privacy and security policy, data collected includes a user's name and other similar identifiers, a student's school, the student's device, network and internet connection and the student's use of the Zoom platform, including actions taken, date and time, frequency, duration, quantity, quality, network connectivity, and performance information related to logins, clicks, messages, contacts, content viewed and shared, calls, use of video and screen sharing, meetings and cloud recording (Bailey et al 2020). On the other hand, using Skype meant accepting Microsoft's general privacy policy. In addition, some platforms such as ClassDojo 'drew criticism over collecting vast amounts of data on children, raising questions about whom it shares this data with, and where it is stored' (UNESCO 2020). DingTalk was enabling teachers to remotely monitor students without consent, and Google's G Suite for Education was recently sued for collecting information on children without parental consent (Han 2020). Furthermore, in Serbia it emerged that some teachers did not have computers or wi-fi at their homes, while their mobile connection to the internet was not strong enough to hold all the platforms and conduct all the activities in order to conduct lessons (Danas 2020). Some schools gave laptop computers to some of the teachers in need, while others tried to share an internet connection with their neighbours to conduct classes (Danas 2020). However, although Serbian schools attempted to solve the issue of access, there may have been very few considerations regarding children's privacy. In fact, students had to create profiles in different platforms in order to follow classes and often were obligated to accept new friends, such as their classmates and teachers, even though this option may influence their privacy. Specifically, even if their profiles are officially 'private' and they have a variety of posts on them, during this phase they were forced to share them with their teachers. Teachers as well as students were required to share their cellular phone numbers, because sometimes there were 15 Viber groups to join in order to get in touch (Danas 2020). In this regard, it is questionable whether the platforms used in Serbia respected children's privacy, or whether they put them in the online sphere without adequate protection.

Furthermore, teachers received a large amount of students' data to be entered into online platforms. According to the SHARE Foundation (2020), in Serbia another platform collected data more than before the

pandemic, namely, the electronic teacher's book that represents an attempt to digitise mandatory records of pupils and students, which are kept by schools in accordance with the Law on the Basics of the Education System of 2017; but there are no guarantees that the subsequent (and imperfect) Law on Data Protection has been applied on the teachers' e-book. One may even wonder whether there is a disconnection between these two laws and how it will affect the personal data protection of students. This practice is called esDnevnik, which is a part of the Unified Information System in Education (UISE) consisting of several registries that contain personal information about pupils, parents and employees. However, according to publicly available information, UISE still is not established or operational. In addition, a private company has developed software called ***eSkola***, which should function in a manner similar to ***esDnevnik***, but with additional features for parents, depending also on the service 'package' they choose for and are prepared to pay. Interestingly, it turned out that all the data contained on ***esDnevnik*** could also be found on ***eSkola***. The privacy of Serbian children, therefore, has become even more questionable as children's education data seems to be far less safeguarded than health data.

It has been highlighted that generally a large degree of a child's data is collected by schools and their vendors when a child is online. In addition to 'basic information – name, email address, grades and test scores', other pieces of data can be collected on students, such as biometrics; personally identifiable information; behavioural, disciplinary and medical information; academic progress; geolocation; Web browsing history; IP addresses utilised by students; and classroom activities (Strauss 2020). As we witnessed many breaches in relation to health data, one may wonder what could happen with children's data that can be just as sensitive – disclosing names, home addresses, behaviours, and other highly personal details 'that can harm children and families when misused' (Han 2020). It is worth noting that in March 2020 UNESCO recommended to 'provide support to teachers and parents on the use of digital tools', (i) by organising brief training or orientation sessions for them 'if monitoring and facilitation are needed', and (ii) by helping 'teachers to prepare the basic settings such as solutions to the use of internet data if they are required to provide live streaming of lessons (UNESCO 2020). Thus, as students' data has become more and more available online, it is questionable whether there has been enough awareness of the significance of privacy among both teachers and students in Serbia, as well as whether Serbian schools have factored data privacy considerations in their selection criteria to use certain learning tools.

More precisely, taking into account the data on computer literacy, which is about 30 per cent (Stojanovic et al 2017) and media literacy ranking where Serbia ranks thirtieth out of 35 European countries (Zvijerac 2020),

it is questionable to what degree Serbia was prepared for such a shift into online education. According to research conducted in 2018 by the Belgrade Institute of Psychology, and covering 60 schools in Serbia, with children and young people aged nine to 17 years, most of the children and teens (86 per cent) used the internet on a daily basis; the students mostly spent more than three hours a day online, and more than 20 per cent of them spent up to seven hours a day on weekends, while two-thirds spent between four and seven hours; at normal time 40 per cent of students used the internet for school assignments at least once a week. It was also found that in 2018 more than two-thirds of children and young people had a profile on some social network or gaming platform, although some of them have age limitations (Kuzmanović et al 2019: 24). According to these researchers, almost half of the students aged nine to 12 years did not know how to change their privacy settings on social networks, which is rather disturbing. Focusing on their behaviour on social networks, in the schools in Vojvodina reportedly fewer than half the students read or at least glanced over the terms of use when opening their profiles, whereas 35 per cent had to say that they were older than they actually were, due to the network policies and the age limits (Report on online schooling 2020). This report also indicates that slightly fewer than 35 per cent stated that their parents had a password for their related profiles, but more than 50 per cent said that their parents were either their followers or friends on social networks, which could be a positive trend.

According to the mentioned scholars, it appears that 16 per cent of students experienced cyber-bullying, while some of them engaged in some other type of risky behaviour online. Most often, the risky behaviour involved sharing personal information, adding strangers on social media, and making contact with strangers whom they may later meet offline (Kuzmanović et al 2019: 12). Furthermore, in the schools in Vojvodina, reportedly most students believe that they are familiar with their online rights, although it seems that not all of them are entirely sure what their online rights entail. Related to this, the privacy of 45 per cent of children reportedly were violated to a greater or lesser extent so far (Report on online schooling 2020). Thus, it is questionable whether this vulnerable group of internet users still require more tools and knowledge to be able to clearly point at a privacy problem when they notice it, especially in times when they are required to spend more time online than usual.

In 2018 the Serbian Ministry of Education, Science and Technological Development proposed that secondary schools introduce Media Literacy in their curricula. Some schools have introduced the subject as an elective but, according to SHARE Foundation, potential teachers did not have sufficient training to give these lessons, even though they should contain digital literacy. In this manner, the students were deprived of learning how to behave in an online sphere, to identify risks and opportunities, to know

what information security is, how to recognise cyber-bullying, and so forth (UNICEF Serbia 2019). Such digital skills would have been especially useful during the recent emergency when students had to be online more than usual, in order to attend school, but also to share their personal data with more people. It seems that Serbia follows scholars' recent findings whereby 'schools are not always aware of or attuned to the range of online privacy and security implications' and this can be seen as 'compounded by the fact that privacy notices and terms of service agreements are rife with vagueness, legalese and double-speak' (Bailey et al 2020).

6 Conclusion

The issue of the privacy of children can become an increasingly controversial topic as internet education technologies gain momentum. The COVID-19 pandemic brought the problems of balancing children's rights, such as privacy with the application of online teaching technologies and platforms, to the fore. In fact, it has become questionable whether children, as the most vulnerable group, would be adequately safeguarded in times when they are required to spend much of their time online for education purposes. In the case of Serbia, citizens' rights to privacy have encountered several major challenges even before the state of emergency was declared in March 2020 and the schooling activities fully shifted online. The extended use of technology to minimise learning disruptions related to COVID-19, therefore, has led to raise a basic question as to whether children's rights to privacy were adequately respected and protected or, instead, challenged when the students were required to use a range of programmes, applications and networks to attend classes.

We may conclude that, even though the educational system in Serbia attempted to be adaptable by the very attempt of going online, the reviews and reconsiderations are yet to come in the next academic years, hopefully starting from the forthcoming year. Between March and June 2020 the subjects were scattered all over different platforms, requiring the students to open their profiles and exposing their personal information much more than usual. The vulnerability of children seems to have increased even more because there was no preparation that would clearly indicate what information they may share and what would be dangerous in the online sphere. In this manner, children's rights to privacy have been jeopardised, with their data available on many platforms as teachers had to place them into *esDnevnik*. However, as correctly observed by some scholars, 'it is not the job of individual educators to dig through legal terms and decide what kinds of protections students will or will not have with respect to their data'. Instead of teachers, 'ministries, departments of education and school districts need to offer clear guidance to help educators navigate decisions about educational technology' (Bailey et al 2020). In the case of Serbia these observations should first lead to crucial changes in national policies

regarding the privacy of children, because the new Law on Personal Data Protection is not sufficient for safeguarding students' personal data, and in any case has not been properly implemented yet. Serbia should urgently make its legislative framework compliant with existing international standards that provide protection for the digital rights of children, and particular attention should be paid to the core implications deriving from the proper implementation of the four guiding principles of CRC. In this regard, a new National Plan of Action for Children should be adopted and serve as a basis for effective budgeting for and monitoring of (desirable) policies on their digital rights, including in specific relation to privacy. Strengthening role of the (governmental) Council for Child Rights to coordinate all activities related to the implementation of CRC at cross-sectoral, national and local levels could also be beneficial in this regard. Similarly, the Committee on Child Rights of the National Assembly should scrutinise the adoption and implementation of policies regarding legislation relevant to digital literacy and the protection of the right to privacy in relation to online education. In parallel, the key stakeholder regarding the protection of personal data in Serbia, namely, the Commissioner for Information of Public Importance and Personal Data Protection, should strengthen its own capacities to be able to focus on the prevention of privacy breaches. The improvement of the overall knowledge about privacy rights, especially in the public sector, would advance the capacity of the Office of the Commissioner to fulfil its mandate. Relevant Serbian stakeholders, starting with the government, should certainly follow the aforementioned CoE guidelines contained in Recommendation CM/Rec(2018)7, which regrettably have not been aptly discussed at the national level. Hopefully, the forthcoming General Comment by the CRC Committee will provide further guidance on the specific issue of children's rights to privacy in relation to online education.

A genuine fear in relation to the recent online practices of schools around the world is that 'today's choices will affect privacy and equality in education long after this pandemic ends' (Bailey et al 2020). While hardly any country or school system was prepared for such an unforeseen switch to online teaching without planning and in emergency mode, the various problems highlighted as a result of these changes in the Serbian case should inspire specific efforts to improve national practices and safeguard children's rights in future online teaching exercises and to provide safe access to platforms. In particular, attention should be paid to training those who collect and process. Organisations and institutions that process personal data in the country, including schools, should involve data protection officers to comply with the international standards and to guarantee such protection, thus avoiding legal risks, whereas their users could be able to ensure their own rights more easily. In parallel, it seems that Serbia's citizens generally have little knowledge of their rights as data subjects due to a weak privacy-related culture in Serbian society. It is

positive that more citizens are recognising the importance of personal data protection, but most Serbians are not aware of the protection mechanisms under the new Law on Personal Data Protection and other relevant instruments. In this vein, teachers, students and parents should also be better educated, although this new law does not sufficiently address the problems specifically discussed in this article.

The case of Serbia shows that a country with little practice of personal data protection in general can lead to very serious forms of citizens' privacy breaches. As the educational system has turned to the online sphere more than before, children's privacy has become ever more questionable as there have been neither clear guidelines on the use of the electronic teacher's book, nor on online education overall. In Serbia all schools and individual teachers used different platforms to conduct classes during the pandemic, which made children's data even more vulnerable, in addition to the teachers' e-registry issue. This case illustrates a strong need for adequate media and digital literacy classes and courses, both for teachers and students in order to become familiar with their rights and obligations on the internet. It also illustrates a strong need for more actions from public authorities which should regularly monitor the respect of privacy in relation to children's education data and, accordingly, adopt appropriate measures. For instance, there should be clear regulations on how children's personal data in e-registry is handled and how students or their parents can request the deletion of data. In this manner children's data and privacy would be protected and any type of commercialisation of personal data could be avoided. Public authorities could even require educational technology companies to make binding statements as to how they intend to legally and ethically protect current student data, future student data, and access to both under their own ownership. In addition, the Ministry of Education should share the Digital Violence Prevention and Response manual with all schools, in order to present a good practice in the prevention of digital violence and organise related trainings. Educational institutions should also be informed about the Call Centre for Reporting of Digital Violence of the Ministry of Trade, Tourism and Telecommunications and the 'SOS line' for reporting violence in schools. The Department for the fight against high-technology crime (which, among other things, deals with cases of unauthorised data processing, unauthorised access to a computer/computer network/programme) should become more active in protecting students on the internet and, although an international contact point 24/7 for high-tech crime exists within the CoE, Serbian police administration units should familiarise themselves with this.

The way in which children's privacy has been exposed in relation to internet education technologies in Serbia may even exist in other countries of the region, and further research should be undertaken to investigate this and effectively counter related problems. For example, the critical case of

Serbia indicates an urgent regional need to expand on the already-existing wider research with regard to several major issues that have recently been documented by scholars and that are possible 'by-products' of the data practices of educational technology companies, such as 'corporate tracking of student activities both inside and outside of the classroom, discrimination against young people from marginalized communities, student loss of autonomy due to ongoing monitoring of their activities and sale of student data to third parties often for purposes of advertising to them' (Bailey et al 2020). They have also found that 'large amounts of personal and transactional information some companies collect can also open students up to privacy invasions by future employers', and 'such collection vastly increases the potential for educational surveillance of students through students' datafication'.

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Children's rights budgeting and social accountability: Children's views on its purposes, processes and their participation*

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Abstract: Children's rights budgeting is an international human rights priority and the focus of the UN Committee on the Rights of the Child's 2016 General Comment on Public Budgeting for the Realisation of Children's Rights. General Comment 19 was informed by a consultation that gathered the views of 2 693 children in 71 varied national contexts across all five UN regions. The article describes the process and findings of this consultation, setting out the views of children across the world as to how their governments should make spending decisions that are sufficient, equitable, efficient, transparent and participatory. The consultation provides unique insights into how children in very different contexts think about the ways in which their governments can and do allocate public funds for children and their families in ways that support or undermine the realisation of their rights. The article identifies some of the barriers to including children in decision making on public spending, but challenges assumptions that they are not able to be or interested in being involved. It suggests that if participatory budgeting is to be effective for children, it will require bespoke forms of social accountability.

* The research was undertaken in partnership with the Child Rights Connect Working Group on Investment in Children. The partners on this consultation included: Child Rights Connect along with the African Child Policy Forum, Child Rights Coalition Asia, Defence for Children International, Eurochild, GIFA, IBFAN (International Baby Food Action Network), Plan International, the Latin American and Caribbean Network for the Defense of the Rights of Children (Redlamyc), Save the Children and UNICEF. Plan International and Eurochild provided some of the funding which supported the consultation. All of the partners contributed to the development of the consultation tools and worked to engage the child participants. All partners also commented on the final report. Further detail on the partners and process can be found at: https://www.childrightsconnect.org/working_groups/investment-in-children/

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Key words: *children's rights; participation; budgeting; social accountability*

1 Introduction

Child rights budgeting is a human rights policy priority. It was the focus of a day of general discussion and resolution of the United Nations (UN) Human Rights Council (2015) and a recommendation of the European Commission (2013). The UN Committee on the Rights of the Child (2003) (CRC Committee) has recommended consistently that state parties develop child-specific budgets as a key aspect of implementation of the UN Convention on the Rights of the Child (CRC) (UN 2003), and in 2016 the Committee adopted a General Comment on Public Budgeting for the Realisation of Children's Rights, providing further guidance to governments and non-state actors on how to manage public expenditure for children (UN 2016). General Comment 19 does not define 'child rights budgeting', but describes the obligations on governments as follows: 'States parties are obliged to take measures within their budget processes to generate revenue and manage expenditures in a way that is sufficient to realise the rights of the child' (UN 2016: para 54). Measures range from 'the allocation of special resources for children, to increasing transparency in decision-making and the management of such resources' as well as instances where children are themselves given a budget (Riggio 2002: 52).

The challenges of participatory budgeting for adults are technical (it can be difficult for the public to understand complex public spending decisions and processes); attitudinal (public officials do not value what the public has to contribute); and practical (processes are slow and inaccessible and it can be difficult for the public to commit to these over time). The experience of involving adults suggests that the process is 'bumpy' and that the capacity of officials to explain themselves is better than their capacity to listen (De Sousa Santos 1998). Children's participation in budgeting, a key dimension of children's rights budgeting, faces all of the technical, attitudinal and practical challenges that confront adults, but these may be compounded by the fact that the participants are children (so will be considered to be less capable of understanding the issues and/or to have less interest in being involved) (UNICEF 2011). However, there is very limited research on children's budgeting and much of the existing literature does not address children's participation in budgetary processes (see, for example, Botlhale 2012; Creamer 2004). While there are some interesting case studies of child participation in budgeting (Riggio 2002; Marshall, Lundy & Orr 2016) there has been no research with children more generally on their views of public spending for the realisation of their rights nor on their interest in or capacity for involvement.

Discussion on participatory budgeting often is located and justified as part of a broader discourse of social accountability. Social accountability

has been defined as 'an approach towards [*sic*] building accountability that relies on civic engagement, ie, in which it is ordinary citizens and/or civil society organisations who participate directly or indirectly in exacting accountability' (Malena, Forster & Singh 2004: 3). It has been claimed that social accountability mechanisms, such as participatory budgeting, improve governance, foster democratic engagement and deliver improved policy and services (Malena et al 2004). Moreover, they are considered even more significant where traditional 'vertical' accountability mechanisms (such as public elections) are unavailable or ineffective.

There is a strong case to be made for children's rights budgeting from the perspective of social accountability (see generally Ngyuen 2013; Riggio 2002). For a start, since children do not usually have the right to vote, 'non-electoral' mechanisms may provide an opportunity for securing some degree of accountability in the absence of a voice politically (Peruzzotti & Smulovitz 2006). Second, there is an additional impetus when it comes to children's participation in budgetary decision making: Article 12 of CRC positions children's participation in public decision making as a specific entitlement for those under the age of 18 years, one that the CRC Committee has emphasised repeatedly (UN 2003; UN 2009; UN 2016). The justifications for article 12 often point to children's lack of influence over decisions affecting them, including in the public arena (Lundy, Tobin & Parkes 2018). In spite of these additional spurs to ensure children's involvement in decision making, children's views are largely absent from these processes and much of the academic scholarship on human rights and children's rights budgeting. The research discussed here provides empirical evidence of children's views, addressing the related issues of whether children are willing to contribute to decisions about public spending for the realisation of their rights and what it is they are interested in and have to say about what their governments do and should spend public funds on and how they should do it.

In line with the Committee's remit, in particular its emphasis on children's entitlement to participate in decisions that affect them (UN 2009), the Committee sought the views of children across the world about government spending and children's rights to inform its recommendations in General Comment 19. This article provides a critical analysis of the consultation that was undertaken with 2 693 children in 71 countries to support the development of the General Comment (Lundy, Marshall & Orr 2016). The consultation explored children's views on why governments should invest in children's rights; in what and in whom they should invest; how government should make its decisions; and why and how they should involve children. The process and its outputs provided an unprecedented insight into how children in very different contexts (the majority of which were in the developing world) think about the ways in which their governments can and do allocate public funds for children

and their families in ways that support or undermine the realisation of their rights.

2 Methodology and methods

Achieving global reach in a consultation with children in a short space of time would be beyond the boundaries of a single research team undertaking data collection themselves. In order to address this, the researchers worked in collaboration with key international children's organisations that were part of a working group that had been established to advise and support the development of the Committee's General Comment.

The consultation tools were developed using a children's rights-based methodology, a key aspect of which is the active involvement of children in the research process (Lundy & McEvoy 2012). Core to this is building children's capacity to engage with the issues, an important factor in research that aims to collate children's views on what might be seen as a complex topic. In order to develop research instruments that were appropriate and effective for eliciting the views of children on the topic of budgeting, the research team worked with a Young Person's Advisory Group (YPAG), which included seven children, aged 13 to 17 years, and a Children's Research Advisory Group (CRAG) composed of five children, aged five to six years, in the United Kingdom. The YPAG assisted the research team by identifying the core themes that informed the research questions and analytical framework and developing child-appropriate terminology for use in the consultations. They also advised on the design of participatory research methods. Additionally, after the data had been collected, the YPAG advised on results interpretation and the design of child-friendly dissemination strategies. The CRAG assisted the research team by providing input into the development of a consultation tool for facilitators to use with younger children or those with literacy difficulties. The preference would have been for a group of young people from a variety of global contexts and backgrounds to have been involved as research advisers to enable the group to be as representative as possible of research participants. However, this was not feasible in the time and resources available.

The research team developed consultation tools and a guide for in-country facilitators, which were then used by these partners. In order to reach as many children and young people as possible, two different consultation tools were developed: an online consultation tool (OCT) in the form of a questionnaire (this tool was also offered in paper-based version for those with no access to the internet); and face-to-face consultations, designed as participatory focus group discussions. The face-to-face consultations were conducted by experienced facilitators

employed by the partners in each country, using and adapting methods and templates designed by the research team.

3 Face-to-face consultation tool

The face-to-face consultation tool was designed to engage children aged from four to 18 years in the consultation topics, on a group basis, using participatory focus group methods. The face-to-face consultations were recruited by the regional and national non-governmental organisation (NGO) partners and, although a standardised mechanism for consulting with children was provided, it was designed to be flexible and capable of meeting the needs of children in a range of cultural contexts. The research team provided facilitators with an information pack to assist them in their consultations with children and young people and to advise on ethical considerations. This pack included activities and resources required to engage children and young people in the topics under consultation; a child-friendly version of the purposes/nature of the research; participant and parent information sheets and consent forms (to be used where this was culturally appropriate); and a facilitator response form to record the data. The facilitators, who understood the context and were present during the consultations, were involved in the recording and first level interpretation of the data. This was important for the sake of reliability, as well as feasibility, yet it created a challenge in terms of ensuring consistency of interpretation. To address this, an analysis template was provided in the form of a facilitator response form. This tool was also designed by the research team who, using the pilot data and framework used for the questions, established key themes and points of interest to be noted. This provided the facilitators with an overall framework within which to record the relevant data, while also providing free space to note any additional information. These were completed in English and forwarded to the central research team for final thematic analysis.

3.1 Online consultation tool

In order to ensure that as many children as possible could participate in the consultation, an online consultation tool (OCT) was developed, in the form of an online questionnaire (a paper-based option was also provided where necessary). With regard to sampling, it often is the case that online surveys do not provide for a sampling frame, and as such selection bias (in that a particular type of respondent may respond, as opposed to a random sample of a particular population) could be a concern. It becomes less of a concern if the online questionnaire is used in non-probability or exploratory research, where no assumptions are made about a particular population and no hypotheses are being tested, in which instances it is recognised that researchers are looking to target people who are knowledgeable and can contribute to the dialogue on a particular topic (Sue & Ritter

2012). The OCT was used in this way to further explore children's views on the topic of public expenditure. The results are not generalisable, nor are they representative of children from each of the countries. This was not the intention. Rather, adopting a children's rights-based approach to research, the OCT was successful in providing the opportunity for a larger number of children, from a greater geographical spread, to share their views on this topic. The OCT was aimed at children aged 10-17 years (younger children participated in the face-to-face consultation) and sought to engage the views of children regardless of their access to experienced facilitators or group-based discussions. The OCT was available in English, French and Spanish. It was also translated for use in paper-based questionnaires in Asia-Pacific and Western Europe.

3.2 Participants

Each country was categorised by region, according to the UN regional groups,[1] and these regions are abbreviated in the report as follows: Table 1 presents the regions represented, their abbreviations used in the presentation of the findings and the total number of participating countries in each region. The majority of children taking part were supported by NGOs such as Save the Children, Plan International and working in developing contexts.

Table 1: Participating regions and countries

Region	Abbreviation	Total countries
Africa	Africa	18
Asia-Pacific	Asia-Pacific	16
Eastern Europe	EE	7
Latin America and Caribbean	LAC	16
Western Europe and Others	WEOG	14

4 Results: Children's views on children's rights budgeting

Children were asked why governments should invest in children's rights; in what and in whom they should invest; how government should make its decisions; and why and how they should involve children. The data was analysed deductively in five themes that had been informed by the initial review of the literature and input of the children's advisory groups

1 See http://www.un.org/depts/DGACM/RegionalGroups.shtml (last visited 30 June 2017).

and that had formed the basis for the research instruments used. In the final report they were classified as follows: government spending should be *sufficient, equitable and effective* and the decision-making processes should be *transparent and participatory*. In this article, we also classify them employing the language that was used by the child advisors to the project (and the language used in the research instruments). These themes are as follows: government spending should be enough to meet children's needs; enable all children to enjoy their rights equally; do what it is supposed to do; children should be able to find out what has been spent and how; and children should be involved in decision making.

In the following parts the children's views on public budgeting collated in this consultation are presented under these five core themes. Some of the key regional differences that emerged are identified. However, as discussed earlier, none of this is generalisable and, in any event, one of the things that was striking across the data was that the experiences and views of children in very different contexts were remarkably similar on this issue.

4.1 Sufficient (spending should be enough to meet children's rights)

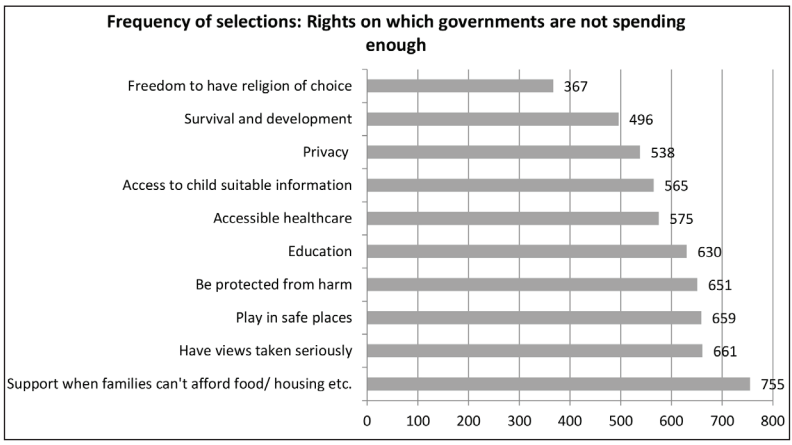
CRC requires states to 'undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources' (article 4). While the concept of 'progressive realisation' is distinct from the obligation to undertake measures to the maximum extent of available resources, the CRC Committee (UN 2003: para 7) has suggested that the latter introduces the concept of progressive realisation with respect to social and economic rights (for a criticism of this, see Nolan 2013). It has also said that the obligation on states is to 'strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances' (UN 2003: para 8). Moreover, while the focus often is on social and economic rights when resources are discussed, the idea that civil and political rights are cheap and/or require only legislation for implementation is 'problematic', since all rights require resources (Donnelly 2003: 27). Moreover, no state has unrestricted public spending. However, when spending choices are being made, children had a strong sense that public budgeting should address their needs explicitly.

4.1.1 Public money should be invested to offer children a decent life (EE)

The OCT offered children some specific examples of children's rights and asked respondents to select all of the rights on which they considered governments were not spending enough. On average, children selected

five of the listed rights. Figure 1 demonstrates how frequently each right was selected. It is notable that all the rights were identified by large numbers of children. The three most frequently-selected rights were support for families; the right to have views taken seriously; and the right to play in a safe place. While many children chose socio-economic rights, such as education and health, amongst their priorities, it is interesting that the second most common selection was the right to 'have views taken seriously'. Other civil and political rights such as access to information and the right to privacy were also chosen by many children, indicating a perceived need among children for more investment in these rights.

Figure 1: Frequency of selections: Where governments are not spending enough



Looking at responses across the different regions represented in the data highlights patterns in the priorities for children in different parts of the world. For example, the provision of an adequate standard of living was in the top three selections for all regions, except for Latin America and the Caribbean. See Table 2 for a breakdown of priorities for each region.

Table 2: Rights on which governments are not spending enough – by UN region

Region	Most frequent selection	Second	Third
Africa	Support for families who cannot afford food/housing etc.	Access to child suitable information	Have views taken seriously
Asia-Pacific	Play in safe places	Support for families who cannot afford food/housing etc.	Have views taken seriously
Eastern Europe	Support for families who cannot afford food/housing etc.	Accessible healthcare	Education
Latin America and the Caribbean	Protection from harm	Education	Play in safe places
Western Europe and others group	Support for families who cannot afford food/housing etc.	Protection from harm	Have views taken seriously

In the face-to-face consultations children were provided with examples of standard areas of budget allocation, which aligned with those offered in the OCT (although this method offered more scope for further discussion) such as education, transportation, health, defence, water and sanitation and social security. They were then asked to identify their priorities for spending. Some of their reasons for choosing particular areas of spending included:

- It is necessary to prevent children from risk of violence and sexual abuse so government has to put in place mechanisms for child protection and make sure there is safety in public places and homes for children (Africa)
- There should be security in parks so that we can feel confident and not afraid that we are going to be robbed or attacked by gangs or human trafficking (LAC)
- Every school should have access to a medical facility for fast and easy access to health care through the educational system (EE)
- Many girl children drop out of school because of lack of toilets and running water facilities in toilets in schools. Every school should have adequate number of toilets with running water (Asia-Pacific)
- If children are in conflict with the law, they are still children and need special attention (Africa)

Some areas generated debate among children, in particular around expenditure on the right to defence: Some wanted governments to spend less on arms, while others (in situations of conflict) said that more could be spent to increase children's sense of security. While a few children felt that freedom of religion was a right that was not a priority for expenditure, in other contexts others (mainly in Africa) suggested that governments needed to invest more to ensure freedom of conscience and to encourage religious tolerance. Access to justice was a common area of concern for many children, particularly those in Latin America who identified a need for more spending on policing to tackle violence in their communities. Many children in the face-to-face groups identified the environment as an important area for spending. One group (Asia-Pacific), in a context where there is significant concern about the impact of pollution on health, had as its second priority the environment, air quality and pollution.

There was a significant and cross-cutting theme in the children's responses acknowledging that public expenditure on families can be an important investment in children: In total 67 per cent of children highlighted 'support for families who cannot afford food/housing etc' as a right requiring more expenditure in their country. Children most often expressed views about the importance of the government investing in ways that ensured that their parents could obtain employment locally, for example, through training programmes or by helping them to start their own businesses and earn enough to take care of them – a finding that aligns with article 18 of CRC, which requires states to support parents to raise their children.

- Investing in parents so that they do not separate and take care of us (LAC)
- If the parents have jobs with adequate wages then they will provide everything for their children. It is the responsibility of the government to ensure jobs for parents (Asia-Pacific)

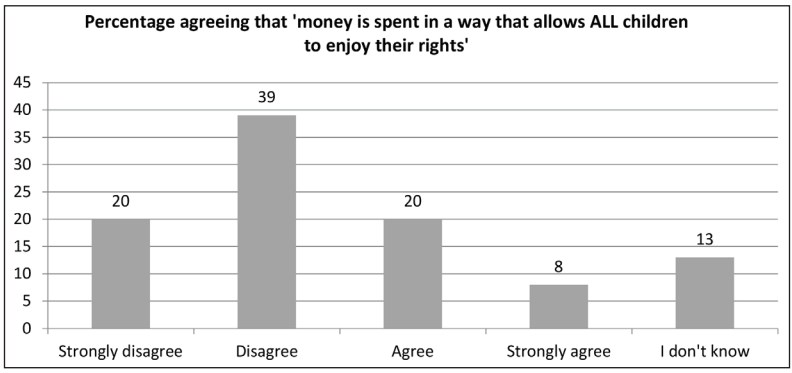
4.2 Equal (spending should enable all children to enjoy their rights)

All children are entitled to enjoy their rights under CRC without discrimination (article 2). However, it is clear both from global data and the CRC Committee's Concluding Observations that some children face significant challenges in the realisation of their rights (UNICEF 2016).[2] The child advisors wanted to know the extent to which participants considered that all children in their communities enjoyed their rights equally. However, when asked in the OCT how much they agreed (on a four-point Likert scale) that money is spent in a way that allows all

2 The global data indicates large numbers of children living in severe poverty and out of school, as well as significant levels of infant mortality.

children to enjoy their rights, responses were not very positive.[3] Figure 2 demonstrates the spread of responses across this question, indicating that only 28 per cent of children agreed or strongly agreed that money is spent in a way that allows all children to enjoy their rights.

Figure 2: Children's views on equal expenditure



Children were asked to identify particular groups of children in their communities who may not enjoy their rights equally because of a lack of resources to address their specific circumstances. Many children identified issues of inequality in relation to disability, gender and race.

- If you are black, if you are a pregnant girl or if you speak another language or have a disability, you are discriminated against in school. You are not accepted; you cannot register (LAC)

Many children considered that expenditure was not distributed equitably across their country and this often was linked to the specific area in which children lived, with rural children, for example, often thought to be missing out.

- The central governments should allocate more resources to every distant region in the country, because children with disabilities do not have access to hospitals (LAC)
- More funds should be allocated in the national budget to cover children in the very remote areas of the country so that they can equally enjoy their rights as those in the cities (Africa)

Children had clear views about those children who are most vulnerable to breaches of their rights in their communities. Not surprisingly, this varied across and within countries. Even so, among all the participants there were certain groups of children mentioned consistently as requiring additional resources, including children with disabilities and those without homes.

3 M=2.2, SD =.9.

Many additional groups were also identified, and some were mentioned frequently across a number of regions. Some of the reasons that children gave for identifying particular groups are given below.

- Children living on the street (homeless): There are no financial resources for them, they are prone to infections, their quality of life is very low (LAC)
- Many orphaned children are forced to look after their young siblings; for a variety of reasons but mainly because they do not want to split up (Africa)

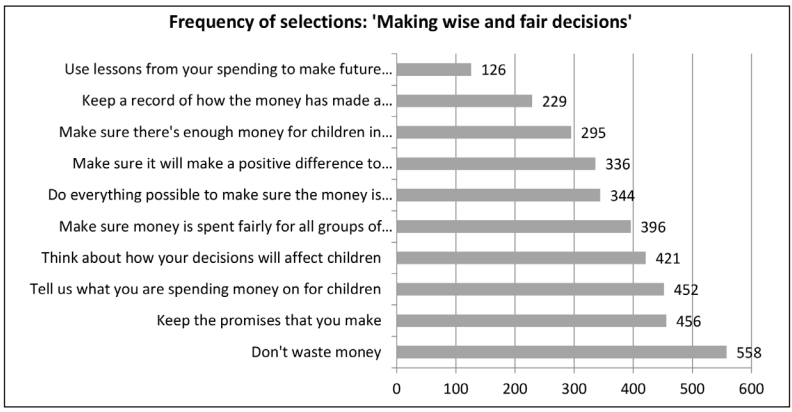
4.3 Efficient (spending should do what it is supposed to do)

One of the key drivers of social accountability mechanisms is the intention to ensure that public resources are used effectively (Schaeffer & Serdar 2008). Many children considered that their governments were not making efficient and effective use of money. Children voiced a variety of concerns that included perceptions of public money being wasted, not spent at all or spent on things that were not the most effective for children.

- Good planning so unspent money does not have to be returned (Africa)
- Manage public funds properly. Do not steal and never use them for personal interests (Asia-Pacific)

The OCT asked the children to select (from a choice of ten) the three most important issues for governments when they are making wise and fair decisions. The top three selections were 'Don't waste money'; 'Keep the promises that you make'; and 'Tell us what you are spending on' (see Figure 3).

Figure 3: Frequency of selections: How governments can make wise and fair decisions



In the face-to-face consultations children's views on the key things on which they wanted governments to focus paralleled the core issues emerging from the OCT data around spending money efficiently and effectively, with children's needs and rights at the forefront of expenditure decisions. Children in a significant number of countries raised strong concerns about corruption on the part of government officials and politicians, which they believed limited the capacity of government to realise children's rights:

- My suggestions to the Minister of Finance is that they shouldn't use the common fund to enrich their families but use it to provide the needs of the district to promote development (Africa)

When making suggestions and recommendations for government ministers, children emphasised that public money should be spent wisely on things that would benefit children now and in the future. This included, for example, spending money on schools and health facilities that were well built so that they would offer sustainable improvements in children's experience of their rights. There was also a common view that children and communities should be given the skills to be self-supporting. Children had a strong commitment to ensuring that resources were managed well to ensure the rights of future children, with some pointing out that 'the children of the future will be our children'.

- They will have the same needs we are having today. They too have rights (LAC)

On the other hand, one group of children living in poor conditions had a different perspective about how enough resources should be preserved for those in the future, suggesting that the onus should be on those whom they believed were wasting resources currently:

- There are people who are greedy in this world. They consume so much food and waste so much food. Let them share their resources with the children of tomorrow. We are provided only very little resources to lead our lives today. How can we share this with children of future whom we do not even know? (Asia-Pacific)

4.4 Transparent (it should be possible for children to find out and understand what is spent on children and the results of the spending)

Civil society engagement with 'children's budgets' seeks to understand how and how much the government is allocating and spending on programmes affecting children, as well as the impact of government spending on children (Malena et al 2004). A common theme emerging from the consultation was the view that any decisions about public expenditure should be based on good information sources defined by one group as 'research and knowing what the issues are' (Africa). Several groups mentioned the need for a good understanding or 'diagnosis' of the problem and stressed that this should

be undertaken across localities, looking at differences by gender and other groups and should involve speaking to children and their parents, including, for example, through peer research. A recurring reason was that this would ensure that government did not spend money on things that they did not need: Government should avoid unnecessary duplication.

- Gather information on the real needs of boys and girls… in order to get a real diagnosis (LAC)
- Not only keep records but also update them constantly because this will help them to determine if they are making progress or not (Africa)

Children's rights budgeting discourse places a significant emphasis on making children, who are usually invisible in public budgets, visible (Sloth-Nielsen 2008). Children strongly agreed that governments should be able to demonstrate ('show') where public money is spent and what the results of this spending have been so 'that we know how well government spends money on us' (Africa). One group called for the enactment of a Freedom of Information law (LAC). With a view to this, children felt that information should be presented in an accessible format that would be understandable to them, addressing directly a common challenge for social accountability, that is, 'the use of non-vernacular or impenetrably technical languages' (Goetz & Jenkins 2001).

- The government and the school committee should give us reports and budget allocation manuals, so that we will be able to know how much was allocated (LAC)

Children in a number of contexts emphasised the need to know that the money is used in the correct way. They suggested that there should be good systems for monitoring how money is spent and that these should involve children. One group suggested that this should include visits to 'poverty stricken areas to check if funds are equally distributed' (LAC). Others considered that government should set deadlines and have regular contact to update them on their progress.

- Stronger communication between those who make the decisions and those who 'get' the consequences of those decisions (EE)
- A system must be established to closely monitor the actions of all leaders (Africa)

4.5 Participatory (children should be involved in spending decisions)

- We are experts in child-related spending! (Asia-Pacific)

The CRC Committee has repeatedly emphasised the need for governments to consult directly with children, including in relation to public spending decisions (UN 2003). Even so, examples of children being involved in public spending (for instance, consulted on budgetary allocations or

priorities or given a budget to spend themselves) remain exceptional.[4] The responses to the OCT highlighted strong support for government engaging with children when making decisions about expenditure. The majority of children stated that they would like to be involved in this themselves and that they would feel comfortable doing so, as demonstrated by their strong agreement to all the items presented in Table 3. However, there was also recognition that not all children would want to be involved or would be comfortable doing so.

Table 3: Children's interest and capacity to be involved in expenditure

Agreement to:	**Full sample** **% Agree/ strongly agree**
I think it is important that governments listen to children's views on how to spend money	87%
I think children would be able to help governments make important decisions like this	77%
I think it is important that governments take action based on children's views	84%
I would like to be involved when the government makes decisions like these	81%
I think most other children would like to be involved in making these decisions	76%
I would feel comfortable being involved in government's decision-making about important topics	79%
I think most other children would feel comfortable doing this	68%

Children also highlighted the support they require in order for them to meaningfully become involved in government decision making. In respect of this, the OCT results demonstrate three main challenges: 'when adults don't listen to children' (62 per cent of the sample reporting this to be true); 'when children don't have information about how governments spend money' (57 per cent reporting this to be true); and 'when children don't know how government makes decisions about money' (49 per cent reporting this to be true).

Many considered that they were well-positioned to advise governments on how to make decisions about spending for children's rights, because they understood the impact of this spending in their lives. Some also

4 See Marshall, Lundy & Orr (2016) for examples of good practice.

emphasised that children were in a good position to speak about the impact of budgets cuts.

- Without the right to have views taken seriously, children will remain deprived. Child views should be reflected in budget formulation (Asia-Pacific)
- Only they know what they miss the most (WEOG)

Children expressed the view that decision makers at all levels of government, including local, regional and national, should take active measures to seek the views of children on budgeting decisions and should include children directly in decision making whenever possible. Providing information is not enough since governments 'cannot expect information provision to generate single handily the positive feedback loops between State and society' (Ackerman 2004). Many children identified a need for officials to go out to where children are located to check the situation on the ground and to seek their views. While there was support for national bodies (such as children's parliaments), many children wanted to be sure that views from all regions were fed into this properly.

- It can be better to support children's groups and meetings to take place at grassroots level periodically to inform the national summit about the real situation of children on the ground (Africa)

Many participants identified the need to involve adult facilitators to support them to understand the details of consultation processes and to assist them to make their views known to the government. They also suggested that decision makers should 'Try harder to listen to our voices!' (Asia-Pacific) by increasing their capacity to understand children's views. Some children were concerned about the fact that adults might not think that they were able to have sensible views on issues related to public expenditure, when in fact many had interests not just on issues immediately affecting them but on global issues affecting their economies.

- I think the government is belittling our capacities to learn and understand issues (Asia-Pacific)

There was strong recognition of the need for participation to be inclusive and suggestions that governments should include the views of children from diverse ages and backgrounds and localities, as well as the organisations that worked with them and on their behalf. Many argued that these should reach out in particular to those with disabilities and those who do not speak the majority language. It was suggested that governments could make consultation processes known through methods that target children specifically, such as mass media or through schools.

- Government must consult children from minority groups, including those with a disability, when drafting the budgets so that their needs will be taken into consideration during the budget preparation process (Africa)

- Create panels that truly represent young people (different age brackets, all social and economic segments of society) (WEOG)
- I think we should go out on the streets and find the children who are begging to ask their opinion, what are their greatest wishes in life and to convey that to someone who is in charge (EE)
- Make consultations with all the children nationwide, taking into account the context … given that the reality of the eastern side of the country is not the same as the western side, or the rural side is different to the city (LAC)

A frequent recommendation was that governments should follow up on the proposals made by children during budgeting discussions, whether that is through government consultations or through more formal mechanisms for children submitting their proposals (for instance, youth parliaments discussing municipal spending) and offer feedback to the children about why decisions were taken to implement (or not) the children's recommendations. They emphasised that adults should involve children in monitoring the impact of spending.

In the OCT, 9 per cent of the children had direct experience of participation in budget decision making. This often was as part of youth councils or via NGOs. Of those who had experience participating in budgeting processes, 90 per cent enjoyed the experience, and 80 per cent felt that the adults listened to their views, which in turn made the children feel empowered and valued. However, only 52 per cent felt that changes were made based on their views, a commonly-reported outcome in children's participation in public decision making generally.[5] Examples of positive action included seeing policy change; governments carrying out further work based on children's input; and the realisation of physical buildings/services. Nevertheless, such positive examples were in the minority. Often, when these children were asked what they would improve about this process, they cited a desire to see action/change.

- If you see change then you'll know government has done something … you see facilities being built. You have to see change (Africa)

Many gave examples of having participated but that they did not have their views taken seriously or followed up.

- It was evident that they used our participation showing up in the media (in relation to a consultation that took place after the budget was finalised) (EE)
- We tried to get an appointment with him (the Minister) for over a year, and not once could we go and see him, even though he told us that his office door is always open to us children. (Africa)

5 Children often report that little changes in response to their input. See Lundy (2018); Lansdown (2006).

- The need to take our opinions seriously, and not just provide the space so as to meet the requirement of listening to children (WEOG)

5 Conclusion

- The budget should not say that because children are not able to vote, they (government officials) will put the concern of only the adult. Because they are in the government for all and must listen to our views (Africa)

One of the things that may be distinct in this study of children's views on public spending and rights, which may not be as apparent with other groups of rights holders, is their need to justify the fact that they are a legitimate focus of spending and their accounts of the struggle to be taken seriously by adult decision makers. Many used the terminology of 'investment', a description that is contested by some for its presentation of children as a commodity to be invested 'in'. Moreover, children often argued that investment in their rights made good economic sense, not only for children but for the country as a whole. Sometimes this was connected to the negative consequences of a lack of investment, such as poorly-resourced education reducing employment opportunities and children turning to drugs and crime. Often, however, children suggested that investment in areas prioritised by them, such as technology (including internet access), play spaces and roads, would promote a more general public good.

- More money should be spent on youth homelessness and support for low income families. Youth recreation programmes funded by the government could help youth avoid crime (WEOG)

- Public spaces to attract more tourism, improve the economy. With a better economy, we could invest more in the future (LAC)

In a similar vein, children felt the need to justify their participation in budgetary processes. While children may not be aware of their entitlement to be heard on matters affecting them, the obligation remains. Children's participation in policy making, including at an international level, remains sparse, with children excluded *ab initio* from contributing to decisions that affect them, often on the assumption that the decisions are too complicated and outside their capacity (Lansdown 2006; Lundy 2018). Government spending is one of those no-go areas; few examples remain of public bodies consulting children on issues related to budgeting and expenditure (Guerra 2002; Botlhale 2012; Marshall, Lundy & Orr 2016). This study dispels assumptions that children do not have views on public spending, are not able to speak to the effects of public spending on the realisation of their rights and are not interested in being involved in public spending decisions to realise their rights. That is not to say that all children wish to do so or think that others would, nor does the data suggest that children's views will always differ widely from those of the adults who

ultimately have control in the decision making. Moreover, it is clear from the reports of the children who had experience of participatory budgeting that the significant challenges identified earlier (technical, attitudinal and practical) persist. However, the findings demonstrate that children do have unique perspectives on the implications of public spending (or the lack of it); what governments need to do to change this, and how they might be involved.

General Comment 19 urges governments to consult with children as part of public budgeting processes (UN 2009). In its support for and endorsement of the consultation, the CRC Committee has taken an unprecedented step in modelling an approach that should counter some of the arguments that children have no place or value in these discussions. To inform this step, it has not only actively sought children's views, but for the first time has foregrounded them in a General Comment of a UN treaty body (UN 2016: para 8). The Committee has also called on those states with experience 'in engaging children in meaningful participation in different parts of the budget process … to share such experiences and identify good practices that are appropriate to their contexts' (UN 2016: paras 52-56). The research team has conducted a follow-up study which provides examples of how children are participating in budgeting processes globally (Marshall, Lundy & Orr 2016). What the study described here provides is evidence from children themselves that they can and do want to be heard in public spending and that, when given the opportunity to form and express their views, they provide unique and valuable insights as to how the substance and processes of public spending can be operationalised to further the realisation of their rights.

As in the case of many practices that are child-centred, there is learning from the children's responses that might be applied universally. Not only were children aware that their rights and those of the adults who care for them were inextricably linked, but it is clear that many of the challenges identified by children in realising their rights often also affect adults. The children's suggestions about ways to make public spending accessible and participatory, often creative and/or harnessing the possibilities of social media and technology, are relevant to the wider discussion and practice of human rights budgeting. Children can see solutions where adults may see barriers.

The study also contributes to an understanding of what constitutes meaningful social accountability when the citizens in question are children. Ngyuen has observed that those proposing child-responsive accountability face a compounded challenge since 'children have to overcome two unequal power relationships; between State and society but also that between children and adults' (Ngyuen 2013: 7). In many forms of child advocacy, children are dependent on the support of adults (Orr

et al 2016). A further challenge arises from the fact that children are a constantly-changing population: Children grow up and thus age out of their status as children, with the processes in danger of becoming 'fixed in time and space' (Cabannes 2006: 218). In processes that are ongoing, they need to be succeeded by other children, a process that often requires continuity in the form of a stable adult presence (Orr et al 2016: 245; see also Wyness 2009). These factors inevitably impact on the understanding and implementation of traditional forms of social accountability.

The building blocks of social accountability have been described in the following chronology: (i) mobilising around an entry point; (ii) building an information evidence base; (iii) going public; (iv) rallying support and building coalitions; and (v) advocating and negotiating change (Malena et al 2004: 9). The findings from the consultation suggest that each of these 'stages' may encounter different challenges and require a different process when those seeking accountability are children. First, it appears to be much more likely that adults will identify the need for children to be included in budgetary decision making and invite children in rather than initiate the process themselves. Moreover, children reported that they would need the support of adults to both access relevant information and understand it. And finally, they were aware that taking part will often need permission from parents and other gate keepers as well as particular contacts, resources and skills. The combined effect of this is that coalitions are likely to be forged with other adult stakeholders, and advocacy and negotiation needs to create entry points, ongoing relationships and credibility (which children should be afforded, but which the data in this study suggest is often missing). It has been suggested that a key difference in social accountability mechanisms for children compared to those for adults is that children are dependent on 'adult intermediacy', defined as 'channelling their voices' (Ngyuen 2013: 24). While that may be what occurs in practice, it is not necessarily compliant with a rights-based approach or indeed with children's wishes as expressed in this study. The CRC Committee has emphasised that government must build direct relationships with children and not always work through representative NGOs (UN 2016). Moreover, children in the study also recognised a need for adults to facilitate their involvement, not to represent them.

In line with broader human rights-based approaches, children should have their capacity built to claim their rights, in particular the right to have their views given due weight on matters affecting them (Lundy 2007). Adult duty bearers also need to have their capacity built to be able to listen to children and take their views seriously. Even with this in place, when children are involved in participatory budgeting, the traditional vertical and/or horizontal lines of social accountability are inevitably disturbed, the straight lines to government subject to a series of detours or loops to adults (for permission or support). Children live in a socially-constructed

'culture of dependency' (Cockburn 1998: 99), relying on adults to create the opportunities for participation, inviting them in (or allowing them to attend), providing accessible information, negotiating access to decision makers and communicating decisions. Of course, adults are citizens too and there is a need for a clear demarcation of roles so that children's views are not usurped, obscured or manipulated by adult interests and agenda.

In some respects the newer models of social accountability, so-called hybrid mechanisms (Goetz & Jenkins 2001) may be even more appropriate for children. These approaches, described as diagonal models, operate when civil society operates not vertically, but within previously-closed horizontal models, allowing direct access to decision makers. For example, municipal authorities could invite representatives from their children's councils to attend full council meetings and present their priorities at finance sub-committees. This places children in direct communication with decision makers rather than relying on adult intermediaries. Ackerman has observed that '[i]nstead of sending sections of the State off to society it is often more fruitful to invite society into the inner chambers of the State' (Ackerman 2004: 448). For such forms of co-governance to work effectively, key rules of engagement have been identified for citizen observers, all of which could work to address some of the challenges identified by children: legal standing, a continuous presence, clear procedures for meetings, access to information and a right to dissent (Goetz & Jenkins 2001: 369). Each of these acquires enhanced significance for children's effective participation in accountability mechanisms given that children's experience is characterised by a lack of legal standing; intermittent contact with duty bearers; dependency on adults for entry and child-accessible information; and a concomitant risk that their views will be subsumed within or substituted by those of adults.

Finally, the study reinforces the significance of culture and context for effective social accountability. Children were attuned not only to the needs of their communities and the types of practices that might be effective, but provided insight into the broader social and political dynamics and their scope for influence. For some of the children in the study the concept that an adult would be interested in their views on anything, never mind public budgeting, was inconceivable. Others recognised the fact that adults should be interested, but were in no doubt about the resistance they would encounter (or had in fact encountered) during attempts to engage. General Comment 19 provides a renewed springboard for these initiatives, one that might be used to spur governments to create entry points for children in public decision making about government spending. It may be a long game and one that is marked by the technical, attitudinal and practical challenges identified earlier. However, concerns that it cannot be done well (for example, that the process will be tokenistic) are not an excuse for doing nothing at all (Lundy 2018). The findings shed light on

some of the challenges from children's perspectives rather than those of adults. They also provide insights from children as to how the barriers might be addressed. A consequence of this study (and the public initiatives that are beginning to emerge or embed) is that the children involved will soon grow into the next wave of adult decision makers and parents, with fresh perspectives on the role that children and the general public should and can play in public spending and human rights.

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The Third Optional Protocol to the Convention on the Rights of the Child: Preliminary case law assessment for the effective promotion and protection of children's rights

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Abstract: *On the occasion of the thirtieth anniversary of the United Nations Convention on the Rights of the Child, the locus standi of the child could be considered among its key elements. CRC has also been strengthened by the adoption of the Third Optional Protocol (Optional Protocol to the Convention on the Rights of the Child on a communications procedure) introducing the communication mechanism under the mandate of the CRC Committee. The decisions released by this monitoring body interestingly exemplify how the mechanism functions. The reasoning the Committee takes on in cases related to the best protection of the rights of claimants is examined in this contribution. In order to understand the operational relevance of the mechanism, different categories of cases so far handled by the CRC Committee will be explored: for instance, communications that have either been declared inadmissible, discontinuous or examined and decided on in order to take measures against the states directly concerned. The investigation will be supplemented by referencing pending cases, as described by the CRC Committee in its latest published report about the communications still under examination. Starting from the rights under examination and the recognition of the locus standi in favour of the child, the ultimate aim of the contribution is to assess how the communication mechanism is relevant in terms of advanced guarantees. Additionally, the article will explore whether, although different from judicial reasoning, it remains a relevant mechanism for the promotion and protection of children's rights at the maximum level.*

Key words: *Convention on the Rights of the Child; Third Optional Protocol; communication procedure; best interests of the child; children's rights*

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1 Introduction

On the occasion of the thirtieth anniversary of the United Nations Convention on the Rights of the Child (CRC), some questions are often raised concerning the role and mandate of the Committee on the Rights of the Child (CRC Committee). In fact, the body over time has provided an important contribution by monitoring country situations, releasing General Comments and promoting children's rights during the days of general discussion and awareness-raising actions among the public, states, professionals, civil society and academia. These activities must also be related to the consolidation of two aspects: the protection of children involved in armed conflicts, as well as the prevention and persecution of the sale of children, child prostitution and child pornography, as provided by the two Optional Protocols to the Convention, which in 2020 will celebrate the twentieth anniversary of their adoption and entry into force.

However, little research is dedicated to the active role played by the holder of the rights and freedoms enshrined in these legal instruments. Indeed, the *locus standi* of the child is the real added value of CRC, which has been strengthened only when the negotiation for the compilation and adoption of the Third Optional Protocol was initiated, ultimately resulting in the introduction of the communication mechanism under the mandate of the CRC Committee. The decisions released by this body, which exemplify both the function of this mechanism and its assessment of some cases related to the best protection of the rights of claimants, are examined in this contribution. In order to understand the operational relevance of the mechanism, the article will specifically explore different categories of cases so far handled by the CRC Committee: communications that have been declared inadmissible, communications that have been considered discontinuous, and communications that have been examined and decided on so as to take measures against the states directly concerned. Finally, the investigation will be supplemented by a reference to pending cases, as described by the CRC Committee in its latest report published on the state of the communications under examination.

Starting from the rights under examination and the recognition of the *locus standi* in favour of the child, the ultimate aim of the article is to preliminarily assess (due to the limited case law) the extent to which the communication mechanism is relevant in terms of advanced guarantees. Additionally, the article will explore whether, although different from judicial reasoning, it remains a relevant mechanism for the consolidation of the promotion and protection of children's rights at the maximum level.

2 Some preliminary remarks on the Third Optional Protocol to the Convention on the Rights of the Child

The need to provide CRC with a mechanism for accessing its Committee, whose mandate is to receive communications directly from rights holders and to adopt decisions stopping violations while restoring the correct application of the Convention, is a fundamental step (Cantwell 1992; Doek 2011). The introduction of such mechanisms in the key human rights treaties is provided in the same texts or otherwise in Optional Protocols. For CRC this option was assumed both during the negotiation and the compilation of the first two Optional Protocols (Detrick 1992). However, primary attention was paid to the formulation of provisions of the Convention so that strictly procedural aspects were taken into account.

It was only in 2008 that the General Assembly, fuelled by pressure from civil society, accepted the request by several associations to set up an open-ended working group involving representatives of member states interested in drafting the Third Optional Protocol to CRC on Communications (A/HRC/8/NGO/6, 26 May 2008). The official establishment of this Working Group is contained in the Human Rights Council (HRC) Resolution 11/1 of 17 June 2009. The Working Group met in December 2009 to discuss the contents of the Optional Protocol, receiving many contributions from all the involved actors, that is, member states (members and non-members of the HRC), international governmental and non-governmental organisations (NGOs), civil society and CRC Committee components (A/HRC/13/43, 21 January 2010). The renewal of the mandate of the Working Group through a further HRC resolution allowed its members to draft a preliminary version of the text (A/HRC/RES/13/3, 14 April 2010). At this stage the mechanism included the double reference to the communications that can be formulated and submitted to the CRC Committee by individuals as well as groups of individuals which was appreciated by the members of the Committee (A/HRC/WG.7/2/3, 13 October 2010) (Lee 2010).

Nevertheless, during negotiations at the beginning of 2011, the collective dimension was removed by the inclusion of an opt-in clause: Ratifying states would be allowed to decide whether to declare the competence of the CRC Committee to receive and consider communications from individuals and groups of individuals (A/HRC/WG.7/2/4, 13 January 2011). A wide and articulated debate within the Working Group has contrasted the two main views. On the one hand, a large number of state representatives were in favour of the individual *locus standi* of the communication, thus excluding the collective *locus standi* or opting-in clause. On the other hand, associations, experts and the members of the CRC Committee stressed the value of keeping both the individual and collective *locus standi* as part of the mechanism (A/HRC/17/36, 16 May 2011).

The final document, adopted by HRC Resolution 17/18 on 14 July 2011 and sent to the General Assembly for adoption and opening for signature (GA/11198, 19 December 2011), however, only provides for individual communications. Following the celebration of the signing at the Human Rights Council on 28 February 2012, the Third Optional Protocol entered into force on 14 April 2014, having so far been signed and ratified by 46 state parties (Grover 2015).

2.1 Legal framework: Substantive contents of the Third Optional Protocol

The Third Optional Protocol consists of four parts. The first section (articles 1-4) defines first of all the competence of the CRC Committee in terms of admissibility of the communication, the acknowledgment of presumed violated rights and the accession of the alleged state to the Third Optional Protocol. The body must operate by ensuring full respect for the principle of the best interests of the child and the right to be heard, adopting special rules of procedure that ensure that children are not influenced and manipulated by adults and that they are effectively protected.

The second part (articles 5-12) describes the communication mechanism itself. As far as the admissibility of the communication is concerned, some key legal components are introduced: the *ratione personae* parameter (individuals, groups of individuals or their representatives) and the possibility for the state to take temporary measures to avoid further harm to the child. In conformity with article 6, so-called interim measures may be required by the CRC Committee before its determination, excluding that they imply a decision on the merits of the communication. The state concerned, for example, could receive a request for the adoption of necessary measures in extraordinary circumstances to avoid any negative effect on the victim of the alleged violations. As per article 7, the admissibility of the communication is proved according to the lack of anonymity and written submission; cases other than those governed by the Convention or Optional Protocols; the fact that the communication has already been examined by the Committee or is pending before another international body; the exhaustion of domestic remedies, provided that they are not particularly lengthy or have not solved the case within one year after the submission of the communication; a manifest ill-founded basis; and, finally, according to the presumed violation prior to the entry into force of the Protocol (unless its effects have continued even after its entry into force). If the above requirements are met, the formal submission of the communication must take place within the following six months. The CRC Committee may propose a friendly solution to the parties. Otherwise it will proceed with the analysis of the case in a timely and confidential manner. If the state is requested to take temporary measures, the handling of the communication must be even more timely.

The procedure ends with the adoption and sharing of the opinion and recommendations to the parties, which then are tracked in the following six months by a state's report on the implementation of all requested measures. The CRC Committee is also entitled to pose further questions to the state for more detailed clarification. This procedure takes on the same features with regard to inter-state communications, given that both states concerned have recognised the Committee's competence to receive and examine such documents.

The third part (articles 13-14) describes the CRC Committee's competence to conduct investigations in cases where the information received indicates serious and systematic violations of the rights set out in CRC and its related Optional Protocols, provided that the relevant State has previously declared that it accepts this competence. In such circumstances, it is essential for the State to effectively cooperate with the CRC Committee – even when one member or more wishes to visit the territory and neighbouring areas across national borders. The results of the investigation subsequently are to be translated into a final document, including recommendations sent to the state concerned for a reply within six months, possibly indicating what measures have been taken to respond to the CRC Committee's comments.

The fourth and final part (articles 15-24) introduces the procedural provisions concerning assistance and cooperation activities as well as information on the Third Optional Protocol. This includes the signature, ratification and accession processes, while highlighting that entry into force only occurs after the tenth ratification.

2.2 Functioning of the communication mechanism provided by the Third Optional Protocol

Beyond the provisions of the Third Optional Protocol, a detailed overview of the functioning of the mechanism is here provided, as planned in the Rules of Procedure adopted by the CRC Committee at its 62nd session (14 January to 1 February 2013; CRC/C/62/3, 16 April 2013). For the best management of communications, the CRC Committee has established a dedicated Working Group on communications in compliance with Rule 6. The Working Group is composed of nine members, who contribute to its mandate in line with a biannual rotation principle concerning four or five of the members. It is required to adopt its decision by majority, with the exception of decisions concerning the above-mentioned interim measures, which demand the support by at least three members of the Working Group and which should be adopted within a time frame of 24 hours.

When the Secretariat (Petition Unit) receives a communication, it forwards it to the Working Group, which appoints one of its members as

case rapporteur, who is tasked not only with the analysis of all information included in the case file, but also with the collection of further data by doing additional research. The final duty of the case rapporteur is to formulate draft recommendations on the admissibility and the merits of the case, which is then shared with the other members of the Working Group for their reactions and comments. The last step on behalf of the case rapporteur is to prepare a consolidated draft decision on the admissibility and the merits of the case that is then forwarded to the CRC Committee for adoption either by consensus or by majority. The Working Group could also benefit from consultations with independent experts or other CRC Committee members, who have expert knowledge and specific experience in aspects related to the specific case law under examination.

With regard to the analysis of the functioning of the communication mechanism, there is a further relevant difference between communications submitted by children and communications submitted by adults acting on behalf of children. In the first case, the communication should be forwarded immediately from the Secretariat (Petition Unit) to the Working Group, even if it were considered *prima facie* inadmissible. Using child-friendly language, the Secretariat should inform the claimant in a timely fashion that the communication was duly received. Conversely, if the communication is submitted by an adult, the Secretariat must first screen the communication so as to check if it is in compliance with formal requirements. Such requirements include that the communication is not submitted anonymously; that it is not manifestly unfounded; that it refers to children's rights as provided for by CRC and related Optional Protocols; and, finally, that the defendant is a state party of the Third Optional Protocol. If the communication is found not to be compliant, the Secretariat should reject it. Finally, if the communication is submitted by adults acting as representatives of children, the task of the Working Group is to assess if the children have been subjected to inappropriate pressure.

Compared to the communication mechanisms of other core treaties, the Third Optional Protocol faces the same weaknesses, as pointed out by academics and civil society (Buck & Wabwile 2013; Smith 2013; Hunt-Federle 2017). First of all, although containing detailed and practical recommendations addressed to the attention of the relevant state, the CRC Committee decisions are not binding. The mechanism only requires states to pay 'proper attention' to the recommendations and supplement this attention by a further report indicating legislative and operational actions taken. Furthermore, there is a lack of awareness about the communication procedure among individuals, groups of individuals and their representatives (including legal representatives) while the difficulty to meet all the communication requirements for admissibility by the CRC Committee presents a major obstacle. For these reasons, the factual relevance of the Third Optional Protocol has been limited: At the very

beginning the number of communications was rather small and linked to the rejection of communications for reasons of inadmissibility. However, there are some cases of admissible communications where the CRC Committee has done truly progressive work to protect children's rights (Liefaard & Doek 2015).

The three categories of communications, as set out above, will be closely examined in the following parts. First, inadmissible communications concerning three main state parties (Denmark, Spain and Switzerland) will be evaluated on the basis of the rights of CRC and its Optional Protocols. Second, so-called 'discontinuous' communications will be analysed via the example of three main country cases (Denmark, Germany and Spain). With regard to admissible communications, one part will also provide a careful argument based on the child rights violated and the state parties concerned (Belgium, Denmark, Spain and Switzerland). Finally, attention will briefly be devoted to cases pending before the CRC Committee.

3 Case law of the CRC Committee: Inadmissibility

For inadmissible communications submitted by claimants to the CRC Committee, Rule 21 of the Rules of Procedures states as follows:

> (1) Where the Committee decides that a communication is inadmissible, it shall, through the Secretary-General, without delay, communicate to the extent possible in an adapted and accessible format its decision and the reasons for that decision to the author(s) of the communication and to the State party concerned.
>
> (2) A decision of the Committee declaring a communication inadmissible may be reviewed by the Committee upon receipt of a written request submitted by or on behalf of the author(s) indicating that the reasons for inadmissibility no longer apply.

As such, the investigation is based on a thematic parameter with primary reference to three country-wide systems, notably, Denmark, Spain and Switzerland.

3.1 Danish case law (7/2016, 32/2017 and 33/2017)

Given that the Third Optional Protocol entered into force on 7 January 2016, the claimants (adults acting on behalf of children) noted that the Danish institutional system in charge of verifying applications for refugee status or the granting of a residence permit on humanitarian grounds did not take due account of the best interests of the child nor of their physical safety.

In case 7/2016 (CRC/C/78/D/7/2016, 9 August 2018) the deportation of the claimant and his children to Afghanistan were presented as being

in breach of several articles of the Convention (articles 1, 2, 3 and 19). However, the CRC Committee pointed out that the statements and evidence submitted by the claimants at national level were in part appropriately examined by the competent national bodies. Indeed, they exhausted all domestic remedies and ensured the protection of the principles of the best interests of the child and of *non-refoulement*. The evidence presented by the claimants, however, did not match the motivations introduced in the communication submitted to the CRC Committee. The argument that returning the children in question to Afghanistan would expose them to Taliban forces and further endanger them due to their conversion to Catholicism were deemed not to be strong enough to legitimate their stay in Denmark. The declaration of inadmissibility under articles 7(e) to (f)) of the Third Optional Protocol was motivated by the partial and thus satisfactory exhaustion of domestic remedies, as well as the substantive grounds offered by the communication. The declaration, however, was followed by the state's decision to suspend the transfer order of the claimant and his children to Afghanistan.

Conversely, in cases 32/2017 (CRC/C/82/D/32/2017, 24 October 2019) and 33/2017 (CRC/C/82/D/33/2017, 8 November 2019) the claimant's request to the CRC Committee to assess the reasons for the refusal of the competent Danish bodies to accept the claimant's application for a residence permit on humanitarian grounds so as to avoid deportation to Albania was examined. In contrast to the previous case, the CRC Committee highlighted the fact that domestic remedies had not been exhausted. Viewed from a children's rights-based approach, there also were not sufficient substantive reasons to uphold the national decision. The case thus was referred to the concomitant competence of the UN Committee for Human Rights. However, it also noted the irrelevance of the evidence brought forward by the claimant, thus ultimately concluding the communication to be inadmissible under articles 7(d) to (f) of the Optional Protocol. This case clearly illustrates the difficulties faced by a claimant to produce proper evidence as well as the *locus standi* of the child as separate from the status of the parents – a dimension clearly stated in General Comment 23 (CMW/C/GC/4-CRC/C/GC/23, 16 November 2017) (Kilkelly 2020).

3.2 Spanish case law (1/2014 and 14/2017)

As far as inadmissible communications in relation to Spain are concerned, two main issues may be mentioned. On the one hand, the age and status of the claimant as an unaccompanied minor (official acronym UAM) were deemed inapplicable by the Spanish competent authorities. On the other hand, reconciling the needs of children in an unstable family context with the quality of admissible evidence presented for the protection of the best interests of the child can present significant obstacles. In cases 1/2014

(CRC/C/69/D/1/2014, 8 July 2015), 8/2016 (CRC/C/78/D/8/2016, 11 July 2018) and 14/2017 (CRC/C/80/D/14/2017, 14 August 2019) the CRC Committee found the communications inadmissible for several reasons. In the first case, the communication was submitted prior to the entry into force of the Third Optional Protocol in Spain (*ex* article 7(g) of the Third Optional Protocol), which immediately excluded the communication. In the second and third cases, references were made to age assessment procedures, guardianship, European Union (EU) as well as international principles granting special protection of children in such conditions. This evaluation of the facts combined with the statements made by the claimant as to their truthfulness led the CRC Committee to rule on the inadmissibility of the communication under article 7(c) of the Protocol.

In case 14/2017 the contribution from a third party (namely, the French Ombudsman) also supported the CRC Committee's reasoning. This was possible because the opportunity to include third party interventions in the communication mechanism of the Third Optional Protocol is established in Rule 23, paragraph 1 of the Rules of Procedure. It has also been outlined in *ad hoc* guidelines prepared and adopted by the CRC Committee. Indeed, the Working Group on communications may decide to ask for third party interventions or to accept information and documentation submitted by third parties. However, the CRC Committee must send a formal written request to the relevant third party via the Petitions and Urgent Actions Section of the Office of the High Commissioner for Human Rights, describing the setting and explaining why the request has been forwarded for attention. Also, the specific time frame and formal criteria are provided by the CRC Committee so as to facilitate support from the third party. With the prior consent from the claimant, the third party is charged by the Committee to get in contact with the claimant in order to collect relevant documents on the case file. The third party is obliged to neither disclose all information contained in the documents nor to divulge sensitive data concerning the child or children in question. The CRC Committee could disregard the contribution of the third party if these requirements are not respected. In the end, the third party intervention is shared both with the claimant and the state concerned for written comments in reply, if feasible. The intervention and the replies are taken into appropriate account by the CRC Committee in formulating its final decision on the case.

3.3 Swiss case law (2/2015)

In cases 2/2015 (CRC/C/73/D/2/2015, 26 October 2016) and 13/2017 (CRC/C/81/D/13/2017, 17 June 2019) the CRC Committee was called upon to address the issue of strengthening the implementation of the principle of the best interests of the child. Its decisions in these cases were based on two concrete factors, namely, (i) detailed evidence that one of the two parents were removed from the family and placed in a state other

than the one where the child resided (Switzerland); and (ii) that the Swiss jurisdictional system ensures that it takes note of the case and rules on its merits. A close consideration of these factors led the CRC Committee to reject both communications pursuant to article 7(f) of the Third Optional Protocol.

4 Case law of the CRC Committee: Discontinuity

When the CRC Committee positively assessed the preliminary admissibility of a communication, which then eventually is followed by the adoption of measures by the defendant state aimed at protecting children's rights, the possibility remains that the communication can be discontinued. Rule 26 of the Rules of Procedure is the key legal basis for this discontinuity, providing for the disruption of the function of the CRC Committee. It explicitly states that '[t]he Committee may discontinue the consideration of a communication, when, inter alia, the reasons for its submission for consideration under the Convention and/or the substantive Optional Protocols thereto have become moot'.

It should be added that at its 81st session the CRC Committee deliberated on the inclusion of a motivated reasoning for discontinuing decisions. Case 43/2018 (CRC/C/82/D/43/2018, 1 November 2019) concerning the situation of an Iranian family (parents and three children) deals with the rejection by the competent Danish authorities of the application for asylum and the consequent displacement of the family to Italy on several occasions. With the repeated rejection of the application paired with the extreme physical and mental health situation of one of the parents, the impact on the safety and well-being of the children was clear. Consequently, the competent Danish authorities reopened the asylum application procedure leading to the granting of refugee status to the claimants, thus making the action required by the CRC Committee unnecessary. The communication subsequently was discontinued. A similar outcome was reached in case 35/2017 (CRC/C/78/D/35/2017, 11 July 2018) which concerned a Syrian claimant, who had previously received the authorisation for reunification with his relatives in Germany. However, the reunification was delayed for procedural reasons.

In some instances within the Spanish system (for instance, Case 18/2017, CRC/C/77/D/18/2017, 8 March 2018; Case 39/2017, CRC/C/78/D/39/2017, 12 June 2018; and Case 54/2018, CRC/C/82/D/54/2018, 13 November 2019) it can be noted that claimants complained about the inaccuracies around age assessment, which led to the placement of children in adult reception centres. These children also were not officially listed as unaccompanied foreign minors (UAM), which led to their inability to gain access to measures dedicated to their protection and general assistance.

The intervention of Spanish authorities to correct these errors, however, gave the CRC Committee good reason to declare the case discontinued.

5 Case law of the CRC Committee: Admissibility and related decisions

According to Rule 20 of the Rules of Procedures, the admissibility of communications is provided for as follows:

> (1) The Committee shall as quickly as possible, by a simple majority and in accordance with the following rules, decide whether the communication is admissible or not under the Protocol.
>
> (2) The decision to declare a communication admissible may be taken by a working group established under the present rules provided that all its members so agree.
>
> (3) A working group, established under the present rules, may declare a communication inadmissible provided that all its members so decide. Its decision is to be transmitted to the Committee plenary, which may confirm it without formal discussion, unless a Committee member requests such discussion.
>
> (4) Where a communication is brought to the Committee on behalf of a child or a group of children without evidence of her/his/their consent, after consideration of the particular circumstances of the case and the information provided, the Committee may decide that it is not in the best interests of the child(ren) concerned to examine the communication.

Rule 27 is also relevant in this regard:

> (1) In the event that the Committee finds that the state party has violated its obligations under the Convention or its substantive Optional Protocols to which the state is party, it will make recommendations on the remedies for the alleged victim(s), such as, inter alia, rehabilitation, reparation, financial compensation, guarantee of non-repetition, requests to prosecute the perpetrator(s), as well as indicate the time limit for their application. The Committee may also recommend that the state party take legislative, institutional or any other kind of general measures to avoid the repetition of such violations.

Where the protection of children's rights is concerned, the CRC Committee's case law is particularly relevant when considering the admissibility of communications – especially in relation to defendants who are state parties to the Third Optional Protocol (Geary 2013).

5.1 Belgian case law (12/2017)

In a case concerning Belgium (12/2017 (CRC/C/79/D/12/2017, 5 November 2018) the CRC Committee argued its decision on admissibility

in a complex manner (Erdem Türkelli & Vandenhole 2018). In the case there are two parents as claimants, one of Belgian nationality and the other of Belgian/Moroccan nationality. Following a ruling by the court of first instance in Marrakesh recognising the *kafala* scheme, they applied for a visa for their child. However, since the *kafala* was not considered an official legal family relationship in Belgium, the visa application was refused on grounds of family reunification. In fact, they refused it on many occasions in 2012, 2014, 2015, 2016 and 2018. Between 2016 and 2018 the parents submitted the communication to the CRC Committee, noting a breach of articles 2, 3, 10, 12 and 20 of CRC. They also pointed out that Belgium's position did not comply with the obligations set out by the Hague Convention on Parental Responsibility and Protection of Children – a convention to which Belgium of course is also a contracting party. The CRC Committee's reasoning was based on procedural and substantial matters. Procedurally, the claimants lodged their communication while still awaiting a reply from the Belgian authorities regarding an application for a visa for family reunification. This could very well have led to the case being deemed inadmissible. However, the CRC Committee pointed out that previous appeals lodged by family members had already exhausted domestic remedies. As for the substantial aspects, the CRC Committee found that although articles 2 and 20 had not been violated, articles 3 and 12 in fact clearly had been violated – regardless of any consideration of the child's age, the degree of maturity and level of understanding. Additionally, article 10 had also clearly been violated in that the legal definition of the *kafala* has developed significantly, thus amounting to a *de facto* family setting. This particularly is the case if it is related to the need for rapid and effective management of family reunification situations dictated by migratory conditions. This is in line with General Comment 14 (CRC/C/GC/14, 29 May 2013) as well as General Comment 23 and the Belgian case law of the European Court of Human Rights (European Court) (*Mubilanzila Mayeka and Kaniki Mitunga v Belgium*, 12 October 2006, para 55; *Chbihi Loudoudi v Belgium*, 16 March 2015).

5.2 Danish case law (3/2016)

The CRC Committee addressed a very sensitive issue in Case 3/2016 (CRC/C/77/D/3/2016, 8 March 2018, commented by Sloth-Nielsen 2018). In this case the claimant was a pregnant mother from Somalia, who requested Danish authorities to accept her application for asylum in order to avoid deportation back to her country where her newborn child would run the risk of being subjected to the practice of female genital mutilation (FGM), which is a common practice in her home region Puntland. The CRC Committee and the Danish authorities had a tough exchange of views on issues such as the expulsion ban (carried out by the Danish authorities), the adoption of interim measures (denied by the CRC Committee) and the request for discontinuity of the communication (denied by the Committee,

although at the time of its formulation the Danish authorities justified its scope in the absence of the mother and daughter on Danish territory for reasons not further specified by their lawyer).

With regard to the alleged breach of articles 1, 2, 3 and 19 of the Convention, the CRC Committee reasoned that the evidence presented by the claimant under article 2 was manifestly unfounded. The Committee, however, considered the communication's claims based on articles 1, 3 and 19 to be admissible, emphasising the serious risk of the child being subjected to FGM if the mother were expelled and returned to Somalia (referring also to General Comment 6 (CRC/GC/2005/6, 1 September 2005) and General Comment 18 (CEDAW/C/GC/31-CRC/C/GC/18, 14 November 2014). They also noted that there were limited reporting data and legislative measures in Puntland to ensure the protection of the child – especially when the child would then only be protected by the parent's ability to resist family and social pressures.

At this point it is worth highlighting the aforementioned interim measures, which were adopted by the CRC Committee (see Guidelines for Interim Measures under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure). The option for interim measures is established in article 6(1) of the Third Optional Protocol:

> At any time after the receipt of a communication and before a determination on the merits has been reached, the Committee may transmit to the state party concerned for its urgent consideration a request that the state party take such interim measures as may be necessary in exceptional circumstances to avoid possible irreparable damage to the victim or victims of the alleged violations.

So far, interim measures have been used in order to achieve several goals. For one, they are aimed at enhancing the protection of children from severe harm while also preserving the legal conditions to prevent any further violation during the examination of a complaint by the CRC Committee. The interim measures are also instrumental for the integrity and effectiveness of the decision to be adopted by the CRC Committee on the merits of the case, ensuring that the decision itself does not cause harm. Additionally, these measures facilitate the implementation of the final views and the related reparations. Hence, the interim measures are connected to the following conditions, as defined in the above-mentioned Guidelines:

(a) 'exceptional circumstances' refers to a grave impact that an action or omission by a state party can have on a protected right or on the eventual effect of a pending decision in a case or petition before the Committee;

(b) 'irreparable damage' refers to a violation of rights which, due to their nature, would not be susceptible to reparation, restoration or adequate compensation. This also implies that, in principle, there is no domestic remedy that would be available and effective.

Furthermore, the interim measures require that the risk of threat to the child should be imminent and tangible, as well as supported by strong evidence. For instance, well-supported evidence would require the inclusion of relevant facts about alleged violations, which are then to be assessed on a case-by-case basis. Furthermore, the interim measures could be adopted at various stages – that is, either at the beginning of the process, during the course of the communication procedure, or afterwards when the communication is reviewed in light of new information provided. Finally, if the state concerned does not implement the interim measures, this non-compliance amounts to a violation of article 6 of the Third Optional Protocol.

5.3 Spanish case law (4/2016)

There are many cases in which the CRC Committee has declared admissible the communications submitted by claimants following the violations of children's rights by Spain. Here, Case 4/2016 (CRC/C/80/D/4/2016, 15 May 2019, commented by Morlacchetti 2019) is interesting as an example, since it can also be compared to several other cases where the CRC Committee has reached similar decisions. (See, for example, Cases 11/2017 (CRC/C/79/D/11/2017, 18 February 2019, commented by Dorber & Klaassen 2019); 16/2017 (CRC/C/81/D/16/2017, 10 July 2019); 17/2017 (CRC/C/82/D/17/2017, 5 November 2019); 22/2017 (CRC/C/81/D/22/2017, 9 July 2019) and 27/2017 (CRC/C/82/D/27/2017, 5 November 2019)). The main topic of these communications relates to entry into Spanish territory, which necessitates the implementation of age assessment procedures, the placement of children in reception facilities, guardianship appointments as well as children's access to the national system for examining asylum applications for refugee status. In the case law mentioned above, regardless of questions related to the nationality of the (alleged) child (Mali, Côte d'Ivoire, Algeria, Cameroon, Guinea) the CRC Committee noted the violation of those children's rights enshrined in the Convention in articles 3, 8, 12, 20(1), 24 and 37, which is in line with Committee's General Comment 6 (CRC/GC/2005/6, 1 September 2005), General Comment 22 (CMW/C/GC/3-CRC/C/GC/22, 16 November 2017) and General Comment 23 (CMW/C/GC/3-CRC/C/GC/23, 16 November 2017). These violations concern the inappropriate identification of the child, the exposure to risks due to the lack of access to assistance and physical safety measures in reception centres, and the lack of procedural efficiency by the Spanish authorities (excluding the contested ruling that the territories of Ceuta and Melilla, through which children also enter into the Spanish territory, are not subject to national jurisdiction).

5.4 Swiss case law (47/2017 and 61/2018)

Finally, the CRC Committee handled two cases concerning Switzerland (Cases 47/2017 (CRC/C/81/D/47/2018, 28 June 2019) and 61/2018 (CRC/C/81/D/61/2018, 28 June 2019)). Here the CRC Committee pointed out that the status of the claimants (Angolan and Eritrean nationals respectively) as asylum seekers should necessarily imply a careful examination of the application by the competent Swiss authorities in order to prevent them from being returned to their state of origin. It should also include full guarantees for family reunification in Switzerland. The CRC Committee thus declared the communication itself discontinuous.

6 Cases pending before the CRC Committee

Looking at the information collected by the CRC Committee in March 2020 on the communications submitted as admissible, a mere quantitative analysis reveals that the mechanism is more widely used by claimants in specific countries, including Belgium, Denmark, Spain, Switzerland, France, Finland, Germany, Georgia, Ireland, Slovenia, Argentina and Chile. These submitted communications often are associated with violations of children's rights and freedoms as these relate to migration and asylum applications, critical family situations, children in conflict with the law, health conditions (FGM, corporal punishment in the family and at school) (Spronk 2014), and the general protection of the best interests of the child (Alston 1994). A first case of multiple communications has been forwarded to the CRC Committee involving several states (104/2019, Argentina; 105/2019, Brazil; 106/2019, France; 107/2019, Germany; 108/2019, Turkey). In this instance the claimants saw themselves as victims of climate change, highlighting the violation of articles 3, 6, 24, and 30 of CRC. They noted that the poor measures taken by states to limit pollution not only led to a high percentage of CO_2 emissions harmful to their health, but also damaged the future of younger generations.

7 Conclusion

The entry into force of the Third Optional Protocol to CRC should be considered a significant step for international human rights law, since as the most globally-ratified Convention it has been given a procedural mechanism to ensure greater protection of the rights and freedoms set out in it. The CRC Committee's mandate involves primarily to receive communications – categorised as inadmissible, discontinuous or admissible – from individuals and groups of individuals complaining of the violation of one or more of the rights enshrined in CRC. The recent progress report on the functioning of the communications mechanism, released by the CRC Committee in October 2019, contains relevant

information that allows the assessment of its scope. This report not only is limited to the position of the CRC Committee on the violation of children's rights, but has also facilitated a constructive dialogue with the state parties concerned in order to evaluate whether the CRC Committee's decisions have been fully or partially implemented. With regard to the latter, it is necessary to receive further and more updated information on the follow-up by states in order to assess whether or not they act in line with the CRC Committee's requests.

On a general note, the follow-up to the views adopted by the CRC Committee has special added value, particularly in relation to admissible case law where the monitoring body has ascertained violations of CRC and related Optional Protocols. The procedure is described in detail in Rule 28 of the Rules of Procedure. Apart from common features with other UN treaty bodies with individual and collective communication mechanisms, the uniqueness of this procedure is the designation of a rapporteur or working group to follow up on the views of the CRC Committee:

> (1) The Committee shall designate for follow-up on views or decisions closing the consideration of a communication following a friendly settlement in accordance with article 11 of the Protocol a rapporteur or working group to ascertain the measures taken by the state party to give effect to the Committee's views, recommendations or decisions closing its consideration following a friendly settlement agreement.
>
> (2) A rapporteur or working group may make such contacts and take such action as may be appropriate for the due performance of their assigned functions and shall make such recommendations for further action by the Committee as may be necessary.
>
> (3) …
>
> (4) A rapporteur or working group shall report to the Committee on follow-up activities at each session of the Committee.
>
> (5) The Committee shall include information on follow-up activities and, where appropriate, a summary of the explanations and statements of the state party concerned and the Committee's own suggestions and recommendations in its report under article 44, paragraph 5, of the Convention and article 16 of the Protocol.

Following the recent assessment released by the CRC Committee with respect to the case law concerning Denmark, Spain and Switzerland, it has expressed partial appreciation for the first two and positive appreciation for the third. The common thematic approach of the CRC Committee's views remains on migratory issues, encompassing *inter alia* the principle of *non-refoulement*, age determination of unaccompanied migrant children and family reunification matters, but with some innovative sights.

As per the Danish case law, it is undoubtedly significant that the threat of FGM is deemed reasonable grounds to demand asylum. This takes

into account a twofold consideration in relation to the implementation of the Third Optional Protocol (which had just been ratified and entered into force in the country concerned). These two considerations are (i) the necessity to create the proper conditions in order to hear from the child; and (ii) the difficulties in managing a good defence of the victim (despite adequate contact and communication with the counsel) due to the refusal to include in its drafting process a collective complaint procedure. Meanwhile, the complexity of the migratory issue and the search for a legal balancing between private and public interests has powered a lengthy reply by the domestic asylum management system and, on a general note, a partial fulfilment of the reception of the Third Optional Protocol for the appropriate procedural functioning of the national machinery. This also depends upon the wording adopted by the CRC Committee for its views, which is vague enough to guide the relevant state to report information about the measures adopted and to ensure the dissemination of the views. In this sense the remedy is neither innovative, concrete and effective enough to achieve the targeted results in this specific case, nor can it have an indirect impact on similar future cases so as to ensure that the violations of CRC provisions are not repeated.

With regard to the Spanish case law, the position of the CRC Committee highlights the country's faulty management of migratory and asylum procedures involving foreign unaccompanied children. Previous communications have dealt with different aspects of the same issue, such as the lack of access to asylum proceedings, inaccurate medical testing for age determination, detention in migratory centres for adults, and the denial of legal recognition of children as migrant and asylum seekers. In the case under examination, another aspect was recognised as a violation of CRC, namely, the push-back practices carried out by border control agents and coastguards to prevent people from entering and seeking international protection in the territory. These people are forced to return immediately to their country of origin without any guarantees. Hence, the CRC Committee's views confirm international and national reports and investigations into the situation of migrant children in Spain. These views also are in line with the observations formulated by the same CRC Committee during the interactive dialogue held with the Spanish delegation during its last periodic report in March 2018. This stance equally emphasises the relevance of the fundamental standards of CRC interpreted by the CRC Committee in its General Comments 6, 22 and 23. However, the substantive and formal significance of the CRC Committee's views lies in their urgent and unequivocal call to end the automatic push-back practice of children by Spanish authorities by adopting necessary legislative measures as well as administrative tools and procedures to protect children's rights in those special circumstances.

The Swiss case law in turn could be considered a good practice impacting on structural and procedural domestic features within the country – the management of migratory issues concerning migrant accompanied children being a primary example. Indeed, the reasoning of the CRC Committee's views has been translated into a review of the case discussed in this contribution. However, a comprehensive reassessment of neither the legal framework and related proceedings governing the release of residency permits, nor the protected and safe return of migrants to their countries of origin occurred.

It is a matter of fact that landmark positions expressed by the CRC Committee in its views of the above-mentioned cases offer substantial and formal solutions that need to be adapted and corrected for an authoritative impact at the national level. The next step will be to consider whether the Third Optional Protocol, with a double reference to case law and the implementation of the CRC Committee's views, should in fact in future years be considered a crucial instrument for the effective promotion and protection of children's rights.

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Rethinking the façade of decentralisation under the 1996 Constitution of Cameroon

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Abstract: *The 1996 Constitution of Cameroon tried to put in place a decentraliased system of government in order to accommodate Cameroon's diverse communities. The constitutional and political evolution from the colonial era up to the present has a role to play in decentralisation efforts. The country today faces a number of serious challenges to governance which the decentralisation project in the 1996 Constitution was supposed to address. Some of these challenges that were discussed during the national dialogue that took place in the country from 30 September to 4 October 2019 include difficulties in dealing with the country's dual colonial heritage, particularly the perception of marginalisation by the Anglophone community. Other challenges include embracing constitutionalism; tackling minority concerns such as the rights of women and indigenous people; curbing ethnic tensions; and managing the transition from authoritarian to democratic governance. An examination of the constitutional and legal framework of decentralisation under the 1996 Constitution shows that these issues have not been adequately addressed under the current dispensation. There thus is a need for a fundamental constitutional overhaul that would provide a more effective decentralised framework for administrative, political and fiscal decentralisation. The new framework should equally entrench the basic elements of constitutionalism such as upholding human rights, fostering the separation of powers, the amendment of the Constitution and judicial independence. There equally is a need for legal safeguards, such as a constitutional court, to guard against the usurpation and the centralisation of powers by the central government. Only such elements can facilitate Cameroon's decentralisation efforts and thus ease the accommodation of diversity, enhance development, democracy and manage conflict.*

Key words: *decentralisation; federalism; constitutionalism; democracy; human rights; diversity management*

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1 Introductory remarks

The *raison d'être* of decentralisation varies from state to state especially as each design is instituted to solve the particular challenges that a country faces. In many respects, Cameroon reflects the paradoxes of decentralisation in Africa and the negative consequences it can have on development, democracy, constitutionalism, human rights and the rule of law, if it is not carefully designed to fully address a country's underlying problems.

The President of Cameroon, President Paul Biya, in a message to the country on 10 September 2019 announced the holding of a major national dialogue, in a bid to end the three-year long ongoing bloody conflict in the two Anglophone regions of the country, the north west and south west regions. Certain resolutions, including recommendations on a need for a special status arrangement granting autonomy to the Anglophone regions, under a decentralisation framework were arrived at (website of the Presidency of the Republic 2019; website of Major National Dialogue 2019). On 24 December 2019 a Bill to Institute a General Code on Regional and Local Authorities in Cameroon (2019 Decentralisation Code) was promulgated into law by President Paul Biya. By harmonising laws on decentralisation such as Law 2004/017 of 22 July 2004 to lay down the Orientation of Decentralisation (Decentralisation Orientation Law), Law 2004/019 of 22 July 2004 to lay down the Laws on Regions (Law on Regions) and Law 2004/018 of 22 July 2004 to lay down the Laws on Councils (Law on Councils), it is hoped that the 2019 Decentralisation Code will accelerate the decentralisation process in Cameroon. This article examines and proposes a more rationalised design for decentralisation in Cameroon, along the lines of some of the recent developments around this national dialogue and the recently-promulgated 2019 Decentralisation Code. The contribution commences with an analysis of the present challenges of governance in Cameroon. A summary of the key weaknesses of the present constitutional and legislative framework as well as an examination of the present Cameroonian identity crisis is made in part 2. Part 3 focuses on the present challenges within a rationalised decentralisation framework. This entails examining whether Cameroon should opt for a federal system or maintain its present decentralised unitary state form. Another important issue examined in part 3 is whether the decentralisation framework under the 1996 Constitution falls under a constitutionalised framework or a non-constitutionalised (legislative) framework and whether this aspect has contributed to constitutionalism and reduced the central government's quest for power. Other issues examined in part 3 include the need to reinforce political and administrative autonomy. Owing to the fact that fiscal arrangements are fundamental for a decentralisation design to succeed, part 4 focuses on this aspect. Part 5 examines supervision and the need for intergovernmental cooperation. Part 6 examines the

importance of managing diversity, ethnic and minority issues as well as constitutionally entrenching the role of women and traditional authorities in a rationalised decentralisation framework. Part 7 envisages dispute resolution and implementation mechanisms. The contribution ends with some concluding remarks. It is contended that the Cameroonian decentralisation process is failing because it was designed to protect rather than improve on the *status quo*.

2 The present challenges of governance in Cameroon

Cameroon has been faced with several governance challenges since independence. These challenges have persisted due to fundamental weaknesses of the present constitutional and legislative framework. One of the major challenges that impeded governance and democratic rule is the Cameroon identity crisis, dominated by the Anglophone problem. This part addresses a summary of these key weaknesses and particularly the Anglophone problem.

2.1 A summary of the key weaknesses of the present constitutional and legislative framework

A close examination of the constitutional and legal framework of decentralisation under the 1996 Constitution exposes the dominance of the powers of the executive, which trickles down through shared rule and self-rule elements of the governance architecture of the country. With respect to shared rule, the President of the Republic has the discretion of appointing 30 of the 100 senators in the country (article 20(2) of the 1996 Constitution). Most of those appointed are loyal to the Cameroon Peoples' Democratic Movement (CPDM) ruling party. This means that the President's control over shared rule is very strong and he can still influence many decisions of senators. Moreover, the Senate is considered by many as undemocratic and a cumbersome institution especially in a time of financial crisis.

The executive's influence is also strong over the institutions of self-rule such as the regional councils and municipal councils. The President of the Republic alone decides on how territorial units should be carved out. At the level of regional councils, the Secretary-General is appointed by the President, while at the level of municipal councils the Secretary-General is appointed by the minister in charge of local and regional authorities (referred to as the Minister of Decentralisation and Local Development as of 2018). This shows how powerful the executive is over the institutions of shared rule and self-rule in the country.

Concerning ethnic and minority issues, as will be examined, there is no operational plan and effective strategy to deal with diversity, minority

and ethnic issues especially as line ministries consider decentralisation as a threat to control over their influence as well as resources.

With respect to traditional leaders and traditional institutions, their role remains obscure and this seems to be deliberate. Generally considered auxiliaries of the administration, they are attributed limited functions or duties by the legal instruments regulating the decentralised system, especially the 2019 Decentralisation Code.

The 1996 Constitution does not accord financial autonomy to the regions. Financial decisions are taken by the central government and imposed on the regions. The main instrument governing financial issues under the decentralisation architecture is Law 2009/011 of 10 July 2009 relating to Financial Regime of Regional and Local Authorities (2009 Decentralisation Law). It purports in section 2 to provide local government authorities 'financial autonomy for the management of regional or local interests' (section 2 of the 2009 Decentralisation Finance Law). The regions are not consulted in the budget-drawing process and depend on the budget drawn up by the central government. Custom duties as well as major taxes are collected by the central government and shared to the regions and councils. The only source of revenue for local government is property tax, business licences, user charges and market fees. In many municipalities, there are huge gaps between reported and projected revenues. This is due to the many distorted and incoherent decentralisation laws, including the Decentralisation Code, related to finance as well as the poor administrative capacity at the levels of bodies such as the Special Council Support Fund for Mutual Assistance (with French acronym *FEICOM*) to enforce the payment of taxes.

Organised local government exists through the organisation and functioning of the United Councils and Cities of Cameroon (UCCC) (the local government system in Cameroon, country profile). The UCCC aims at instilling harmony between the councils and to promote development, taking into consideration the common interest of all. In this respect, councils in divisions may realise joint projects, upon the request from the supervisory authority (the state representative), or owing to joint deliberations from their respective executive councils. This includes the construction of rural roads to facilitate movement as well as other local services of importance. In reality the UCCC has not been effective in instilling harmony and equitable development in councils because serious disparities continue to exist in terms of development among councils.

Supervisory bodies include the National Decentralisation Board (Board) (section 2 of the 2008 Decree of the Board) and the Interministerial Committee on Local Services (Committee) (section 2 of the 2008 Decree of the Committee). Elections Cameroon (ELECAM) supervises the election process of parliamentarians, senators, regional councillors as well as

municipal councillors. The National Commission on the Promotion of Bilingualism and Multiculturalism (the NCPBM), although created in 2017, also has a role to play in the decentralisation framework of the country. A clear examination of the functioning of these bodies shows a significant degree of duplicity, overlap and confusion in the role these institutions play.

In an era that has seen the expansion of constitutional review, even in Francophone African states, Cameroon has remained reticent to change by adhering to a system that is not consistent with modern developments, but which covers state institutions from constitutional accountability for their inactions as well as actions. As transpires from part 7, the Cameroonian constitutional review system demonstrates that the design and functioning of the review mechanism can have a positive or negative effect on constitutional evolution as well as decentralisation in the country (Fombad 2017).

2.2 The present Cameroonian identity crisis as a major challenge

A problem of major concern that has become acute because of the weak constitutional framework on decentralisation is the current Cameroonian identity crisis particularly characterised by the Anglophone problem. The Anglophone area of Cameroon consists of two of the country's ten regions, the north west and the south west regions. It covers 16 364 square kilometres of the country's total area of 475 442 square kilometres and has approximately five million of Cameroon's 24 million inhabitants, roughly about 20 per cent of this population. It is the stronghold of the main opposition party, the Social Democratic Front (SDF), and plays an important role in the economy, especially its dynamic commercial and agricultural sectors. Most of Cameroon's oil, which accounts for one-twelfth of the country's gross domestic product (GDP), is located off the coast of the south west region (Crisis Group Report 2017: 2).

The Anglophone problem dates back to Cameroon's independence period of 1961. However, before delving into the genesis of the Anglophone problem, it is important to examine Cameroon's colonial constitutional history.

The present-day Cameroon, as well as some sectors of its neighbours, was an outcome of the Berlin Conference of 1884, when it was declared a colony of Germany with the name 'Kamerun'. It was a German colony until a combined French and British military contingent defeated the German army in Cameroon in 1916 during World War I and divided the territory into two. The French took the larger part composed of about four-fifths of the territory, while the British took two small disconnected parts, which they labelled Southern and Northern Cameroon respectively. This partition

was later acknowledged by the League of Nations and its successor the United Nations (UN). The French administered its part via direct rule while Britain effectively governed its two disconnected portions as simply parts of its nextdoor Nigerian colony. However, under a plebiscite which was conducted by the UN on 11 February 1961, the Northern Cameroons decided to remain and is today part of the Federation of Nigeria, while the Southern Cameroons voted in favour of re-uniting with the former French Cameroon which had already gained its independence as the Republic of Cameroon on 1 January 1960 (Asuagbor 2004; Awasom 2002; Starks 1976; Bongfen 1995; Dent 1989; Kom 1995; Kamto 1995).

After the plebiscite that took place in Southern Cameroons, the then Prime Minister, Dr John Ngu Foncha, who led the Southern Cameroonian delegation, struggled to arrive at a new constitutional arrangement with Ahmadou Ahidjo, the then President of the Republic of Cameroon. This constitutional arrangement was to put in place a fairly loose and decentralised federation. The negotiating power of the Southern Cameroonians was very weak, leading President Ahidjo to make some concessions from their proposals by simply amending the 1960 Constitution by an annexure termed 'transitional and special dispositions'. This happened because the Southern Cameroonian delegation may have been politically inexperienced as compared to their Francophone counterparts who had the assistance from French constitutional law experts. In actual fact, what became the Federal Constitution of the Federal Republic of Cameroon was simply a law revising the Republic of Cameroon's Constitution of 4 March 1960. The reunification not only brought together people of different backgrounds inherited from the English and the French but also a multitude of about 250 ethnic groups with over 270 various languages. Faced with such a mixture of cultural, ethnic and linguistic groups having various aspirations and interests, at independence the then government needed to set up an institutional framework to manage diversity under an umbrella of unity, particularly between Anglophone and Francophone Cameroonians. Apparently diversity was not adequately managed under the 1961 Federal Constitution as well as under the 1972 Unitary Constitution. Anglophone Cameroonians again have not adequately benefited from the autonomy that was envisaged under this unity under the 1996 Constitution. Never before has tension around the Anglophone problem been so acute. It is thus important to examine events that reignited this problem.

From October to December 2016 lawyers and teachers from the north west and the south west region went on strike. The requests, especially from Anglophone lawyers, ignored until then by Cameroon's justice ministry, were related to the justice system's failure to adequately utilise the common law in the two Anglophone regions. The lawyers requested the translation into English of the Code of the Organisation for the Harmonisation of Business Law in Africa (with French acronym OHADA)

and other legal texts. They objected to the 'francophonisation' of common law jurisdictions (Crisis Group Report 2017: 9). Concerns of an intentional policy of assimilation and 'de-identification' gained serious ground before 2018, especially as Francophone prosecutors and judges with hardly any or very little knowledge of the English legal system were appointed to serve in the Anglophone regions (Cameroon 2015 Human Rights Report). The threatened elimination of the English legal system, widely considered one of the last vestiges of the inherited English culture in the country, probably is some of the clearest evidence that the overriding policy objective is one of unity pivoted on suppression and harmonisation of differences rather than the accommodation of such differences.

Administrative authorities of the deconcentrated administrative areas have over the years also been a cause for tensions between the Francophone and Anglophone communities in the country. Francophone officials from the lowest to the highest ranks, who often comprehend and speak very little English and usually have little understanding of the culture, are appointed to several areas, even remote parts of the Anglophone regions. Having very little understanding of the working environment, these authorities have loyally carried out political instructions from the central government and also served their own interests. In actual fact they have done very little to address the real issues of the community in which they are called upon to serve. This has over the years generated complaints as well as raised suspicion of a deliberate policy of imposing the Francophone culture and eradicating the Anglophone culture. Although the official policy of bilingualism in the country has for some time now meant nothing more than a type of 'bilingualism in French', in the last decade many Francophone Cameroonians have now made vital strides to not just study English but also to undergo their secondary education in the Anglophone regions (*Gunme & Others v Cameroon* (2009) AHRLR 9 (ACHPR 2009)).

Secessionist groups have also emerged since January 2017. They have taken advantage of the current Anglophone crisis to radicalise the population with support from a segment of the Anglophone diaspora. While the risk of dividing the country is minimal, the probability of a resurgence of the crisis in the form of armed violence is high, as some groups such as the Southern Cameroons People's Organisation (SCAPO), the Southern Cameroons National Council (SCNC) and the Southern Cameroons Ambazonia Consortium United Front (SCACUF) are now clamouring for that approach (Crisis Group Report 2017:15).

The government has taken several measures since March 2017 to address the Anglophone crisis. For instance, on 23 January 2017 the President created a National Commission on the Promotion of Bilingualism and Multiculturalism (Decree 2017 of the NCPBM). On 30 November 2018 the President also created the National Disarmament, Demobilisation and

Reintegration Commission (Decree 2018/719 of 30 November 2018 to establish the National Disarmament, Demobilisation and Reintegration Commission). However, Anglophone Cameroonians criticised the creation of these commissions as too little, too late and regretted that nine of especially the NCPBM's 15 members were Francophone Cameroonians, that most of them belonged to the older generation and that several were members of the ruling Cameroon Peoples' Democratic Movement (CPDM) party (Agbaw-Ebai 2017).

In May 2018 the NCPBM undertook missions to the Anglophone regions and held workshops with civil society groups and administrative officials. The aim was to listen to the concerns of the people especially with respect to the Anglophone problem, ethnic as well as minority issues. Concerns such as employment opportunities, underdevelopment, poor service delivery and the use of English as one of the national languages were raised. The NCPBM vaguely promised to channel these problems to the government for lasting solutions (Musonge 2018). It is feared that if some of these concerns are not taken seriously and incorporated into the decentralisation framework through constitutional means, the country will still be entangled in the Anglophone problem as well as ethnic and minority problems. The NCPBM is handicapped by its remit, which gives it no power to impose punitive measures, and restricts it to preparing reports and advocating bilingualism and multiculturalism. Some of its members have recognised this weakness. It is thus important for the role of the NCPBM to be entrenched constitutionally for its decisions to be given adequate constitutional importance.

Other measures taken by the government to curb the identity crisis include the creation of a common law section at the Supreme Court and a new department for common law at the National School of Administration and Magistracy with French acronym ENAM, as well as common law departments in some state universities. The government has equally recruited Anglophone magistrates mostly in the Anglophone regions and over 1 000 bilingual teachers (Crisis Group Report 2017: 12-13). However, the leaders of the Anglophone movement are not satisfied with these measures.

Another initiative undertaken by the government of Cameroon in a bid to address the Anglophone crisis is the major national dialogue, which was mentioned in the introduction of this contribution. The national dialogue convened by the President on 10 September 2019 commenced on 30 September 2019 and ended on 4 October 2019 with a closing ceremony presided over by the Chairperson of the dialogue, Prime Minister Joseph Dion Ngute. The five days of deliberations by some 600 delegates from home and abroad in eight commissions was sanctioned by recommendations that were presented to the public during the closing

ceremony. The major recommendations included the need to grant a special status to the north west and south west regions, in conformity with section 62(2) of the Constitution. Other recommendations included the need to take specific measures to ensure equality of the English and French languages in all aspects of national life; the need to reinforce the autonomy of decentralised local entities; the need to improve upon the infrastructure of judicial services throughout the country; the need to strengthen the humanitarian assistance to better serve internally displaced persons; the need for double nationality to be granted to the Cameroonian diaspora; the need to institute a special plan to reconstruct the conflict affected areas; the need to popularise the head of state's offer of amnesty to combatants who drop their weapons and enter the reintegration process; and the need to create a team responsible for mediation with radicalised members of the Cameroonian diaspora (Teke, Cameroon Radio Television 10/2019). The Prime Minister then dispatched delegations to the two Anglophone regions to sensitise the people on the need to accept these recommendations (Teke, Cameroon Radio Television 11/2019). There is no gainsaying that the national dialogue brought hopes for peace in the two Anglophone regions. It is important for some of these recommendations, especially the content of the suggested special status, to be defined and endorsed by the Cameroonian population and henceforth constitutionalised so as to give them value. If not, the national dialogue may be considered a waste of time and resources and may instead exacerbate more conflict.

Another step towards resolving the Anglophone crisis is the provision of a special status for the two Anglophone regions in the 2019 Decentralisation Code (section 327). As is subsequently examined, many argue that the putting in place of the special status did not respect the canons of the implementation of special regimes found elsewhere in the world. The special status under the Decentralisation Code provides in section 330 for a regional assembly and a regional executive council. The regional assembly is to be the deliberative organ of the two Anglophone regions. It will be made up of 90 regional councillors. It will be composed of a house of divisional representatives and a house of chiefs. The duties of the house of chiefs remain obscure. According to section 328 of the 2019 Decentralisation Code, the special status regime may allow the Anglophone regions to participate in the formulation of national policies relating the Anglophone education sub-system, decide on development projects in both regions and on issues on chiefdoms. However, the use of 'may' instead of 'shall' in section 328 of the 2019 Decentralisation Code denies the people of the two Anglophone regions the right to particpate in decision making on issues of fundamental importance to their existence.

The introduction of an ombudsman, otherwise referred to as an independent public conciliator, in sections 367 to 371 of the 2019 Decentralisation Code is a welcome innovation and should be applauded.

However, his or her appointment should not depend on proposals from the representative of the state and the president of the regional council (section 368), since most complaints by the people of both Anglophone regions are likely to be against these two officials. Some analysts, especially members of the major opposition party, the SDF, think that the involvement of the representatives of the state (appointed governors, senior divisional officers and divisional officers) in the affairs of the Anglophone regions is unwelcome. Despite this view, it is argued that there must be some control and not usurpation over some mayors, most of whom are interested in enriching themselves at the expense of the people.

Another important innovation in the 2019 Decentralisation Code is the eradication of the position of appointed government delegate, to be replaced by an elected super mayor of the City Council, to be elected from his or her peers from councils in the concerned region (section 246 to 249). This indeed is a positive step in the decentralisation process as this will guarantee some certain degree of autonomy in the managment of council affairs than before. Despite this positive move, the 2019 Decentralisation Code restricts the position to an indigene or autochtone of the region which may to some extent eliminate potential candidates who are not autochtones of that region.

International pressure has been muted, but has nevertheless pushed the government to put in place the measures described above (Caxton 2017). Measures equally from religious leaders and civil society groups have been muted (Crisis Group Report 2017: 15-16). The central government of Cameroon seems more sensitive to international than to national pressure. Without coordinated, persistent and firm pressure from its international partners, it is unlikely that the government will seek lasting solutions to the ongoing crisis.

Being an Anglophone Cameroonian means that there is a need for well-defined mechanisms to be put in place for their administrative and political autonomy, which is not the case under the current decentralisation dispensation. There is a need for the state to recognise the legal culture and identity of Anglophone Cameroonians, something that is not the case under the *status quo*.

The politicisation of the Anglophone crisis and the radicalisation of its protagonists is due mainly to the government's response, particularly the disregard, denial, repression and intimidation of Anglophone Cameroonians. There has been diminishing trust between the government and the Anglophone population. The identity crisis has been exploited by political actors who have aggravated the population's resentment to the point that probably most Anglophone Cameroonians now view secession or a return to federalism as the only feasible way out of the identity crisis.

The Anglophone crisis is a classic example of excessive control from the centre. First, the crisis has led to restrictions on civil liberties, which have become more pronounced since 2013, particularly with the banning on demonstrations. It has even served as an excuse for repression, with the use of anti-terrorist legislation for political ends, threats against journalists and greater control over social media (Crise Anglophone 2017). Second, it reveals major governance failures accentuated by a false decentralisation and a political system that relies on co-opting traditional chiefs and local elites (Crisis Group Africa Briefing 101 2014).

3 Addressing the present challenges within a rationalised decentralised framework

In addressing the present challenges within a rationalised decentralised framework we first consider whether Cameroon should opt for a federal system or maintain its current decentralised unitary state form. It is equally important to examine whether the decentralisation framework for Cameroon is of a constitutionalised or a non-constitutionalised (legislative) nature, as well as whether this has contributed to constitutionalism and reduced the central government's quest to centralise power.

3.1 Opting for federalism or maintaining the unitary state framework?

The current crisis has increased support for secession and or federalism among the Anglophone Cameroonian population. This point of view demonstrates how complicated the Anglophone problem has become. School closures and ghost town operations could not have continued for long without the adherence of a large part of the population (Crisis Group Report 2017: footnote 70 page 8). An issue that needs to be addressed is whether federalism or the current unitary state disposition may resolve the governance issues, including the Anglophone problem.

Although most Anglophone Cameroonians advocate federalism, there is no consensus about the number of administrative units or regions in a future federation. Much confusion remains as to returning to a two-state federation, as before unification. Some Anglophone Cameroonians are in favour of a four or six-state federation to better reflect the sociological composition of the country and to make the idea of federalism acceptable to Francophone Cameroonians. There equally are other Anglophone Cameroonians who are in favour of a ten-state arrangement to copy the current pattern of Cameroon's ten regions. There equally is a view that however many federated states are created, the political capital, Yaoundé, should not be made the federal capital or included among the federated states (Crisis Group Report 2017: 18; Asuagbor 2004: 497; Awasom 2002: 427; Starks 1976: 429; Bongfen 1995: 22; Dent 1989: 172; Kom 1995:

143-152; Kamto 1995: 10-11). For another category of activists, federalism seems to be a better negotiating option in order to achieve at least an effective decentralisation, with adequate political, administrative and financial autonomy in all of the country's ten regions. This also necessitates a complete revision to and the full application of the country's current laws on decentralisation (Crisis Group Report 2017: 18; Yusimbom 2010).

In as much as several states have opted for a federal system and others have opted for a decentralised unitary state arrangement, it is argued that in the case of Cameroon, due to several factors especially historical, political and most importantly cultural factors, a decentralised unitary arrangement is preferable. Maintaining the current 10 regions, 58 divisions and 360 subdivisions, may be important for the country to promote democracy, enhance development, manage diversity, ethnic issues as well as minority issues. Such an arrangement may also be important in incorporating traditional authorities as well as effective for the enhancement of constitutionalism and respect for the rule of law. For such a decentralised system to work, however, it may be necessary, as was recommended during the national dialogue, to have a constitutionalised asymmetrical arrangement or special status arrangement as will be analysed in part 3.3. It may equally be important to have strong regions with the effective establishment of regional councils and also a strong local government system, as in the case of South Africa (Powell 2015: 32-52).

3.2 A more conducive framework: Constitutional versus legislative framework

Assessing the nature and importance of the trend towards the constitutional entrenchment of decentralisation in Cameroon is necessary. This trend raises important questions and has implications not only for efforts towards the constitutional entrenchment of devolved government but is equally important for constitutional and democratic governance in the country as a whole.

Regarding the constitutional entrenchment of decentralisation, the 1996 Constitution of Cameroon, with perhaps the exception of the Constitution of the Democratic Republic of the Congo (DRC) of 2005, has one of the most exhaustive provisions on decentralisation that can be found in any civilian-style or Francophone constitution in Africa. The present decentralisation framework under the 1996 Constitution of Cameroon indeed is a constitutional one, but a closer look at the provisions therein, especially provisions on decentralisation, reveals that there are many claw-back clauses. Many very important issues on decentralisation are allowed to be determined by subsequent legislation, especially the 2019 Decentralisation Code. The 1996 Constitution of Cameroon barely provides for powers to be shared between the state and the regions but

leaves the exact form and nature these are to take to subsequent legislation. In fact, although the decentralisation provisions are found in only six articles, in at least 13 clauses within these six articles fundamental issues of the process are left to be determined by subsequent legislation. For instance, article 55(1), after stating that the regional and local authorities of the country shall be composed of regions and councils, adds that 'any other such authority shall be created by law' (article 55(1) of the 1996 Constitution of Cameroon).

It is also important to examine whether the number of tiers of government in Cameroon is constitutionalised or left to be determined by subsequent legislation. Several constitutions are silent on the number of tiers of government a country should have. Although this is a common phenomenon in Francophone countries, it equally is a growing trend in some Anglophone countries. The 1996 Constitution of Cameroon provides for two tiers of government, the regional government and local government (article 55). It is argued that the security of lower spheres of government is guaranteed where their existence is upheld through adequate constitutional restraints that have been instituted to check against arbitrary usurpation by the central government (Fombad 2018: 15).

With respect to political decentralisation, as is examined in part 3.3, the 1996 Constitution of Cameroon provides for a mix of appointed and elected officials at the lower tiers of government (articles 57-60). Concerning administrative decentralisation, the degree of administrative decentralisation is low, due to the cumbersome level of supervisory and discretionary powers the 1996 Constitution grants to central government over lower tiers of government (article 55(3)). Unlike the Constitutions of South Sudan (sections 168 and 175-179 of the 2011 Transitional Constitution of the Republic of South Sudan), South Africa (sections 213-230 of 1996 Constitution of South Africa) and Uganda (articles 178 A and 190-197 of 1995 Constitution of Uganda) that provide for a high degree of fiscal decentralisation, the 1996 Constitution does not exhaustively focus on fiscal decentralisation. This is left to subsequent legislation.

Regarding elements of constitutionalism, particularly the promotion and protection of human rights, the 1996 Constitution, unlike most post-1990 constitutions, lays emphasis almost completely on civil and political rights, although some mention is made of some social and economic rights (Preamble). Almost all the fundamental rights outlined in the 1996 Constitution are only found in the Preamble.

Some major UN treaties have been ratified by Cameroon (Office of the High Commissioner for Human Rights). Cameroon has signed and ratified the African Charter on Human and Peoples' Rights (African Charter) (Okafor 2007: 248; Diwouta 2012: 21). The country has opted for a monistic system with respect to international law: All international treaties

Cameroon has approved and duly ratified and published are supposed to become part of domestic law. International law does not necessarily need to be domesticated into national law by another legal instrument since the act of ratifying immediately converts the treaty into domestic law. Article 45 of the 1996 Constitution furthermore confers a higher normative status to such agreements or treaties so that they could trump any domestic legislative that goes against them, not excluding the 1996 Constitution (article 45).

The scope of application and enforceability of human rights under the 1996 Constitution thus is limited. Instead of having these rights in a well-structured bill of rights, these rights are outlined in the Preamble of the 1996 Constitution. The enforceability of human rights under the 1996 Constitution is definitely wanting. Entrenching provisions of decentralisation has not effectively led to the promotion and protection of human rights.

On the important issue of constitutionalism such as the amendment of the Constitution, the 1996 Constitution provides two ways through which a constitutional amendment can be initiated. Article 63(1) stipulates that amendments to the Constitution may be proposed either by the President or by Parliament. Any amendment proposed either by the President or Parliament shall be signed by at least one-third of the members of the House of Assembly (article 63(2)). According to article 63(3) 'Parliament shall meet in congress when called upon to examine a draft or proposed amendment. The amendment shall be adopted by an absolute majority of the members of Parliament. The President of the Republic may request a second reading; in which case the amendment shall be adopted by a two-thirds majority of the members of Parliament' (article 63(3)). Article 63(4) goes further to state that the President may decide to submit any Bill to amend the 1996 Constitution to a referendum. An amendment may only be adopted if a simple majority of the votes cast in the referendum is in favour of the amendment.

In April 2008 the Cameroon National Assembly accepted a revision of article 6(2) which, while maintaining the seven-year tenure of the President of the Republic, removed the two-term limit. Although the opposition parties protested against this controversial amendment, the CPDM, with its overwhelming parliamentary majority of 116 seats out of 180, readily approved the amendment. In the months following the vote, there were widespread riots in the country against the constitutional amendments, but these protests were suppressed.

It thus is possible for amendments, under the 1996 Constitution, to be readily approved by Parliament which before 2013 was solely composed of the National Assembly. In the National Assembly there are no concrete measures in place for other political parties such as the major political

party, the SDF, to veto unconstitutional amendments. Unlike in the case of South Africa, where one level of government cannot unilaterally amend the 1996 Constitution of South Africa to its advantage (Steytler 2005: 340), the 1996 Constitution in the case of Cameroon, before 2013, allowed for unilateral constitutional amendments by the executive. Although the Senate now is operational, the executive retains the final decisions of amendments before Parliament. This is a weakness with respect to governance especially in relation to the principles of constitutionalism. The executive still has powers over the amendment of the 1996 Constitution despite the entrenchment of provisions of decentralisation therein.

A constitution is only as good as the *modus operandi* put in place for ensuring that its provisions are respected by all citizens and violations of it are promptly sanctioned. An independent judiciary is provided for in articles 37 to 42 of the 1996 Constitution. The notion of judicial independence is expressly stated in article 37(2) of the 1996 Constitution, which provides that 'the judicial power shall be independent of the executive and legislative power'.

Although the 1996 Constitution professes to institute for the first time what it terms 'judicial power', judicial independence is effectively neutralised due to the President's unlimited power to appoint and dismiss judges. Perhaps most serious is the fact that the 1996 Constitution does not have the force of a supreme, overriding law and as a result there is no guarantee of respect for the rule of law.

As is discussed in part 3.7, the lack of an efficient and effective system of constitutional review also is one of the principal loopholes of the 1996 constitutional framework (Fombad 1998: 172-186). Articles 46 and 47 of the 1996 Constitution give the Constitutional Council the jurisdiction to regulate the way in which institutions operate and to mediate on any 'conflicts between the state and the regions, and between the regions'. However, only the presidents of regional executives may forward any conflict related concerns to this organ 'whenever the interests of their regions are at stake'. However, there is no efficient and effective system for constitutional review under the 1996 Constitution, despite the entrenchment of provisions on decentralisation.

It thus is evident from the above analysis that such entrenchment of decentralisation has not significantly reduced the central government's capacity to centralise power. Despite the entrenchment of provisions of decentralisation in the 1996 Constitution, the central government is still domineering over the affairs of the other branches of government as well as local government.

3.3 Reinforcing political autonomy

Reinforcing political autonomy is important with respect to Cameroon's decentralisation process. A rationalised decentralisation system ought to promote political autonomy at lower tiers of government if it is to realise development, promote democracy, manage diversity, minority as well as ethnic issues, incorporate traditional authorities, promote constitutionalism and preserve the rule of law. Reinforcing political autonomy has several dimensions, which the Cameroonian decentralisation system may be tested against.

In as much as article 14(2) of the 1996 Constitution stipulates that both the National Assembly and the Senate, acting as Parliament for the enhancement of shared rule, 'shall legislate and control government action', they do not operate on an equal basis. The National Assembly and the Senate do not possess the same powers. The Senate has less influence and powers than the National Assembly. This is comprehensible, since the senators represent just the regional and local authorities and are either elected by indirect universal suffrage or appointed by the President of the Republic (articles 20(1) and (2)), whereas all the members of the National Assembly are selected through direct and secret universal suffrage and represent the entire country (articles 15(1) and (2)).

Although the principle of bicameralism was introduced in the 1996 Constitution, the Senate only became operational in 2013. The Cameroonian Parliament is considered an organ that simply rubber stamps what the government tables before it and thus is of little importance to the concerns faced by the ordinary populace on a daily basis. The re-introduction of multi-partysm has not really changed the *status quo*, especially as several of the rules and regulations utilised by the National Assembly were introduced during the one-party system era. Another reason for this melee is because the tensions among the opposition parties and their insignificant numbers as compared to the large majority enjoyed by the CPDM, the ruling party, has prevented any serious alterations to parliamentary procedure.

There thus is a need for the role of the second chamber to be redefined so as to give more meaning to shared rule. For instance, appointing 30 out of 100 senators is absurd. As in the case of South Africa, some members of the second chamber may be elected by the provincial executives while others are elected by their respective regional assemblies (Ghai 2015: 11-12). There may be a need for a special veto power with respect to laws concerning the decentralised units in Cameroon as in the case of South Africa (sections 76(5)(b)(i) and (ii) of the 1996 Constitution of South Africa). If adopted in the case of Cameroon, this may go a long way towards reinforcing the autonomy of the senate and subsequently in promoting democracy and development.

There is no rational, legal or logical explanation for the way of distribution of councils *vis-à-vis* the population. The gerrymandering of council and sub-divisional council boundaries is an issue decided upon by the President of the Republic based purely on political opportunism in which the wishes of the people as well as their welfare are purely incidental. According to article 61(2) of the 1996 Constitution, the President has the absolute discretion to create, recreate, change, name, re-name and modify the geographical boundaries of all the administrative and political sub-units. The only qualification to this, if it could be read as one, is article 62(2) of the 1996 Constitution which stipulates that he may 'take into consideration the specificities of certain regions with regard to their organisation and functioning'. Articles 2 to 5 of the 2004 Law on Councils, article 2 of the 2004 Law on Regions, section 6 of the 2004 Law on the Orientation of Decentralisation and the 2019 Decentralisation Code all reaffirm the constitutional rights of the President of the Republic to create and change administrative and political entities at will without consulting anybody or institution. This indeed is a method that is not in accordance with contemporary trends of democracy especially as observed in states such as Kenya (Murui 2015: 105).

Two elements are identified by Watts in a boundary demarcation exercise: First, there must be participation by the concerned population via referenda or other means of making the views of the affected persons heard. Second, the process must be objective and transparent (Watts 2008: 78). In Cameroon where ethnicity is magnified, it may be necessary to use ethnic identity as a main element in carving the borders as was done in Ethiopia (article 46 and 47 of 1995 Constitution of the Federal Democratic Republic of Ethiopia). It may also be important to use other non-identity factors such as economic viability in demarcating the borders. It is also prudent for states to entrust an exercise such as boundary demarcation to an autonomous body. In South Africa, for instance, boundary demarcation is entrusted to the Municipal Demarcation Board (Fessha & De Visser 2015: 87). It is also necessary to have such an institution oversee issues of boundary demarcation in Cameroon.

The composition of regional councils is also a major concern hampering effective self-rule. For instance, article 57(2) states *inter alia* that 'the Regional Council shall reflect the various sociological components of the region', and in clause 3 that 'the Regional Council shall be headed by an indigene of the region elected from among its members'. The regional bureau is also supposed to reflect the 'sociological components of the region'. Once again, the 1996 Constitution and the applicable laws dealing with these issues contain glaring contradictions and anomalies.

First, the requirement of respecting the sociological composition of the regional council as well as who qualifies as an indigene applies only

to regions and not to councils. How can this be upheld when a similar condition is not imposed on councils, especially as it is from the council membership that the regional council is elected through indirect means?

Second, the 1996 Constitution as well as other subsequent legislation do not give any further definition on exactly what is meant by 'sociological component of a region' or who is an 'indigene' ('autochthony' is the actual word utilised in the French texts). The question as to who qualifies as an indigene has also been raised by authors such as Guimdo (Kamto also ponders on the issue of who is an indigene mentioned in Guimdo 1998: 90). Issues concerning autochthony in the form of politics of place, belonging and identity open flood gates to some of the most controversial issues in African politics in that they mostly favour exclusion rather than inclusion. This in actual fact leads to fragmentation and polarisation rather than fostering national consciousness and unity. In cases where autochthonous representation is imposed by the central government at the local government level, especially in municipalities, decentralisation may not necessarily promote democracy (Moudoudou 2009: 37). Such autochthons are more liable to serve the central government's political interests as well as their personnel interests rather than the interests of the people. In such a situation decentralisation may instead hamper democracy. It thus is important for the issue of autochthony to be well defined under the 1996 Constitution.

Third, the Cameroonian Constitution builder is concerned about having persons and indigenes reflecting the 'sociological components of the region' when it concerns decentralised political areas but instils no such condition when referring to the origins of personalities such as administrative authorities. These authorities hold far more powerful and important posts in the deconcentrated administrative areas and predominantly control and supervise the activities of decentralised areas. It is these administrative authorities of deconcentrated administrative areas that have over the years been the main reason for tensions between the Francophone and Anglophone communities in the country. There thus is a need for conditions on the origins of these administrative authorities to be well defined under the 1996 Constitution.

In addition, the President of the Republic's enormous powers to appoint some of the top government officials in the decentralised political administrative units may actually influence the decision to create administrative units. In the appointment of these officials and authorities, the President or his Ministers have no obligation to either consult anybody or to consider the political composition of the local government area. The consequence therefore is that the people of an administrative unit or council area may vote for one party but the President of the Republic and his ministers may appoint members from the ruling party, the Cameroon

Peoples' Democratic Movement (CPDM), to act either as general manager or executive head of the local government executive as well as accounting officer even in local government areas controlled by opposition parties. This is worth comparing with a country such as Zambia, which has taken serious strides in lessening the influence the ruling party and central government have over local government administration. Through the Local Government Act of 1991 and the Public Sector Reform Programme of 1993, the country has opted for local government choosing competent managers rather than relying on political appointments from the central government (Chikulo 2008: 1). Amadou thus argues that appointing executive heads, particularly government delegates in local government areas, as in the case of Cameroon, is a regression to the principle of democracy (Amadou 2011: 16; Division for Public Administration and Development Management and UN Department of Economic and Social Affairs 2004: 5-6). Cameroon may want to opt for such a model as in Zambia where competence is given priority to in selecting officials at the local government level.

In a rationalised decentralisation design it is equally necessary to examine how powers may be dispersed symmetrically and asymmetrically throughout the country. Symmetric decentralisation entails equally dispersing the same powers and authorities from the central government equally to all lower spheres of government (Anderson 2010: 54-55). Asymmetric decentralisation entails according special autonomy to certain regions or a region within a country (Anderson 2010: 54-55). An asymmetrical decentralised framework or a special status arrangement, as was recommended during the major national dialogue, and included in the 2019 Decentralisation Code, may go a long way in addressing the Anglophone problem in that such a design will recognise and protect the two English-speaking regions' autonomy. The people of the concerned regions or units to be granted a special status must take part in the process and design of such special status. If well designed and subsequently implemented, it may also go a long way towards constitutionally entrenching a right to a continuation of their legal system, culture, language and other issues such as education. There is a need for a mechanism that warrants concurrent and shared powers to exist between the central government and local government (articles 146(2)(c), 146(3)(a), 146(3)(b) and 146(5) of the 1996 Constitution of South Africa). In the current dispensation, the decentralisation design has intensified a system in which Anglophone Cameroonians feel as if they are second-class citizens with very limited chances of entering into the deconcentrated administrative system. With such a decentralisation framework, Anglophone Cameroonians have no autonomy whatsoever. Development in the two Anglophone regions, as a result of poor governance and central government indifference, has lagged further behind than in the other eight regions of the country. Most

Anglophones are also appointed as assistants to Francophone bosses (Yusimbom 2010: 27).

Having an inclusive electoral system is necessary in a rationalised decentralisation system. The electoral system is considered 'the most powerful lever of constitutional engineering for accommodation and harmony in severely divided societies' (Wolf 2011: 7). An electoral system therefore can be designed in such a way so as to facilitate interdependence between groups in a fragmented society, as well as cross-communal cooperation (Reilly 2004: 2).

With regard to several indicators of good governance and democracy, Cameroon happens to be one of the few African states that is far from being classified as democratic. For the presidential election, the system used is the first-past-the-post system (FPTP), while for electing members of parliament a complex system constituted of FPTP and party list proportional representation (PR) system is used. In fact, since 1972 when Freedom House began investigating and providing its findings on Freedom of the World, Cameroon remains one of the few African states that has never been classified as a 'not free' zone, even in the 1990s when many African states made many efforts to be democratic by instituting strong constitutions (Sisk 2017). Since the 1990s, Cameroon has lagged behind other African states with respect to putting in place a system of government that is transparent, devoid of corruption and accountable to its people (2015 Ibrahim Index of African Governance Country Insights, Cameroon).

There are approximately 300 registered political parties in Cameroon. While several African states continue to make progress towards good governance and multiparty democracy, it is argued here that Cameroon's sole genuine effort at organising transparent, free and fair elections began and ended in 1992. Since then, elections in the country have been tainted with serious fraud and election rigging, as postulated by international and national election observers.

In as much as there are several electoral systems from which Cameroon may select, it is argued that the PR system may be preferable as it prevents a clear majority from emerging, thus facilitating inclusive decision making and creating room for the creation of coalition governments (Wolf 2005: 62). Cameroon may want to adhere to such an electoral system than retaining a complex electoral system that has only led to election rigging and, thus, bad governance.

Another important component of a rationalised decentralisation system embraced by most states is the rule of law. The rule of law dictates that accessible and comprehensible written laws, be they constitutional or legislative, should guide government actions as well as decisions.

Moreover, these laws must be fairly and consistently applied to everybody by government, including government officials, and everyone must have access to justice and the enforcement of the laws. Therefore, a commitment to the rule of law also necessitates vigilance against the abuse of power and corruption (Hedling 2011:17). A commonly practical and agreed rather than theoretical conception of the rule of law includes an element of justice. Therefore, in addition to the law being predictable, universally applicable and accessible, the just legal system gives impetus to the rule of law. Apart from merely adhering to the law or the valid enactment of law, it must encompass equality and human rights and must not discriminate unjustifiably among various classes of people (Hedling 2011:17).

Cameroon may promote the rule of law in several ways, most importantly by adopting a coherent legal system. The doctrines of judicial review, constitutional supremacy and independent oversight bodies can indeed solidify such a framework. For instance, the Preamble as well as a separate provision of the Constitution of Rwanda accord importance to the supremacy of the Constitution and the rule of law (Preamble and article 200 of the 2003 Constitution of the Republic of Rwanda). Any conflicting legislation is considered null and void. Supremacy, therefore, protects and gives importance to the rule of law via ample legal structures, checks and balances, and the guarantee of rights.

The judiciary, which applies the law to individual cases, acts as the guarantor and the guardian of the rule of law. Therefore, a properly operating and independent judiciary is essential for the rule of law, which necessitates a legal system that is just, promotes the right to fair hearing and accessibility to justice (Hedling 2011: 18).

3.4 Strengthening administrative autonomy

Strengthening administrative autonomy is very important for the reinforcement for political autonomy as well as the effectiveness of fiscal autonomy. For administrative autonomy to be strengthened there is a need for administrative authority over the setting up of internal procedures, over the firing and hiring of own staff as well as over the salaries of personnel.

There is no gainsaying that administrative autonomy is weak especially at lower tiers of government in Cameroon. Regions as well as councils do not have authority over their personnel. The hiring and firing of staff is still coordinated by the central government. Most mayors do not have academic qualifications that allow them to carry out their demanding duties especially as there is no provision for this in the 1996 Constitution as well as in subsequent legislation. Likewise, the internal procedures of local government in Cameroon are still influenced by central government (Amadou 2011: 28, 37-50; Division for Public Administration and

Development Management and UN Department of Economic and Social Affairs 2004; Ndiva 2011: 513-530; Fru 2016: 2-3). Furthermore, the central government still influences the determination of the salaries of local government authorities and officials (Decree 2015/406 of 2015 relating to Indemnities of Government Delegates and Mayors; AIMF 2015: 7).

For administrative autonomy to be reinforced there is a need for administrative authority over the setting up of internal procedures. If lower spheres of government in Cameroon are given the mandate to put in place their own internal procedures, there is a chance for them to respond to the demands of their localities (OECD & Mountford 2009: 26-27). For instance, countries such as South Africa have put in place efficient modalities for lower spheres of government to establish their internal procedures, which have gone a long way towards enhancing better service delivery and thus the enhancement of democracy, development as well as in curbing conflict (Sokhela 2006: 211-220). Such a measure may be very necessary in Cameroon for more efficient administrative autonomy.

There equally is a need for administrative authority over firing, training and hiring of own staff. Lower spheres of government may not effectively and efficiently deliver on their mandate if they use employees from the public sector especially those over whom they have no control. Nevertheless, for lower spheres of government as in the case of Cameroon which may find difficulties in retaining and attracting skilled staff, it may be important for the central government to step in and put in place a deployment scheme whereby some national government staff are sent to these lower spheres of government. Once these lower spheres of government have put in place their personnel structure, setting up a code of conduct, which needs to be made public, is necessary, which will go a long way towards ensuring that these public officials are disciplined and assiduous (UN Habitat 2007 mentioned in Chingwata 2014: 70). Countries such as Kenya and Uganda have accorded administrative authority to local government with respect to hiring, training and firing staff and this has gone a long way in enhancing development, democracy and equally in curbing conflict (Department of International Development 2002: 4-7). Professionalisation through the training and adequate staff recruitment for efficient local government that may accommodate diversity, manage minorities, enhance development as well as promote democracy is also important in Cameroon. Therefore, it is instrumental to improve on the curriculum of Cameroon's Local Government Training Centre with French acronym CEFAM, created by Presidential Decree 77/497 of 7 December 1977. Mayors need a combination of academic as well as professional training to accomplish their very demanding task at the local government level.

Administrative authority over salaries of personnel of lower tiers of government in Cameroon is also very important. This entails having authority over putting in place the salary scales of local employees which may go a long way in attracting and retaining skilled personnel (Rodriguez & Tijmstra 2005: 6). For instance, a lower sphere of government such as local government may vary salary levels on the basis of scarcity of a specific skill, performance or with respect to profession. However, the power to put in place salary scales at lower spheres of government should be exercised with caution so as to avoid resource wastage and corruption (Siegle & Mahony 2006: 138). Therefore, in a rationalised decentralisation design for Cameroon it may be necessary for central government to clearly define modalities whereby lower spheres of government, especially local government, may set salary levels for their staff. Countries such as Kenya (Department for International Development 2002: 4-7) and South Africa (Rodriguez & Tijmstra 2005: 6) have accorded powers to lower spheres of government with respect to setting salary scales for personnel. This has contributed to administrative efficiency at the local government level.

4 The necessity for fiscal and resource management autonomy

Fiscal arrangements are also important for a rationalised decentralisation design because without enough financial resources it would be impossible for lower spheres of government to carry out their duties judiciously. Fiscal decentralisation refers to the degree to which certain central executives give lower spheres of government financial autonomy (Anderson 2010 : 2-5). Delaying or omitting fiscal decentralisation renders political and administrative decentralisation ineffective. It is important for the assignment of expenditure to accompany the assignment of competencies and tasks. This part thus examines the importance of fiscal and resource management autonomy in a rationalised decentralisation design especially in Cameroon.

The financing *modus operandi* provided under the decentralisation framework in Cameroon is not working. Book five of the 2019 Decentralisation Code focuses on the financial regime of regional and local authorities. The distorted way in which revenue is distributed and the widely differing nature of municipal and urban councils have resulted in serious inequalities in development and have led to conflict in some parts of the country (World Bank 2011: 8-16). The consequences of this is that smaller councils with very limited resources are faced with difficulties in carrying out their fundamental statutory responsibilities, especially the responsibility under section 28 of the Financial Regime Law to issue certain compulsory payments (World Bank 2011: 11-14). In addition to this, lower spheres of government do not have adequate financial raising and borrowing powers. Intergovernmental transfers also remain weak. It

thus is important to bring in the example of South Africa with respect to how adequate fiscal and resource autonomy may interplay in a rationalised decentralisation design for reinforced political and administrative autonomy. This may better inform constitution builders in establishing a rationalised decentralised design for Cameroon.

Some states such as South Africa allow lower spheres of government to raise their own finances. The 1996 Constitution of South Africa states that the designation of administrative and political functions and powers to lower spheres of government must be accompanied by adequate financial means (section 214(2)(d); Conyers 1986: 91; the local government system in Rwanda, country profile). This therefore implies that local government should be endowed with adequate fiscal powers and authority to carry out the duties and functions attributed to it by the Constitution. This in no way means that that central government should relinquish control over its main financial instruments by highly devolving fiscal autonomy to local government as argued by Bahl and Lin (Bahl & Linn (1992) mentioned in Stanton 2009: 246). Should this happen, it may be difficult to adjust levels of inflation that may be aimed at reducing imports or stimulating imports. It also becomes complicated to pass structural tax reforms or to increase revenue in order to reduce the national budget deficit (Bahl & Linn (1992) mentioned in Stanton 2009: 246).

It therefore is important to take into consideration three major elements in enhancing a fiscal decentralisation design for Cameroon. The first element is the assignment of responsibility to lower levels to raise revenue (Shah 1994: 15-18). The second element is the assignment of responsibility for expenditure or in other words assigning responsibility to a level or levels to pay out money for services. The third element is intergovernmental transfers, which focuses on how various tiers of government equalise imbalances and share revenues. To ensure that the administration effectively carries out its duties, the propensity to assign competencies and tasks must follow or accompany the assignment of responsibility for expenditure. If all taxing authority is vested in the national government, this may result in undesirable consequences (Anderson 2010: 2-3). For instance, by separating spending powers from the revenue-raising authority may obscure the nexus between the gains or benefits of public expenditure and its cost, which are the taxes levied to finance them, so that the separation does not encourage fiscal responsibility among politicians and their electorate at the local level (Shah 1994: 15-18). If the Constitution confers too much responsibility for raising taxes to local government, the central government may have difficulties with macro-economic development planning (Anderson 2010: 2-3).

It thus is important for constitution drafters to further take into consideration two major elements when deciding whether to give the

tax raising and spending responsibility to local government. First, local government should be allowed to collect sub-national revenues from their local residents linked to benefits obtained from local services. Ensuring that there is a nexus between benefits received and taxes paid fortifies the accountability of local administrators and equally governmental service delivery (Anderson 2010: 41). Second, revenues allocated to the local governments should be adequate to finance all locally-provided services that mainly profit local residents (Anderson 2008: 35-36).

An imbalance often exists between spending and taxing at the levels of government, especially lower spheres of government, in that the central government usually collects the greatest share of taxes but assigns enormous spending duties to the local level (Anderson 2010: 34). Horizontal imbalances, which are imbalances between sub-national levels, exist (Anderson 2010: 6). Pre-transfer fiscal deficits, also known as vertical imbalances, equally occur (Anderson 2010: 6). Usually lower tiers of government are not entrusted with the same revenue raising capabilities, especially as wealthy residents cannot live in every region, nor do they all have the same needs. Some regions demand more services than others while some are more populated than others. To adjust such imbalances, there thus is a need for intergovernmental transfers, vertically (Bird 2010: 1), if the payments are from the central government to lower spheres of government and horizontally (Ahmad 1997: 6), if these transfers are between sub-national governments. There may equally be grants transferred from the central government to lower tiers of government, which may go a long way towards making local government in countries autonomous (Anderson 2010: 58).

It also is important for the role of the Presidency, the Prime Ministry, the Ministry of Territorial Administration (MINAT), the Ministry of Decentralisation and Local Development, the National Anti-Corruption Agency with French acronym CONAC, the directorate-general of taxation, budget and customs to reinforce the role of FEICOM in the fiscal decentralisation agenda of the country so as to curb corruption and resource wastage for efficient administrative and political decentralisation.

5 The need for supervision and intergovernmental cooperation

A meaningful consultative mechanism between central and local government is important in a rationalised decentralisation design. Cooperative governance and consultative mechanisms have become imperative for an efficient and effective local government system to ensure that the concerns as well as the views of the community are fully reflected and catered for in local governance. This part examines the importance

of supervision and intergovernmental cooperation in a rationalised decentralisation design.

In Cameroon there is no exhaustive chapter for intergovernmental relations in the 1996 Constitution. The President of the Republic and the Minister of Decentralisation and Local Development are in charge of driving the entire decentralisation agenda. This is done with a National Decentralisation Board (Board) chaired by the Prime Minister, which is supposed to be monitoring and assessing the implementation of decentralisation (section 78 of 2004 Law on the Orientation of Decentralisation Law; Composition of National Decentralisation Board in official website of the Presidency of the Republic of Cameroon). An inter-ministerial Committee on Local Services (Committee) is responsible for the preparation and monitoring of the allocation of powers and resources to local government entities. What is disturbing again here is that all these bodies for supervising and monitoring the decentralisation process are primarily constituted of authorities nominated by central government with very limited opportunities accorded for the views of other stakeholders, the community or even local government. Their functions overlap, leading to a waste of funds and corruption.

Some countries have constitutionally entrenched such cooperative governance and consultative mechanisms; some have put in place institutions to oversee cooperative governance and others have developed it through practice. A case worth emulating is Zimbabwe, where consultative mechanisms are entrenched in the 2013 Constitution. Chapter 3 of the Constitution of South Africa focuses on cooperation, and has even gone further to put in place the Intergovernmental Relations Framework Act 13 of 2005 which governs the functioning of the provincial premiers' intergovernmental forums, the functioning of district intergovernmental forums and the functioning of the technical support structures controlling political intergovernmental structures (Intergovernmental Relations Framework Act 2006: 5).

In Cameroon both the Board and the Committee are supposed to play a supervisory role by ensuring that the decentralisation process is effectively carried out, especially the equitable development of impoverished areas. These bodies also have the responsibility to ensure that issues such as minority, ethnic and diversity concerns, as well as the incorporation of the traditional governance system into the decentralisation agenda, are upheld. These structures, however, simply extend the powers of the executive and operate as deconcentrated units. Cameroon may want to emulate the example of South Africa for effective supervision and intergovernmental relations.

On the important issue of organised local government, Part VII of the 2019 Decentralised Code focuses on decentralised cooperation,

groupings and partnerships. In this respect, organised local government or decentralised cooperation is feasible where there is an agreement between two or more councils, especially when they decide to merge their different resources with an aim of attaining common objectives (section 94(1) of the 2019 Decentralisation Code). Such a cooperation may be carried out between Cameroonian councils or between Cameroonian councils and councils of foreign states (section 94(2) of the 2019 Decentralisation Code).

In a bid to achieve inter-council cooperation, councils of the same division or region may, by at least a two-thirds majority of the decision of each council, create a union (section 104(1) of the 2019 Decentralisation Code). Such a council union shall be set up by agreement by the mayors of the concerned councils (section 104(2) of the 2019 Decentralisation Code). The bodies of the council union shall be constituted of a union board and a union chairman (section 106 of the 2019 Decentralisation Code).

The United Councils and Cities of Cameroon (UCCC) is an association created by the councils and cities in Cameroon in 2003. The UCCC was formed from the merger of the Cameroon Union of Towns and Councils and the Cameroon Association of Towns (local government system in Cameroon, country profile). From its appellation, city councils and councils constitute the membership of the UCCC and are represented therein by government delegates in the case of city councils, and by mayors in the case of councils. These members put together, constitute the UCCC assembly at the national, regional and divisional levels, from which is elected the executive bureau at that level. In reality the UCCC has not been effective in playing a role in the development of councils because serious disparities continue to exist in terms of development among councils. There therefore is a need for Cameroon to follow the examples of South Africa and Zimbabwe, of which the most salient features were set out earlier, for effective organised local government.

6 Redefining the role of women, ethnic and minority groups as well as traditional rulers in the decentralisation process

This part advocates the need to redefine the role of women, ethnic and minority groups in a rationalised decentralisation design. The part equally examines the need to redefine the role of traditional rulers in a rationalised decentralised design.

6.1 Reinforcing the role of women

The status of women and their active involvement in the decentralisation process are not adequately addressed by the 1996 Constitution. It has been

established that Cameroonian women indeed face many cultural barriers as far as being involved in decentralisation is concerned. The poor rate at which women participate in public life and especially politics is further complicated by the fact that men are given more attention when it comes to higher educational opportunities and are favoured for administrative duties, while women, even those who went to school, are prepared to be better housewives (Mufua 2014; Lauzon & Bossard 2005: 8). For women to actively take part in the decentralisation process – especially decision-making positions – as well as in politics in Cameroon, they need to seriously participate in the registration and voting process for elections in the country.

There is no gainsaying that women in Cameroon outnumber men with respect to population statistics, which already gives them an added advantage. However, they are less active in the political domain (Mufua 2014). Women's underrepresentation in issues of governance, especially with respect to political affairs and development at the national as well as lower spheres of government, will only get worse if concrete measures are not taken for the constitutional entrenchment of their role in these domains. Apart from the case of South Africa, countries such as Zimbabwe and Kenya have already taken steps in this regard (sections 3, 13, 14, 17, 24, 56, 68, 80, 124, 157, 194 and 269 of the 2013 Zimbabwean Constitution; articles 21, 27, 97, 98, 100, 127 and 232 of the 2010 Kenyan Constitution).

6.2 Emphasising the importance of diversity, minority and ethnicity issues

The Preamble to the 1996 Constitution stipulates that the 'state shall ensure the protection of minorities and shall preserve the rights of indigenous populations in accordance with the law'. Article 1(3) of the 1996 Constitution adds that the official languages of the country shall be English and French with both having the same status (article 1(3)).

Section 2(2) of the 2004 Orientation of Decentralisation Law states that the Cameroonian decentralisation framework is designed to act as a major medium for the promotion of diversity issues at the local level. It is argued that the scope for the decentralisation framework under the 1996 Constitution to serve as a platform from which to resolve diversity issues, as well as ethnic and minority issues, is limited (World Bank Report 63369-CM 2012: 31).

In opting for a top-down centralised symmetrical decentralisation design, the Cameroonian Constitution builder fails to address diversity, minority and ethnic issues, particularly the Anglophone problem as well as discrimination faced by disabled and indigenous people, women and the

youth. An important aim of a good constitutional system, especially the design of the decentralisation framework, is to ensure that issues of equity, inclusion, diversity, equality and differentiation of all citizens are catered for. For instance, the 1996 South African Constitution indirectly protects marginalised cultural and linguistic groups (section 9(3)). Recognition is officially accorded to 11 languages (section 6(1)). Even though some other languages are not officially recognised as such, the Pan-South African Language Board (PanSALB), created under the South African Constitution, has the duty to promote and create conditions for the development and use of these languages, such as the Khoi, Nama and San languages (section 6(5)). The 1996 Constitution of Cameroon in several instances is weak in addressing some of these issues but for the major part completely ignores them while hoping that they would be resolved automatically or fortuitously. Therefore, equally entrenching the promotion and protection of the rights of these groups in the 1996 Constitution of Cameroon is important. Ensuring that the rights of these minority groups are adequately protected and promoted in practice is equally, if not more, important.

6.3 Asserting the role of traditional authorities

Traditional authorities in Cameroon are classified under the existing legal framework into three categories, namely, first-degree chiefs, second-degree chiefs and third-degree chiefs. Also generally considered as auxiliaries of the administration, they are not attributed any particular functions or duties by any of the legal instruments regulating the decentralised system. Under the Special Status arrangement (Part V of the 2019 Decentralisation Code) the 2019 Decentralisation Code provides for a House of Chiefs in both Anglophone regions (section 337 of the 2019 Decentralisation Code).

In the author's view traditional authorities have to play an important role in accelerating the decentralisation process in Cameroon. A reform of traditional chiefdoms is underway in Cameroon (Josué 2018). The current reform of traditional chiefdoms aims to confer on the traditional chiefs a status compatible with the specific nature of their missions and adapted to the institutional evolution of the country (Josué 2018). Traditional authorities will henceforth be important actors in the supervision of socio-economic and developmental activities of the populations, under the supervision of the administrative authorities (Josué 2018). If the role of traditional authorities in Cameroon is constitutionalised and well defined as in the case of South Africa (Bizana-Tutu 2008: 7; sections 211(1) & (2) of the 1996 Constitution of South Africa; the Traditional Leadership and Governance Framework Act 41 of 2003) and also Zimbabwe (Makumbe 2010: 88; Chingwata 2016: 20), they may indeed become important actors in helping local government in development, conflict management and service delivery.

7 Envisaging dispute resolution and implementation mechanisms

An important element for enhancing constitutionalism, the respect of the rule of law and hence adequate decentralisation is the presence of an umpire (usually the courts and/or a referendum). This umpire – usually the Constitutional Court or council, as the case may be – is entrusted with the duty of upholding the Constitution and ruling on disputes between the various spheres of government (Kincaid 2011: xxvii). This part suggests a rationalised design for the composition and functioning of the Constitutional Council (Council) of Cameroon.

7.1 The composition of the Constitutional Council

According to article 51 of the 1996 Constitution, the 11 members of the Constitutional Council are appointed by the President of the Republic. Besides the 11 members mentioned above, former presidents of the Republic shall be *ex officio* members of the Constitutional Council for life. In case of a tie, the president of the Constitutional Council shall have the casting vote.

Three observations may be made about these constitutional provisions with respect to who can be nominated, on what basis such appointments are made and who makes these appointments. First, the competence, effectiveness and independence of a Constitutional Court judge depend on an appointment procedure with clearly transparent criteria and established objectives that are based on elements such as integrity, qualifications and competence. Copying from the 1958 design, article 51 of the 1996 Constitution of Cameroon simply states that the 'members shall be chosen from among personalities of established professional renown' and 'must be of high moral integrity and proven competence'. This means that they need not be jurists to qualify as judges (Fombad 2017: 84). It is thus argued that, because of their training in and capacity for analytical critical legal thinking and reasoning, jurists will make more rational and effective judges than merely personalities of established renown who are not jurists.

Second, the original 1996 Constitution's formulation of article 51(1) stipulated that members of the Council were to be designated for a 'non-renewable term of office of 9 (nine) years'. This provision was revised in 2008 by the President of the Republic, in favour of an open term, when he decided to remove the two-term presidential term limit from the Constitution. This is a drift from the 1958 French design which, at first glance, gives the impression that this encourages the general will to expunge term limits from the Constitution. In spite of the open term, section 18 of Law 2004/004 of 21 April 2004, which lays down the rules and regulations concerning the membership of the Constitutional Council

(2004 Law on Membership of the Council) provides that the Council 'by a majority vote of two-thirds of its members may, of its own motion or at the request of the designating authority and following an adversarial procedure, terminate the appointment of a member'. This demonstrates that although it seems that the members of the Council have an open term limit, their term limit can be terminated not only by the President of the Republic but also by the Council.

Third, unlike in several states such as South Africa and Brazil (Shankar 2013: 92-93), all 11 members of the Council are appointed by the President. Although it is stated in the provision that the President of the Republic directly appoints only three members and the others are to be 'designated' by other personalities such as the president of the National Assembly, the president of the Senate and the Higher Judicial Council, the reality is that the President through the ruling CPDM influences the appointment of all members of the Council. Similarly, the Higher Judicial Council is chaired by the President and co-chaired by the Minister of Justice. They both decide on its agenda and when it is to meet. In a nutshell, the President of the Republic finally decides on who qualifies as a member of the Council (Fombad 2017: 84; Bastos 2016: 176-179). This should not be the case. It may be necessary for leaders of political parties represented in the National Assembly to complement a well-constituted Higher Judicial Council in the selection of members of the Council.

Before 2018 the Supreme Court played the role of the Council. The legality of having this body play the role of the Council was questionable. Article 51(5) of the 1996 Constitution expressly states that '[t]he duties of members of the Constitutional Council shall be incompatible with those of members … of the Supreme Court'. However, for 22 years judges of the Supreme Court acted as the Council without any consideration of this express prohibition. More difficulties arose from the various ways in which the judges of the Supreme Court were selected.

Generally the Supreme Court, while it acted as the Council, sat in a panel of joint benches, which in principle was composed of at least 19 judges. The way in which the judges were appointed was not based on transparent and objective criteria that relied on elements such as integrity, competence and qualifications. The appointments were made by the President of the Republic, supposedly based on recommendations from the Higher Judicial Council, which is chaired by the President of the Republic with the Minister of Justice as deputy chair. The judges were usually selected from among those who had reached the highest rank in the judiciary (usually from the fourth grade to the exceptional grade). Attaining the grade that qualifies a judge to be appointed to the Supreme Court, however, does not depend on integrity, competence or even proven record, but rather on loyalty to the CPDM, the party in power. Similarly, although senior judges are

supposed to retire at the age of 65, this requirement may be waived by the President of the Republic especially in his favour. Such absolute powers of the President extend to determining the allowances and salaries of judges. As in other states in Francophone Africa, the salaries and allowances of judges have been unrealistically increased to influence the decisions of judges with respect to electoral disputes (Fombad 2004: 361-397).

The 1996 Constitution allows for a situation whereby the Council is composed of personalities who are appointed in a particular way. Before 2018 the judges of the Supreme Court virtually served at the pleasure of the President of the Republic and doubled as members of the Council. It could hardly be predicted who among the many judges was to sit in the panel of joint benches, which carried out the duties of the Council because the president of the Supreme Court had the free will to appoint who he wanted to be a member of any of the divisions and benches. For a state that claims to be democratic, there is a need for a provision that the composition of these bodies should reflect not only integrity but equally the ethnic, religious and gender diversity of the country.

7.2 The functioning of the Constitutional Council

In making suggestions on how the Council may better function it is important to address the scope of its review powers, access to this body and the nature of opinions and decisions. With respect to the scope of review powers reserved for the Council, one of the major factors to an effective system of judicial review is the powers accorded to such a body. The ambit of matters that the Council is empowered to handle is regulated by articles 46 to 48 of the 1996 Constitution and Law 2004/004 of 21 April 2004 on the organisation and functioning of the Council. An overview of these laws demonstrates that the Council has been accorded jurisdiction over advisory and contentious issues. The provisions on contentious issues are more elaborate and provide that the Council may carry out constitutional review in three major areas: First, it can intervene in the situation of conflicts of competence between certain state institutions; second, it can ensure the regularity of elections; and third, it has a general power of review of the constitutionality of laws, agreements and treaties. The Council has not been effective in carrying out these objectives. There thus is a need for the Council to be effective in carrying out these objectives.

With respect to access to the Council, the issue of constitutional justice happens to be one of the major weaknesses of the French 1958 Constitutional Council design adopted by Cameroon in all its constitutions (Fombad 1998: 186). In general, cases may only be referred to the Council by the President of the Republic, the presidents of both the Senate and National Assembly, one-third of members of the Senate or one-third of members of the National Assembly. The major exception here relates to electoral disputes. In this respect, article 48(2) of the 1996

Constitution stipulates that any cases in respect to electoral disputes, or parliamentary or presidential elections may be brought before the Council by 'any candidate, political party that participated in the election in the constituency concerned or any person acting as government agent at the election'. When confronted with cases involving electoral disputes, the Council instead has focused on procedural loopholes and sanctioning non-compliance with filing requirements than with carefully investigating and sanctioning violations of electoral laws as well as other violations that emanate from the electoral process (AD Olinga mentioned in Fombad 2017: 92). There is a need for the Council to go beyond such a scope and examine more substantive issues involving electoral disputes.

Concerning the nature of opinions and decisions, rulings of the Council may take the form of a decision or an advisory opinion. However, the way in which this provision was drafted leaves a lot to be desired. For instance, article 50(1) of the 1996 Constitution stipulates that decisions of the Council are not subjected to appeal and are binding on all judicial authorities, military officials, administrative officials, public officials as well as all corporate bodies and natural persons. Article 50(2) further states that 'a provision declared unconstitutional may not be enacted or implemented'. The utilisation of the permissive 'may' appears to mean that the Council is not obliged to nullify legislation that is inconsistent with the 1996 Constitution, yet the purpose of the whole section is to ensure that any legislation found to be inconsistent with the 1996 Constitution is not adopted. From all indications this means that the powers of the Council with respect to constitutional review are limited, which should not be the case.

8 Concluding remarks

Cameroon's constitutionally-entrenched mechanism needs to intentionally provide a clear direction of the scope and nature of decentralisation and not by way of claw-back clauses, in order to allow important issues of constitutional importance to be decided by the President of the Republic, as this indeed is a recipe for failure. It may therefore be necessary to suggest certain mechanisms to be put in place.

First, although the decentralisation process seems to have taken power and politics closer to the people, especially with the putting in place of a special status in the two Anglophone regions, the distortion and micromanagement of the process at the local level have to ensure that it has an impact and provide the improvement and self-development in actual governance that should accompany it. This is so because high hopes have been raised by the process and there is too much potential danger in not making sure that it comes to fruition. The current failed experiment contains the ingredients for what is needed in the future.

Second, decentralisation is unlikely to help in promoting development, democracy, constitutionalism and respect for the rule of law if the central government that presides over the process is not aspiring to be genuinely democratic. The decentralisation process needs to alter the way in which the authoritarian regime operates. As it stands, at its very core the present system is personally-based authority based on a patron-client network. The ruling CPDM and government positions need not be used as a medium from which to manipulate and control its followers who hold strategic posts throughout central and local government administration in order to fortify its grip on power.

It thus is evident from a critical examination of the constitutional and legal framework with respect to the central government in Cameroon that the executive is domineering over shared and self-rule arrangements. With respect to shared rule, the President should not have the discretion of appointing 30 out of 100 senators in the country. If the powers of the President are limited, this would give more meaning to shared rule. Senators would be able to make decisions independently with little coercion from the executive.

Likewise, the influence of the executive should not be so dominant over the institutions of self-rule such as the regional councils and municipal councils. The President should not on his own decide on how territorial units are carved out. He should also not have extensive powers to appoint personalities such as government delegates and secretary-generals of regional councils. There also is a need for the issue of who an indigene is to qualify as a regional councillor, to be revisited. This may lead to better management of diversity.

For better self-rule and thus political autonomy, in line with developments from the national dialogue, there also is a need for an efficient electoral system. The PR system may be preferable as it prevents a clear majority from emerging, thus facilitating inclusive decision making and creating room for the creation of coalition governments.

In addition, for better self-rule, promoting the rule of law is important. This may be done in several ways, the most important of which is by adopting a coherent legal system. The doctrines of judicial review, constitutional supremacy and independent oversight bodies can indeed solidify such a framework.

Local government should have autonomy over the hiring and firing of its staff so as to ensure better administrative autonomy. There also is a need for professionalisation of especially executives such as mayors and government delegates. Autonomy over the internal procedures of councils is also important for administrative autonomy. Local government should

have authority over putting in place the salary scales of local employees. This may go a long way in attracting and retaining skilled personnel.

There is a need to revisit the many distorted and incoherent decentralisation laws related to finance as well as to improve on the poor administrative capacity at the levels of bodies such as FEICOM to enforce the payment of taxes. There also is a need to improve on the poor administrative capacity to assess the revenue base; eradicate corruption, such as the embezzlement of revenues; to lessen or better still to eradicate external pressure on the local finance department to furnish optimistic projections; and weaken political pressure on the local tax administration to relax on revenue collection, especially during election periods.

Supervisory bodies such as the National Decentralisation Board (Board) and the Interministerial Committee on Local Services (Council) need to be effective. Elections Cameroon (ELECAM), the body that supervises the election process of parliamentarians, senators, regional councillors as well as municipal councillors needs to be transparent and efficient. The National Commission on the Promotion of Bilingualism and Multiculturalism (NCPBM), created in 2017, which has a role to play in the decentralisation framework of the country, must be constitutionalised and be made to function effectively. Central government should limit the duplicity, overlap and confusion in the role these institutions play.

A meaningful consultative mechanism between central and local government is important in Cameroon's decentralisation design. For cooperative governance and for efficient consultative mechanisms, there is a need for an exhaustive chapter for intergovernmental relations in the 1996 Constitution. Organised local government, especially the role of the UCCC, should also be strengthened so as to better oversee the decentralisation process.

Reinforcing the role of women, ethnic and minority groups as well as traditional rulers in the decentralisation process also is fundamental. There is a need to constitutionalise the role of women in the decentralisation process. Emphasising the importance of diversity, minority and ethnic issues in the Constitution also is fundamental. Officially recognising the languages and culture of minority groups and Anglophone Cameroonians is very important, and constitutionally asserting the role of traditional authorities in the decentralisation process is also necessary.

Cameroon's constitutional review system should be modernised in order to supervise the decentralisation process. Several issues need to be addressed. First, denying ordinary citizens the right to access the Council, especially in a situation where their constitutional rights have been violated, amounts to the refusal of constitutional justice and cannot be justified. Ordinary citizens need to be given access to the Constitutional

Council. Second, in the absence of an independent judiciary respect for the rule of law, constitutionalism and hence decentralisation has remained an illusion in the country since independence. This is exacerbated by the lack of an effective, credible and efficient system of constitutional review, which upholds the rights of citizens.

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European populism in the European Union: Results and human rights impacts of the 2019 parliamentary elections

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Abstract: *Populism is a problem neither unique nor new to Europe. However, a number of crises within the European Union, such as the ongoing Brexit crisis, the migration crisis, the climate crisis and the rise of illiberal regimes in Eastern Europe, all are adding pressure on EU institutions. The European parliamentary elections of 2019 saw a significant shift in campaigning, results and policy outcomes that were all affected by, inter alia, the aforementioned crises. This article examines the theoretical framework behind right-wing populism and its rise in Europe, and the role European populism has subversively played in the 2019 elections. It examines the outcomes and human rights impacts of the election analysing the effect of right-wing populists on key EU policy areas such as migration and climate change.*

Key Words: *European parliamentary elections; populism; EU institutions; human rights*

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1 Introduction

2019 was a year fraught with many challenges for the European Union (EU) as it continued undergoing several crises, including the ongoing effects of Brexit, the migration crisis, the climate crisis and the rise of illiberal regimes in Eastern Europe. Accompanying these crises was the increasing success of right-wing populist parties in many EU member states. This gave rise to concerns in many quarters about a potential landslide win for these parties in the European parliamentary elections (EPE) scheduled for the spring. The 2019 EPE were held between 23 and 26 May 2019, where 512 million citizens from 28 member states voted in 751 Members of European Parliament (MEPs) (European Parliament 2020). The 2019 EPE saw losses in both the centre-right and centre-left parties, and despite gains for pro-EU environmentalist and liberal parties, there also was a gain for right-wing populist parties (European Parliament 2020).

Against the backdrop of the political developments surrounding the EPE in 2019, this article examines the impact of a rising wave of right-wing populism on key EU policy and human rights issues and institutional coherence. To do so, we provide an overview of the theoretical underpinnings of populism that provides a basis for the analysis that follows, drawing out aspects particularly relevant to populism in the context of Europe and the EPE. The third part explores in detail the EPE through the filter of the populist parties. Parts 4 and 5 examine how the outcome of the EPE *vis-à-vis* populist parties has impacted the EU from an institutional perspective and what effects the results have had on key EU policy and human rights issues such as migration and climate change.

2 Theoretical background

One of the significant challenges for scholars is to understand the political phenomenon of the radical right populist (RRPs) parties in the last two decades at the national level and, increasingly, at the international level. Even if there still is not a proper theory of populism and the term essentially is a politically-contested one (Müller 2017: 2) it is possible to establish some common characteristics shared among them. Moreover, by analysing the European type of populism found among RRPs one can better understand not only their electoral performance, but the impact of these parties on EU policies.

RRP parties are to be found in many countries, may be traced back to the 1980s and generally seem to pose a threat to (liberal) democracy. They share a certain number of core values and frequently use populist strategies to reach and maintain power. However, there still is no consensus on how to define populism in the context of RRPs or how to describe their international and transnational behaviour.

One criticism the term 'populism' faces is that it is commonly used as a battle term (*kampfbegriff*) to denounce political opponents and, at the same time, it is too vague to the point where it could be used to describe every politician (Mudde & Kaltwasser 2017). The ideational approach, by adopting a minimal definition of the concept, has become the most successful attempt to explain the causes and effects of populism, allowing it to be applied to many different countries and contexts. This approach focuses on defining populism mostly by a narrative in which a moral and Manichean distinction is made between the 'pure people' and a 'corrupted elite' (Hawkins 2018; Kaltwasser 2018). Accordingly, Mudde (2004: 543) defines populism as

> a thin-centred ideology that considers society to be ultimately separated into two homogenous and antagonistic groups, 'the pure people' versus 'the corrupt elite', and which argues that politics should be an expression of the *volonté générale* (general will) of the people.

One of the major advantages of this approach is that it conceives populism as a 'thin-centered ideology', meaning that it always appears attached to other 'concepts or ideological families' (Mudde & Kaltwasser 2017: 19). This allows us to understand how we nowadays see populism, combined with a variety of different ideologies, including nationalism.

In order to define the ideological contours of the radical right-wing parties in Western Europe, we need to observe the discourse of 'the people' against 'the elites' in practice. For the RRPs 'the people' by their perspective not only are menaced from above by 'the elite' (political, cultural, financial and judicial, among others) but by the presence of the 'dangerous other' represented mainly by the figure of the immigrants, who would not share the values of the people and, therefore, would threaten the prosperity of the national state (McDonnell & Werner 2019: 21). In this sense, the contemporary RRPs in Western Europe share a number of core values and policies that may be summed up by their nativist, authoritarian and Eurosceptic positions (McDonnell & Werner 2019; Vasilopoulou 2018).

As Mudde (2019: 27) explains, nativism 'holds that states should be inhabited exclusively by members of the native group (the nation) and that non-native (or alien) elements, whether persons or ideas, are fundamentally threatening to the homogeneous state'. This aspect of the core values of the RRPs is essential to understand the electoral success of the radical right: The socio-cultural conflict dimension has been increasingly prominent in the public debates, with issues that touch on culture, values, and identity being at the centre of the difference between parties along the political spectrum.

While the socio-economic dimension has been put aside, a socio-cultural dimension has increasingly colonised the political discourse, and simultaneously issues such as immigration, border control and ethnic

tensions started to be placed higher on the voters' preference list. As a result, the mobilisation for the right-wing parties also increased (Arzheimer 2018; Rydgren 2018). Other issues, such as the climate agenda, considered part of the 'cosmopolitan elite agenda' (Lockwood 2018: 2) and, therefore, not compatible with the authoritarian and nationalistic values of the RRPs, tend to be marginalised.

At the same time there is much discussion around the compatibility of the radical right with democracy, especially because of its authoritarian aspect. First, it is important to separate the radical right from 'right-wing extremism', which directly opposes democracy (Rydgren 2018). However, while portraying themselves as defenders of 'true democracy' and 'the will of the (pure) people', the RRPs also reject notions of pluralism and many of the institutions that are inherent to the liberal democratic model, invoking popular sovereignty as a principle to criticise the judiciary and the media (Mudde & Kaltwasser 2017: 81).

This appeal for popular sovereignty is one argument for the adoption of Eurosceptic positions by the RRPs, as 'many populist parties accuse the political elite of putting the interests of the EU over those of the country' (Mudde & Kaltwasser 2017: 19). For those parties, the EU stands for globalisation and multiculturalism and, thus, for a real threat to the cultural homogeneity of the European nation-states, consequently labelling established parties, mainstream media and intellectuals as elitist betrayers of their country for their support of the EU (Rydgren 2018; Vasilopoulou 2018).

However, it is important to note that not all parties of the radical wing family share the same opinion on European integration, with those that pursue withdrawal from the EU as their main goal, being a minority. Yet, most of them adopt a pragmatic approach to the issue. Their European position remains mostly defined by both their national context and the strategies followed by the other parties in their domestic system (Vasilopoulou 2016: 134-135).

Ultimately, as much as radical right-wing groups oppose a supranational system such as the EU, they consider it necessary to be politically engaged in the transnational level because as 'any other kind of political organisation, radical right organisations do not exist in vacuum, but instead are embedded in a larger context of multilevel governance' (Caiani 2018: 395). In fact, the RRPs nowadays tend to be happy to demonstrate that they have a common project as their connections at the international level increase in substance. The most formal connection these parties represent is through alliances in the European Parliament (McDonnell & Werner 2019: 197).

Nonetheless, even if the group acronyms of the European Parliament alliances do not particularly resonate with the regular voter, the association with other foreign parties and especially other populist politician figures tend to be pursued by the RRPs and seen positively by their supporters. Here, the strategies of the RRPs tend to be split, either wanting to be seen as 'respectable radicals' able to secure mainstream alliances or as 'proud populists' (McDonnell & Werner 2019).Therefore, the parties that opted for the 'respectable radicals' label were going through a process of mainstreaming, while the 'proud populists' were attempting a 'normalising' approach. This process occurred not only in Europe, but throughout the world, as the RRPs and their policies with time became more common and palatable for voters (McDonnell & Werner 2019; Mudde 2019). For this reason Caiani (2018: 407) writes that '[f]ar-right movements can be narrowly conceived as nationalist organisations, yet often their ideologies synthesise national and transnational visions' as parties or non-party organisations are more and more recognising the importance of the transnational arena and their mobilisation is being directed towards transnational institutions and politicians, particularly on the topic concerning European integration (Caiani 2018: 407).

The behaviour of the RRPs in the last few years shows growth in both international populism and transnational populism even if the parties still do not act as an ideologically homogeneous group. As McDonnell and Werner (2019: 2018) put it:

> This means in practice that radical right populists present themselves not only as working with like-minded parties in EP groups to defend their national 'peoples' from a series of bad elites and 'dangerous others' threatening them at national level but also as doing so to defend a European 'people' from elites and 'dangerous others' at continental level.

McDonnell and Werner (2019: 219) identify three main reasons for this. One reason is support for EU membership among the national public. The second reason is the possibility of reshaping Europe with their views because many of their key issues (for instance, immigration) are perceived as European issues. Finally, RRPs increasingly see themselves as part of a worldwide political wave and no longer focus their activities only on their home states, but also on spreading their world views to as many other states as possible. Moreover, radical rights populists see their influence rising at both national and European levels, as the populist discourse based on a Manichean view of 'the people' versus 'the elite' is being translated into the notion of the respective national 'peoples' against the corrupt/evil elites (including the 'technocratic EU') and the 'others' (for instance, immigrants). 'The people' now is not merely a national concept but a transnational one, as the radical right populists in Europe feel that they no longer are alone in the EU and their presence is considered normal in the EU Parliament, as they seem to step up as 'saviours of Europe' (McDonnell & Werner 2019: 228-229). This development became evident during the

run-up to the 2019 European parliamentary elections and their results, as discussed in the following part.

3 Campaigns and results

A general atmosphere of uncertainty accompanied the run-up to the European parliamentary elections (EPE) in May 2019. This was due mainly to the success of populist RRPs in the aftermath of the 2014 EPE, Brexit, Trump's election and the issue of migration (Bolin et al 2019: 9). 2014 saw a significant increase in the success of populist right-wing rhetoric and ultimately witnessed the best results for radical right-wing parties in the EPE to date, where 73 out of the 751 elected members were from RRPs (McDonnell & Werner 2019: 4). The campaigns and results of the election are analysed in this part to ascertain the potential motives that are driving these RRPs and what lies behind their success.

3.1 Right-wing alliances in the European Parliament

As outlined in the theoretical background part, there is a key difference between those who are RRPs and 'right-wing extremists'. We are specifically interested in analysing those who make the distinction between 'the pure people' and 'the elite' (McDonnell & Werner 2019) and also those who are not actually opposed to democracy but rather defend 'true democracy' (Mudde 2017: 81). In this regard, the breakdown of the Right-Wing Populist Alliances of the European Parliament (EP) is made up of three political groups: the European Conservatives and Reformists; the Europe of Freedom and Direct Democracy; and the Europe of Nations and Freedom.

3.1.1 European Conservatives and Reformists

The European Conservatives and Reformists (ECR) currently is the second-largest group of RRPs in the European Parliament (European Parliament 2020). The ECR started by the UK Conservatives in 2009 as a Eurosceptic right-wing party. Despite initial rejection by the UK Conservatives, the Danish People's Party (DFP) and the Finns Party (PS) were accepted into the group before the 2014 EPE, where the group performed successfully. However, in the run-up to the 2019 election, both PS and DFP left the group and were replaced by the Spanish right-wing party Vox, the Forum for Democracy (FvD), the Greek Solution (EI) and also the Law and Justice Party of Poland (PiS), now the party with the highest number of seats in the group. The ERC agenda, according to their website, focuses on protecting and respecting EU member states, an EU immigration system that works, 'common sense' and sustainability, and notably 'an EU led by national governments not Brussels Bureaucrats' (ECR Website 2020). These values clearly align with the theoretical definitions laid out in part 2, in that

right-wing European parties may be summed up by their nativist, authoritarian and Eurosceptic positions. Although considered a right-wing group, there are some right-wing extremist factions within the alliance, namely, PiS of Poland and AfD of Germany as they have become much more radical-right. Despite discussions on whether to exclude these parties, the same conclusion as those of McDonnell and Werner should be drawn, whereby these parties are included in the post-2019 EP discussion because of their influence and role 'within the broader radical right populist family' (McDonnell & Werner 2019: 6).

3.1.2 Identity and Democracy

The Identity and Democracy (ID) group is the fifth largest group out of nine (European Parliament 2020) and was formed as a successor merging both the Europe of Nations and Freedom group and the Europe Nations and Freedom group leading up to the 2019 EPE (Carbonnel 2019). The group is an example of the largest homogenous radical right populist groups in the EP with the amalgamation of many key nationalist far-right parties from Europe such as the French Front National under Marine Le Pen, the Dutch Party for Freedom led by Gert Wilders, the Italian Northern League Party led by Matteo Salvini, the Austrian Freedom Party and the Flemish Interest Party of Belgium (DW.com 2019). The ID's core policies centre around the protection of democracy (setting them apart from other right-wing extremist parties); the protection of national sovereignty and anti-federalism; the protection of European identity and culture through national control of immigration; and defending individual freedoms and emphasising the particular importance of protecting freedom of speech and digital freedoms, which they consider to be increasingly in jeopardy (ID 2020). These core group values align with the theoretical frameworks of RRPs and many members of ID. Marine Le Pen of France is an example of a populist right-wing leader, seen in her reaction to court proceedings against her, stating that she was wrongly singled out by morally-questionable ruling 'elites' (Rankin 2019a). This sentiment echoes the theoretical definition of populism in part 2 whereby 'the people' are being menaced from above by 'the elite' (political, cultural, financial and judicial, among others). A further example of how the group would be within the RRP definition is the core values of the group. ID have a unifying consensus across all MEPs that immigration in the EU should be under the control of member states to preserve their individual cultures. This equates to the third component of the theoretical definition of populism in part 2, as immigrants are now considered to be 'the dangerous other', who threaten the prosperity and cultural identity of 'the people' (McDonnell & Werner 2019: 21).

Despite not registering after the 2019 election and therefore no longer being considered an official political group, the Europe of Freedom and

Direct Democracy alliance (EFDD) played an important role leading up to the 2019 EPE and the previous EP election – particularly in connection with Brexit – as the major party of the alliance was the United Kingdom Independence Party (UKIP) (McDonnell & Werner 2019: 93). UKIP is a true nativist populist right-wing conservative party that is heavily Eurosceptic and led by the face of the Brexit movement, Nigel Farage (UKIP 2019). Farage and other British MEPs split away from the EFDD to create the Brexit party in early 2019 before the elections, in order to expedite Britain's exit from the EU (Giuffrida & Rankin 2019). This ultimately resulted in the remaining EU RRPs in the group being dispersed into other RRP groups and could arguably be responsible for the success of both ECR and ID.

3.2 Focus of campaigns

The campaigns of different parties for the 2019 EPE had very similar areas of focus particularly in the negative campaigns: Euroscepticism, immigration and anti-federalism. The 2019 EPE saw a significant change in the campaigning landscape compared to the 2014 EPE with the increased use and efficacy in social media campaigning (Ferrari & Gjergji 2019).

According to the 2019 report by the European Election Monitoring Commission, across Europe, the top topics of the 2019 EPE campaigns were Europe (17 per cent); Values (7 per cent); Economics (5 per cent); Social (5 per cent); and Environment (5 per cent) (Johansson & Novelli 2019: 20). The topic of 'Europe' encompasses issues such as general EU issues, EU economy, the euro, critical views on the EU such as Brexit and anti-EU sentiment. The second most prevalent topic in 2019 EPE campaigns was values, which included themes of economic issues, social issues, labour, environment, but also national identity, cultural differences and religion. These topics are key areas of contention in the populist rhetoric (Johansson & Novelli 2019: 20).

The percentage of campaigns that were negative or Eurosceptic was dependent on the country. The overall average of negative attack campaigns was 12 per cent, with countries such as the UK and The Netherlands seeing 20 per cent and countries like such as Slovenia, Belgium, Germany and Luxembourg having virtually no negative campaigns. The vast majority (72 per cent) of most of the negative campaigns were targeted at national institutions, politicians and parties. Interestingly, 21 per cent of these campaigns were targeting foreign institutions, namely, 'EU' and 'Brussels' (Johansson & Novelli 2019: 21). This aligns with the core populist Eurosceptic notion that the EU and Brussels is overly bureaucratic and takes too much sovereignty from states, further fuelling the populist Eurosceptic idea that this supranational body is not representing the true will of the people.

The transition towards more social media campaigns was evident in the 2019 EPE across all of Europe, both in terms of the content posted but also in comparison to other traditional campaigning tactics such as television commercials and posters (Johansson & Novelli 2019: 15). Interestingly, there are some key outliers in the number of posts by particular parties that were particularly successful in the 2019 EPE. One of them is the Italian Northern League led by Matteo Salvini, which generated nearly four times the number of posts compared to the runner-up, the Italian Movimento 5 Stelle (5 star movement), then closely followed by UKIP. Five of the top seven parties were from the ID group and all posted strongly critical and sceptical views of Europe (Johansson & Novelli 2019: 26). Although the high number of posts not necessarily means that the information was properly engaged with and consumed, but there is a very strong correlation between the political parties who post the most and top political parties by engagement (Johansson & Novelli 2019: 28). This supports the notion that the RRPs have successfully harnessed the appropriate channel to campaign and engage with their targeted audience. Social media is a highly-effective communication tool for populist parties, as seen with the new ID group, as the emotional style and, in general, the role of the leader as a source of communication aligns well with social media (Bobba 2018: 11). Social media also gives the leader a platform with the freedom to articulate their message to a broad range of people who would usually consider the regular media channels part of 'the elite' (Engesser et al 2017: 1113).

3.3 Election results

Despite many being successful in national elections, and in comparison to the 2014 EPE, populist parties were not as successful as predicted in the 2019 EPE. In the words of Karnitschnig (2019): 'The bark of Europe's far right [was] worse than its bite.'

Table: European Parliament election results of 2014 and 2019

2014 ELECTION		**2019 ELECTION**	
Political Groups	**Seats**	**Political Groups**	**Seats**
EPP: Group of the European People's Party (Christian Democrats)	216	EPP: Group of the European People's Party (Christian Democrats)	182

S&D: Group of the Progressive and Alliance of Socialists and Democrats in the European Parliament	185	S&D: Group of the Progressive and Alliance of Socialists and Democrats in the European Parliament	154
ECR: European Conservatives and Reformists Group	77	Renew Europe: Renew Europe group	108
ALDE: Group of the Alliance of Liberals and Democrats for Europe	69	Greens/EFA: Group of the Greens/European Free Alliance	74
GUE/NGL: Confederal Group of the European United Left – Nordic Green Left	52	ID: Identity and Democracy	73
Greens/EFA: Group of the Greens/European Free Alliance	52	ECR: European Conservatives and Reformists Group	62
EFDD: Europe of Freedom and Direct Democracy Group	42	GUE/NGL: Confederal Group of the European United Left – Nordic Green Left	41
ENF: Europe of Nations and Freedom	36	NI: Non-attached members	57
NI: Non-attached members	20	-	-
TOTAL	**749**	**TOTAL**	**751**

Source: European Parliament, 2020, Comparative Tool

The above Table shows a general comparison between the groups compared to the 2014 and 2019 elections. Specifically looking at the outcomes of populist groups and seats within these groups, there are some notable remarks. First, with the two largest groups, there has been a decrease in the number of seats in both the Group of the European People's Party (EPP) and the Group of the Progressive and Alliance of Socialists and Democrats (S&D). Second, there has been a decrease in the number of seats of the populist ECR group. Third, despite the deregistration of the EFDD mostly due to the leaving of UK MEPs, the new successor group ID performed reasonably well for a new group, taking 73 seats and becoming the fifth largest group in the EP.

The EPE results ultimately showed a voting shift from the larger centre alliances towards smaller alliances such as RRP groups in the EP. The campaigns of these RRPs showed an increased use of social media by populist parties in comparison to other parties, which proved to be effective with their audience, along with a consistency in their Eurosceptic, anti-institutional and anti-immigration campaigning messages. The human rights impacts arising from the outcomes of the EPE show the importance of the EPE on the EU as an institution.

4 Institutional consequences of populism for the European Union

In the aftermath of the elections, the public's attention soon shifted towards the distribution of offices and the formation of a new commission, which had proven difficult in the past EPEs. The approaching Brexit caused additional uncertainty regarding the way in which the EU would have to adapt. In the following part we analyse how populist parties in Parliament complicated institutional processes within the EU. The formation of a new commission shows that populists were able to spread their ideologies into the mainstream debate and that it requires joint efforts of the other parties to prevent a continuously rising influence. We then discuss Brexit, which was based on populist ideas from the outset and gained additional momentum with the success of the populist Brexit party during the EPE.

4.1 Forming a European Commission

One effect RRPs had on the seating in Parliament was a reduction of the fraction of 'established' parties. In the 2009 and 2014 elections, the largest alliances, EPP and S&D, had an absolute majority. In 2019 these parties won a combined 336 seats falling far short of the halfway mark at 376. A candidate for commission president has to find support with both the heads of state in the Council and the Parliament. As McConnell and Werner (2019: 37) argue, the process 'was obviously not created for the alliance logics within the European Parliament', and it may be added that this is even more the case when Eurosceptic or outright anti-EU parties are involved.

A first defeat for the system became apparent when both *Spitzenkandidaten* were rejected. Both Manfred Weber, who had won the most votes for EPP, and the S&D's runner-up, Frans Timmermans, had lost support before it even came to a vote. As Boucher et al (2019: 5) observe, '[t]he major political groups in the European Parliament were simply unwilling to rally behind one common candidate'. Although the ECR presented their own *Spitzenkandidat* in Jan Zahradil, anti-European RRPs had little interest in advancing the election process (McConnell & Werner 2019: 37).

Instead, populists claimed that they stopped the other candidates: 'Hungarian government spokesman Zoltán Kovács said the 'Visegrád Four' ... had demonstrated their growing strength and influence over the direction of the EU, in part, because they had "toppled Timmermans"' (Rankin 2019c). While Timmermans, a leading figure in the rule of law dispute between the EU and the populist governments of Poland and Hungary, faced the most backlash, ultra-conservative Manfred Weber was equally opposed by populists whom he had called out during his campaign (Boucher et al 2019: 5). As the process dragged on, frustration in Parliament grew, as expressed by Socialist leader Iratxe García: 'It is unacceptable that populist governments represented in the council rule out the best candidate only because he has stood up for the rule of law and for our shared European values' (Rankin 2019b).

A compromise solution was found in German Minister of Defence and Merkel-protegé Ursula von der Leyen. She gained unanimous support among the heads of state in the Council while being confirmed in Parliament by the narrowest margin of votes a candidate for commission president ever received (Darmé 2020: 16). With their agreement to Von der Leyen, the Eurosceptic governments of the Visegrád states also accepted to be omitted from the other leading positions in the EU, such as Parliament president, council president or ECB president which were part of a negotiation 'package' and all ended up in the hands of Western Europeans (Rankin 2019b). Whether populists in Eastern European governments will use this fact to depict the EU as disconnected from the *volonté general* of their domestic populations remains to be seen, but is not unlikely.

After having gathered preliminary agreement in the Council and Parliament, Von der Leyen was faced with the challenge of assembling a commission that would pass the scrutiny of the election procedure. Having to accommodate the candidates and political views brought forward by populist governments similarly proved challenging. The increasing importance of culture, value and identity and the struggle to interpret this became particularly evident in the naming of the new commissioner in charge of migration.

In September, two months after having been chosen to form a new commission, Von der Leyen revealed that the populist hot topic of migration that had dominated much of the 2014-2019 commission's term had been assigned to a newly-formed mandate of a Commissioner for Protecting Our European Way of Life (Stevis-Gridneff 2019). The title had immediately sparked controversy for adopting a radical right narrative of migrants as something from which Europeans needed protection. Human Rights Watch commented as follows on this development (Stevis-Gridneff 2019):

> Putting migration under a portfolio named 'protecting our European way of life' is another example of just how much mainstream politicians in Europe are adopting the framing of the far right ... Normalising their ugly rhetoric is a dangerous step toward normalising their abusive policies that threaten democracy and human rights.

After initially doubling down explaining that migration and the right to asylum were part of the European values she intended to protect, Von der Leyen agreed to changing the title two months later from 'protecting' to 'promoting' European values (European Commission 2019). Parliamentarians from the left, human rights defenders and her predecessor Jean-Claude Juncker, had put pressure on her (Euronews 2019).

A final challenge populist governments posed during the formation of the new commission was the nomination of ineligible candidates. Besides Romania's social democrat, Rovana Plumb, who had been rejected for suspicions of corruption, Hungary's former Minister of Justice László Trócsányi was equally disqualified by Parliament's legal committee for conflicts of interest (Deutsche Welle 2019). Critics claimed that particularly Trócsányi was unsuitable, as he was involved in building the Fidesz autocracy by 'limiting the powers of the judiciary', also accusing him of 'criminalising NGOs for helping refugees and setting up Hungary's container camps for asylum seekers, as well as measures that led to the Central European University being forced to quit Budapest' (Rankin 2019b). Trócsányi is quoted as describing the decision as 'blatant injustice'; Orbán said it was based on his work to stop migrants (Deutsche Welle 2019).

Populists' succeeding in the 2019 EPE affected the formation of the new European Commission in three ways. First, they limited the ability of the previously dominant alliances EPP and S&D to agree on political personnel among themselves without consulting the other parliamentary fractions. However, this analysis must be seen with the caveat that the green and liberal alliances gained even more seats than populists and without delegitimizing pluralism in Parliament. Second, the heads of state from populist governments torpedoed the presidency of both *Spitzenkandidaten* Manfred Weber and Frans Timmermans. They were not alone in this. For instance, French president Emmanuel Macron was equally opposing Weber as president of the Commission. Finally, the appointment of a Commissioner for Promoting our European Way of Life in charge of migration has been seen as a concession to populist perceptions of migration as a menace.

On paper, the formation of the European Commission seems to have overcome these three main institutional challenges by RRPs. However, as will be demonstrated later, the political route taken – particularly during

the migration crisis at the EU-Turkey border – shows that populist voices have gained influence even in the EU's most powerful body.

4.2 Brexit and EU institutions

The Brexit debacle has characterised EU politics for the last three years and negotiations between the UK and the EU still have a long way to go before the nature of the new arrangement can be determined. This part will focus on the impact of the inclusion of the UK in the 2019 EPE, in particular *vis-à-vis* the populist right-wing alliances and parties, and analyse the new redistribution of seats in the EP following the official Brexit date of 1 February 2020. This date represents the UK's departure from the EU, leaving a year for the UK to reconstruct 46 years of trade, security and foreign policy ties with the EU.

One key controversy in the lead-up to the EPE had to do with the question of including UK MEPs despite the UK having already voted to leave the EU. The initially planned date for the UK to formally leave the EU was scheduled with the 2019 elections in mind, for 29 March 2019. With elections taking place on 23-26 May 2019, it was assumed that the EU could avoid the inclusion of the UK. This raised the concern of how the UK's voting power could affect the outcome of the election results. Guy Verhofstadt, leader of the Parliament's liberal block, said that a British vote would poison the election campaign and 'import the Brexit mess into EU politics' (Khan 2019). With support for the Brexit party, it was predicted that the British vote may skew election results to reflect a more Eurosceptic parliament.

The election results affirmed this as there was an increase in the number of seats filled by populist parties, but still these parties did not achieve as many gains as predicted. The Europe of Freedom and Direct Democracy Group (EFDD), previously involving UKIP, and the Italian Five Star Movement, increased their seats due to the strong performance of the Brexit Party (Uberoi et al 2019).

> However, [the EFDD] no longer has enough members to form a Political Group following the departure of AfD and the loss of seats by other parties. EP rules require Political Groups to have at least 25 MEPs and from at least 25% of (seven) Member States.

All in all, the inclusion of the UK in the EPE represented a pattern that was consistent between all EU member states: a disintegration of the centrist two-party system, and the allocation of more seats to both the left and right-wing parties. Fears that the inclusion of the UK would taint the results were not actualised in the ways that were predicted, but instead represent a larger concern about the future composition of the European Parliament, and its ability to reach consensus on EU policy.

Following the UK's official exit from the EU, the reallocation of the UK's seats in the European Parliament required re-configuration. Although this was intended not to dramatically affect the composition, slight changes in the number of seats may have the potential to alter the alliances within Parliament. Out of the UK's 73 seats, 27 have been redistributed to other countries, while the remaining 46 will be kept in reserve for potential future enlargements (European Parliament 2020). Using the principle of 'degressive proportionality', the allocation was also used as an opportunity aimed at addressing issues of under-representation of MEPs in 14 member states affected by this under-representation. This principle takes into account the size of the population of member states as well as the need for a minimum level of representation for European citizens in the smaller ones. This changed most notably for France and Spain with five extra seats each, Italy and The Netherlands with three each, and Ireland with two. Nine other member states, including Austria, Croatia, Denmark, Estonia, Finland, Poland, Romania, Slovakia and Sweden, will receive one seat each. The delay of the UK's official withdrawal meant that the member states that were allocated additional seats were expected to hold the elections as if the new allocation already applied. Candidates elected to the 27 additional seats were then required to wait on standby, and take up their seats in the European Parliament when the UK and its MEPs were intended to depart the EU.

The most noteworthy changes to the party structure of the Parliament manifested in the loss of seats of the EPP and S&D. These parties had until then worked together to control the agenda of the European Parliament. However, both groups lost seats in the election, with the result that these two groups will not have a majority of MEPs between them. The implications of such an arrangement will require that these two groups work with other parties who made gains in the election, and the post-Brexit reallocation, such as Renew Europe and the newly-formed Identity and Democracy party, to set the new parliament agenda.

As established in part 3, the UK's departure further altered the composition of the EP, leaving two parties that have no UK MEPs to lose with gains. These parties were the centre-right European People's Party (EPP), which gained five MEPs, while the far-right populist Identity and Democracy (ID) group gained three MEPs. Despite this, the three largest represented groups in parliament are the EPP, S&D and RE. These three parties are all generally in favour of deepening European integration and not engaging with the populist agenda (Uberoi et al 2020). The effect of Brexit on the constitutional composition of the Commission and the Parliament will become more apparent when examining the way in which matters of policy are handled at the institutional level. The next part examines how populism and Brexit have thus far impacted EU policy decisions, and what effect they may have in the future.

5 EU policy and populism

The impact of populists on EU policies arguably is most visible in the areas of migration and climate legislation. As explained in part 2, preventing migration traditionally is a focus area of RRPs. Their influence on the European Commission and Parliament often is indirect. However, ideas and rhetoric are subliminally introduced into the mainstream conversation and their manifestation in the form of policies becomes distinct when observing the actions of the EU in the early 2020 humanitarian crisis at the border between Greece and Turkey. There, we can find that these ideas translate into a multitude of human rights violations, most clearly the denial of the right to asylum guaranteed by article 18 of the EU Charter of Fundamental Rights. As for climate policy, one can observe that as the topic of climate makes its way to the top of the agenda for many people, consensus on the issue continues to be further divided. RRPs have exhibited a tendency to disregard the importance of climate, and continue to frame the topic as a liberal preoccupation. Below, we will summarise how this may have an effect on goal setting in climate change mitigation, and the extent to which this will impact human rights challenges in the region.

5.1 Migration policy and populism

The issue of migration arguably is the political area on which RRPs are most focused. Although their success during the parliamentary elections was limited, these parties have nevertheless affected the EU's migration policy. Beginning with a short analysis on a rhetorical level, we will show how populist speech translates into the xenophobic and dangerous decisions made or supported by the EU particularly during the humanitarian crisis in the winter of 2019/20 at the EU-Turkey border.

As discussed above, the most recent change in the EU's tone on migration issues became evident after Von der Leyen attempted to present a commissioner for the Protection of European Values whose portfolio included migration. While this decision was later reversed, it foreshadowed a new approach to wording that differed from the Jean-Claude Juncker era. Von der Leyen moved even clearer towards populist anti-immigration rhetoric when the humanitarian crisis at the Turkish border intensified after President Erdogan one-sidedly declared borders towards the EU open. In a speech she gave together with Greek Prime Minister Kyriakos Mitsotakis, she declared: 'Those who seek to test Europe's unity will be disappointed. We will hold the line and our unity will prevail. Now is the time for concentrated action and cool heads and acting based on our values.' And later: 'I thank Greece for being our European "aspida" in these times' (Von der Leyen 2020). The Greek word *aspida*/ασπίδα was translated by the Prime Minister himself to the English word 'shield'.

In these excerpts we find traces of what McDonnell and Werner have described as a notion of defending a European people from 'dangerous others' (McDonnell & Werner 2019: 218). In Von der Leyen's speech this archetypal populist concept has moved from a national to a continental level. Consequently, the implied idea of us versus them shifted to Europeans versus a menace that awaits at the border: 'This border is not only a Greek border but it is also a European border and I stand here today, as a European, at your side' (Von der Leyen 2020).

It should be emphasised that labelling Von der Leyen as a populist or not is beside the point here. Rather, she includes elements of a populist worldview in her public statements and, because of her role as a leading figure of the EU, thereby legitimises and mainstreams them. Arguably, this could even have a global effect, as it explicitly undermines the UN's attempt to shift gears on the migration discourse (UN General Assembly 2017):

> We must sadly acknowledge that xenophobic political narratives about migration are all too widespread today … Progress towards resolving real challenges associated with migration means, in part, dispelling alarmist misrepresentations of its effects. Political leaders must take responsibility for reframing national discourses on the issue, as well as for policy reforms.

Ironically, by thanking Greece for acting as a shield, Von der Leyen also undermined parts of her own agenda which she presented during her short election campaign. There she had framed her views on EU migration politics very differently, claiming that 'Europe has a responsibility to help the countries hosting refugees to offer them decent and humanitarian conditions. To this end, I support the establishment of humanitarian corridors' and 'we need a more sustainable approach to search and rescue' (Von der Leyen 2019). However, these ideas were not translated into policy, as will be shown in the analysis.

One of the highest increases in the EU budget after the elections was dedicated to the area of migration management. However, these funds were not dedicated to the integration of migrants, but mostly to preventing them from entering the EU by further militarising the borders. Accordingly, the Parliament and Council agreed on increasing the border agency Frontex' s budget by 191 million Euro (Council of the EU 2019). As Von der Leyen aimed for in her campaign, the agency has accelerated plans to increase its troops to a 'standing corp of 10 000 Frontex border guards' (Von der Leyen 2019).

Another important aspect of EU migration policy concerns cooperation with third states along migration routes. Looking beyond the EU-Turkey deal, which was tested to the breaking point in early 2020 when Erdogan opened borders, the EU has begun to mainstream its anti-migration policy into the area of development aid. As data journalists analysed, 'money

from the EU Emergency Trust Fund for Africa does not go to the states where most migrants are from, but to those along the migration routes, namely Libya, Mali and Niger' (Grün 2018). Thus push factors in origin states remain in place with less access to aid funds, while the increased surveillance of migration routes forces people to resort to more dangerous paths towards Europe: 'The EU's excessive preoccupation with border security has negative effects on development programmes and increases the number of dangerous and illegal attempts at migration, often with fatal consequences' (Fine, Dennison & Gowan 2019: 21). To demonstrate this, we will examine the spiralling humanitarian crisis at the EU-Turkey border.

The effects of populists on EU migration policy become painfully visible in the treatment of migrants stuck in inhumane conditions in refugee camps on the Greek islands of the Eastern Aegean. An EU report published in mid-October anticipated the coming disaster: '[T]he challenging conditions caused by the increase in arrivals and the onset of winter highlight the need for urgent action' (European Commission 2019). While humanitarian action stalled and the situation of refugees in Greece worsened every day, non-governmental organisations (NGOs) and journalists increasingly voiced criticism, with some claiming that the conditions were part of a reckless anti-refugee agenda to scare off more newcomers (Ayata & Fyssa 2020). Pressure increased on the EU to intervene. With populists in the Council blocking any attempts for the distribution of refugees among all member states, Ylva Johannson, the Commissioner for the Promotion of European Values, in March 2020 announced that seven member states had agreed to evacuate a total of 1 600 unaccompanied minors from the islands (Johansson 2020). This number stands in contrast with an estimated 41 000 migrants and refugees that were stuck on the Greek islands at that point, most of them on their own outside the overcrowded camps (UNHCR 2020).

In February 2020 the situation, especially in Lesvos, spiralled even more out of control with fascists attacking refugees, NGO volunteers and journalists (Smith 2020). At the same time the EU failed to take a clear stance after Greece had illegally suspended the right to apply for asylum, as critics noted, 'a move at odds with European law and the Geneva Convention' (Rankin 2020). What Commissioner Johannson presented instead as 'European solidarity' was a plan to hand out € 2 000 to any migrant who would return to their home country (Johansson 2020). It is this shift in the use of solidarity – allegedly directed at European citizens and states, but excluding solidarity towards migrants and refugees – that shows the damage populists have done to European values.

5.2 Climate policy and populism

The future of the EU's climate policy is inextricably linked to the outcome of the 2019 EU parliamentary elections and inevitably determined by the success and influence, or lack thereof, of RRP parties. This part assesses the extent to which RRP parties may hinder progress in EU climate policy, and how the new composition of the European Parliament may shape the upcoming parliamentary term. First, it is necessary to note how climate policy is linked to populism in a European context. We then summarise developments and other notable events that have characterised the discourse surrounding climate policy in 2019. Finally, we will attempt to draw conclusions as to how the structure of the new EP reflects the effectiveness of anti-climate science populist rhetoric among EU voters.

By using the theoretical framework proposed by Lockwood we can observe RRP party campaigns as having a hostile approach to climate policy, and often even climate scepticism. Lockwood builds on existing literature that attributes hostility to climate change and policy as directly related to structural changes in post-industrial states that have also produced RRP, including job losses concentrated in high carbon industries and a hostility of such groups to any form of tax (Lockwood 2017: 21). Lockwood contributes to this argument by focusing on the ideological content of RRP as combining 'authoritarian and nationalistic values with anti-elitism, producing hostility to climate change as a cosmopolitan elite agenda, along with a suspicion of both the complexity of climate science and policy and of the role of climate scientists and environmentalists' (Lockwood 2018: 2). Furthermore, a distinction is made between Anglophone and continental European RRP parties. European RRP parties 'do not reject [climate] science outright', but instead seek to marginalise the climate agenda 'in order to concentrate on border control and immigration' (Jeffries 2017: 469).

The issue of climate policy has received a considerable degree of attention in the lead-up to the EPE in light of movements such as Fridays for Future. This began as a student movement which has now transcended into the civil sphere, calling for more urgent and ambitious action with regard to climate policy. Meanwhile, parties such as Germany's AfD and Britain's UKIP have increasingly been leading their campaigns with scepticism towards climate action, whereas issues such as immigration, while still a prominent topic, have lost their momentum in European political discourse in 2019 (Waldholz 2019a). Lockwood provides the example of the AfD as actively engaging in, climate change denial through 'repealing the country's energy saving ordinance and its renewable energy support laws, while also being pro-coal and pro-nuclear' (Lockwood 2018: 5). In the lead-up to EPE, the AfD argued that climate policy would place the German car industry under threat while simultaneously raising taxes,

making owning and driving a car more difficult and expensive. Italy's Lega and France's Rassemblement National (formerly Front National) have also resisted policies aimed at transitioning Europe away from fossil fuels (Waldholz 2019b).

In late 2018 and early 2019 the EU saw the adoption of legislation in the Clean Energy for all Europeans package (Climate Action Tracker 2019). This established a framework for the decarbonisation of the energy and buildings sectors. This is an example of the kind of climate and energy law activity in which the Parliament, Commission and Council have recently engaged (Waldholz, 2019a):

> That included reforming the European Union Emissions Trading System (EU ETS), which sets a cap on emissions from energy and heavy industry; new legally binding annual emissions targets for other sectors, including agriculture, transportation and buildings, under the EU's 'Effort-Sharing' legislation; and a major clean energy package covering renewable energy, efficiency, and electricity regulation.

The 2050 emissions neutrality goal currently is under discussion at the European level. While the majority of the EU member states have already adopted strategies in line with the 2050 goal, Poland, the Czech Republic, Hungary and Estonia (which has since withdrawn its opposition) in June 2019 blocked this goal. This was a major setback for the EU's attempt to re-establish its position as a global leader on climate policy action (Climate Action Tracker 2019). The CEE states, which have not shown support for the 2050 goal, are the most coal-dependent states in the EU, and would thus require a considerable amount of funds from the EU budget for the energy transformation of coal regions. It is interesting to note that Poland remains the most difficult to convince. It is the biggest coal consumer and also the country that has been most relentlessly blocking EU efforts to make progress on climate.

Towards the end of 2019 in the lead-up to the United Nations Intergovernmental Panel on Climate Change, a crucial UN climate conference, the European Parliament voted on the declaration of a climate emergency. With 429 votes in favour, 225 votes against and 19 abstentions, the Parliament declared a global 'climate and environmental emergency' as it urged all EU countries to commit to net zero greenhouse gas emissions by 2050 (Rankin 2019d). The vote also called for the attention of Ursula von der Leyen, the newly-appointed president of the European Commission. The Eurosceptic European Conservatives and Reformists group opposed the declaration. Alexandr Vomdra, representing the Civic Democratic Party (ODS), stated that '[r]amping up the rhetoric does not get us away from the serious discussions that now need to take place' (Rankin 2019d). Meanwhile, the Brexit party voted against both climate resolutions.

Although the European Parliament is not directly responsible for target setting in climate policy, the EP composition has the ability to determine cross-party consensus on climate policy. The European Parliament has been historically ambitious in comparison to what the European Commission's proposals have been (Waldhoz 2019b). One of the major tasks of the new European Parliament is to pass a multi-year budget. This budget determines funding towards climate and energy initiatives, as well as informing key policy areas that are decided on the EU level, such as trade and agriculture.

As Figure 1 shows, Greens have made progress in the last EPE. Their share of the 751 seats have increased from 51 to 69 since the 2014 EPE. Although this appears to represent a win for climate activists and a reflection of gains made for movements such as the Fridays for Future movement, 'the surge in climate-focused voting was not European-wide' (Bootman 2019). The rise of populist and far-right parties coincided with a decline in support for traditional centrist parties. This raises concerns over the EP's ability to reach consensus on climate related policies. Nevertheless, the gains of the Greens could mark a shift towards the prioritisation of climate in the EU agenda.

6 Conclusion

This article explored the concept of 'European populism' and provided a distinction of what characterises populism in the EU and how it played out in European politics throughout 2019. In addition, we have analysed the potential consequences that this brand of populism has had on the 2019 European parliamentary elections, and the implications of the results on European institutions and the key policy areas of migration and climate policy. Through this analysis, we find that European populism is characterised by the notion that the concepts of 'the people' and 'the elite' have transcended from the national sphere into the transnational sphere, and are being translated into the notion of the respective national 'peoples' against the corrupt/evil elites that are the 'technocratic EU'. An examination of the EPE results ultimately showed that through effective campaigning and communication channels, a voting shift from the larger centre alliances towards smaller alliances among radical right populist parties in the EP occurred. By assessing the institutional consequences of the election results, specifically how the results have affected the formation of the new Commission and European Parliament, it is clear that the concrete effects of populist parties on these institutions are not overtly evident. However, the rise of a populist presence is likely to further complicate the EU's ability to reach consensus on key topics. The article has also outlined the relationship of European populism to EU migration and climate policy, and found that the impact of radical right populist parties in these areas could have dire consequences for the protection

of human rights and fundamental freedoms not only in Europe, but on a global scale. It is important to recognise the dangers of populism in Europe, not only on a national level, but also at the transnational level, as the success of populist parties in Europe has the potential to undermine the EU's role as a leader of human rights protection and as a normative influence on the rest of the world.

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Selected developments in human rights and democratisation in sub-Saharan Africa during 2019

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Abstract: *This article reviews selected developments in human rights and democratisation in sub-Saharan Africa during 2019. It contextualises the withdrawal of Tanzania from the optional declaration under article 34(6) of the African Court allowing individuals and non-governmental organisations to submit cases directly to the African Court. It notes that while the withdrawal is a painful blow, it is not fatal as the African Commission remains a viable access channel. The authors further commend developments in women's rights in the areas of child marriage, the protection of pregnant school girls, sexual and reproductive health rights and democratisation, but notes that they are piecemeal in nature and more still needs to be done. The article discusses the monumental judgment nullifying presidential elections in Malawi and its implications for democracy, particularly in asserting the independence of the judiciary in Africa. The article also analyses the killings and persecutions of persons with albinism in Malawi and the need for urgent redress. The authors evaluate the mixed developments in LGBTIQ rights juxtaposing the parliamentary successes in Angola, the judicial victory in Botswana, on the one hand, with the judicial setback in Kenya, on the other. The article highlights the fall of Al Bashir's regime in Sudan as a remarkable step towards democratisation in Africa. Finally, the authors screen the drawbacks of violence on human rights and democratisation through the case studies of xenophobia in South Africa, the Anglophone Cameroon crisis, violent extremism in West Africa, and civil strife in Ethiopia, urging for an end to bloodshed in line with the African Union's vision of silencing the guns by 2020.*

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Key words: *courts; African Court; Tanzania; democratisation; elections; human rights; same-sex relationships; sub-Saharan Africa; violence; women's rights*

1 Introduction

Agenda 2063 of the African Union (AU) promises an Africa that is 'peaceful, prosperous and integrated' (AU 2015). However, if the events of 2019 are anything to go by, the continent is still a long way from reaching most of these goals. While monumental strides were made in 2019, especially regarding the rights of minorities and the democratisation process, several areas lag behind. Africa faces systematic human rights violations that permeate all the sub-regions. This article reviews select developments in sub-Saharan Africa, and their impact on human rights and democratisation in 2019. It starts with the African Court on Human and Peoples' Rights (African Court) and the mounting backlash the Court faces from its host state, Tanzania. It observes how Tanzania, following Rwanda's lead, withdrew its article 36(4) declaration, terminating direct individual access to the regional court. It also analyses the year's impact on women's rights, highlighting progress made in Zimbabwe, eSwatini, Mozambique and other states to eliminate child marriage, protect pregnant school girls, ensure sexual and reproductive health rights, and enhance women's political participation. Further, the article examines events in Sudan, the country's celebrated revolution, and its delicate transition to civilian rule. The authors also consider developments in Malawi, where the Constitutional Court overturned the 2019 national elections, and where pervasive violence against persons with albinism persists. Later, the article reviews legislative and judicial decisions affecting same-sex relationships, commending their decriminalisation in Angola and Botswana, while denouncing the continued discrimination in Kenya. Subsequently, the authors analyse the resurgence of Afrophobia in South Africa, the persecution of Anglophones in Cameroon crisis, violent extremism in West Africa, and civil strife in Ethiopia. Finally, the article considers the Ebola epidemic in Central Africa, and its implications for the persistent armed conflict.

2 A hostile host country: A reflection on Tanzania's 2019 withdrawal from the direct individual access option to the African Court

2.1 Contextualising the withdrawal

In 2019 the African Court on Human and Peoples' Rights (African Court) received a stinging blow when Tanzania deposited a notice of withdrawal

of the declaration made under article 34(6) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (African Court Protocol) allowing individuals and non-governmental organisations (NGOs) to submit cases directly to the African Court. State parties to the Court Protocol have to make a separate optional declaration under article 34(6) in addition to ratifying the Court Protocol. By mid-2020 ten African countries (Benin, Burkina Faso, Côte d'Ivoire, The Gambia, Ghana, Malawi, Mali, Rwanda, Tanzania and Tunisia) have made the declaration since the adoption of the Protocol in 1998. Tanzania deposited its notice of withdrawal with the AU on 14 November 2019 (Amnesty International 2019). Tanzania's withdrawal was a huge set-back, particularly in light of the fact that Tanzania hosts the Court in Arusha.

Direct access of individuals and NGOs (cumulatively referred to as 'individual access') is important because, since the creation of the Court in 2006, it has been the main pipeline of the Court's judgments on human rights violations. As of September 2019, out of the 238 applications the Court had received, NGOs had made 12 applications, individuals had made 223 applications, while the African Commission on Human and Peoples' Rights (African Commission) had submitted three applications (De Silva 2019). As such, the Court's effectiveness is greatly hampered by the withdrawal of the direct access option. Tanzania's withdrawal was particularly disheartening as it followed on the heels of Rwanda's withdrawal in 2016. The future does not look bright for the African Court as Benin and Côte d'Ivoire seem to have taken a cue from Rwanda and Tanzania and withdrew from the optional declaration in the first quarter of 2020 (Centre for Human Rights 2020). The successive withdrawals cast considerable doubt on the feasibility of adjudication of human rights violations by the African Court.

A disturbing factor about the withdrawals by Tanzania and other countries is that they seem to be instituted as a form of retaliatory measure to protest dissatisfaction with the Court's decisions. Some scholars are of the view that Tanzania withdrew its optional declaration as a result of the judgment of the African Court in the case of *Ally Rajabu & Others v United Republic of Tanzania* to the effect that the institution of a mandatory death sentence for murder was contrary to the provisions of the African Charter (De Silva 2019). However, another factor informing the decision is that the bulk of the Court's caseload has been against Tanzania, with cases against that country constituting 63 per cent of the Court's pending cases and 43 per cent of the Court's finalised cases (De Silva 2019). At the root of all the recent withdrawals from the Court is the tension between national sovereignty interest and accountability for human rights violations based on international supervision. Sovereignty should not be used as an excuse for evading human rights obligations. The African Court Protocol itself

endeavoured to accommodate political sovereignty by opting for optional instead of compulsory direct access to the Court (Viljoen 2019).

2.2 Impact of the withdrawal

It is important to examine the effect of the withdrawal of the optional declaration by Tanzania. Tanzania ratified the African Court Protocol in 2003 and made the article 34(6) declaration in 2010 (African Union Treaties 2017). The African Court pronounced itself on the effect of a withdrawal from the optional declaration in the case of *Ingabire Victoire Umuhoza v Rwanda*. The Court held that a withdrawal only becomes effective after 12 months and does not impact on cases filed during the 12 month period or cases that have already been pending before the Court (*Ingabire* case paras 67-68). Tanzania, therefore, has the obligation to comply with the Court's orders until all the pending cases are dispensed with. It must continue to be diplomatic in its engagement with the Court and refrain from the approach taken by Rwanda of stopping to cooperate with the Court after depositing its instrument of withdrawal.

The withdrawal of the individual access option by Tanzania and other countries should not be perceived as the end of the road. The journey to hold human rights violations in Africa accountable is not a marathon with a grand finale; rather it is a relay and the baton has now been passed to the African Commission to vigilantly and vigorously utilise its access option to institute cases before the African Court. Ideally, given that the optional direct access declaration is the exception rather than the rule, most cases reaching the Court ought to start as communications before the Commission (Viljoen 2012). The Commission's dismal record of three references is indicative of institutionalised reluctance, which needs to change. Granted, it is not going to be an easy journey as the African Commission has been dealing with a backlash from the African Union Executive Council upon granting observer status to the Coalition for African Lesbians in 2015 (Killander & Nyarko 2018). Nevertheless, it is doable as the Inter-American human rights system illustrates. Although the system does not allow for a direct access option, the Inter-American Commission of Human Rights has submitted numerous cases to the Inter-American Court of Human Rights guaranteeing solid protection of human rights in the region. Additionally, civil society organisations such as the Coalition for an Effective African Court on Human and Peoples' Rights need to engage in campaigns to recruit more members to make the article 34(6) declaration to mitigate the legitimacy gap created by the withdrawing members. South Africa, for instance, comes to mind as it can set an example for the rule of law in its year of the AU Presidency (Centre for Human Rights 2020). Ultimately, AU organs and African leaders must show their commitment to African solutions for African problems and Agenda 2063 of the AU by using diplomatic channels to persuade the

government of Tanzania and other nations in a similar position to reverse their withdrawals.

3 Development in women's rights in Africa in 2019: A case of piecemeal progress

3.1 Policy, jurisprudential and legislative progress on child marriage

In 2019 there were significant developments regarding the rights of women and girls in Africa. These developments include the fight to end the issue of child marriage which for many years has plagued the continent as four in ten girls in sub-Saharan Africa are married before the age of 18 (Maclean 2019). In Tanzania the Supreme Court of Appeal upheld a ruling banning the marriage of young girls and directed the government to raise the legal age of marriage from 15 to 18 years within a year from the date of the judgment (UN Women 2019). In *Attorney General v Rebeca Z Gyumi* the Court of Appeal sitting in Dar es Salaam found sections 13 and 17 of the Law of Marriage Act, Cap 29 to be contrary to the equality clause in article 13 of the Tanzanian Constitution to the extent that they allow a female person to get married at the age of 15 years while a male person can only get married upon attaining the age of 18 years.

Elsewhere, Zimbabwe, the Kingdom of Eswatini, and Mozambique passed legislation outlawing child marriage (Nyamweda & Morna 2019). Legislative measures in the southern hemisphere have been influenced by the Southern African Development Community (SADC) Model Law on Eradicating Child Marriage and Protecting Children Already in Marriage (SADC Parliamentary Forum et al 2018). Additionally, the developments are reverberations of the 2018 decision of the African Court in the case of *Association Pour le Progrès et la Défense des Droits des Femmes Maliennes (APDF) and the Institute For Human Rights and Development in Africa (IHRDA) v Republic of Mali*, in which it held that the Malian Family Code was a violation 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 articles 1(3) and 21 of the African Charter on the Rights and Welfare of the Child (African Children's Charter) to the extent that it set the minimum age of marriage at 16 years for girls and 18 years for boys. The developments in the area of child marriage in 2019 herald much hope that the scourge of child marriage will progressively come to an end on the continent. Sustained advocacy is required as many countries in Africa retain legislation that permits child marriage for girls.

3.2 Jurisprudential advances on the non-discrimination of pregnant girls

Elsewhere, the Economic Community of West African States (ECOWAS) Court of Justice continued to illustrate the importance of sub-regional courts in advancing the rights of women and girls on the continent. In its 12 December 2019 judgment in *Suit ECW/CCJ/APP/22/18 – Women Against Violence and Exploitation in Society (WAVES) v The Republic of Sierra Leone* the ECOWAS Court ruled that the practice by Sierra Leone of banning pregnant girls from mainstream schools and establishing separate educational facilities was institutionalised discrimination contrary to the provisions of international and regional human rights law. The decision is monumental in influencing policy development as pregnant school girls on the continent have faced severe reprisals, as has been the case in Tanzania where the government had instituted a policy to expel pregnant girls from school (Human Rights Watch 2020). Women's rights organisations in Africa can build on the jurisprudence to continue securing the right of education and safety for pregnant girls who should not have to negotiate for their humanity.

3.3 Progress in sexual and reproductive health rights

Significant progress was also made in the arena of sexual and reproductive health rights. A significant step towards the decriminalisation of same-sex relations in Botswana, as more fully discussed in part 6 of this article, was a huge win for queer women in the country who are at the helm of the lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ) rights movement in the country. In the area of reproductive rights the High Court of Kenya made a laudable decision in June 2019 in *Petition 266 of 2015: FIDA-Kenya & Others v The Attorney-General*, in which it ruled the withdrawal of safe abortion guidelines and bans on abortion trainings to be arbitrary and unlawful. The Court reaffirmed the constitutional provisions of legal abortion in Kenya when the health and life of the pregnant woman are at risk. Although the Court held that abortion generally remains illegal in Kenya, its progressive interpretation of the right to health to include political, legal and socio-economic circumstances puts Kenya on the road towards the reduction of unsafe abortion-related maternal mortality (Muhumuza 2019).

Another key highlight of 2019 was the 25th International Conference on Population and Development (ICPD25) Nairobi Summit whereby stakeholders, including African governments, committed to ensuring universal access to sexual and reproductive health and rights, accessible and affordable contraceptives, zero preventable maternal deaths and morbidities, and the provision of post-abortion care among other critical commitments (Nairobi Summit on ICPD25 2019). The commitments

need to be monitored to ensure meaningful progress in the arena of sexual and reproductive health rights.

3.4 A snapshot of democratisation milestones for women in Africa

Laudable gains were also made on the democratisation front. In November 2019 Sudan repealed public order laws that restricted the presence of women in public spaces (Amnesty International 2019). The move by the transitional government prevents the arbitrary arrests and beatings of women when exercising their rights to freedom of expression and association. It was a victory for Sudanese women who were a major driving force of the revolution, as discussed elsewhere in this article. However, one needs to celebrate with caution since the victory may turn out to be pyrrhic, as Criminal Law of 1991 still needs further amendment to repeal clauses that are repressive to women in their entirety. It is hoped that the ongoing constitutional review process will deliver comprehensive protection for women. Unfortunately, Sudan is yet to ratify the Convention on the Elimination of Discrimination Against Women (CEDAW) and the African Women's Protocol. The ratification of the two instruments must be prioritised. Additionally, while the representation of women in most African countries remains dismal, South Africa made impressive progress in the May 2019 elections by attaining 46 per cent of women in the House of Assembly and a gender equal cabinet constitution of 50 per cent women (Nyamweda & Morna 2019). The representation gains made by South African women set a good example for countries in Africa where the issue of equitable gender representation has not yet taken root.

3.5 A call for the continental ratification of the African Women's Protocol in commemoration of the Beijing Declaration

The progress made in 2019 was commendable, but it was slow and remains insufficient in securing equal humanity for the women and girls of Africa. Monumental challenges remain on issues such as dual and contradictory legal systems; rampant and under-reported sexual and gender-based violence (SGBV); a lack of access to safe abortion; the resurgence of HIV among young women; teenage pregnancies; the weak protection of LGBTIQ persons; low gender parity in decision-making bodies, and male-dominated economies (Nyamweda & Morna 2019). The year 2019 marked 16 years since the adoption of the African Women's Protocol and it closed the year with 42 ratifications and 49 signatures. Only São Tomé & Principe ratified the Protocol in 2019 (African Union Treaties 2019). AU organs and African governments need to commit more resources and political will to redress the gaps and challenges in light of the commemoration of 25 years of the Beijing Declaration in 2020. The best way to do so would be by attaining 100 per cent of the ratification of

the African Women's Protocol by all 54 countries that are state parties to the African Charter.

3.6 Sudan's revolution and struggle for civilian rule

On 11 April 2019, almost 30 years after Omar al-Bashir seized power, the man who did so much to ruin Sudan was himself toppled. His fall marks the culmination of the most sustained civilian protest in Sudan's modern history. It also coincides with a wave of change that has blown away many of Africa's longest-serving rulers, from Algeria to Zimbabwe (Boko 2019). In al-Bashir's place, Sudan's military and a coalition of opposition parties appointed a new prime minister, and on 17 August 2019 concluded a delicate power-sharing deal (Kirby 2019). If honoured, the agreement could pave the way for democratic elections in 2022 and civilian rule.

However, the transitional administration, led by Prime Minister Abdalla Hamdok, faces formidable challenges – especially on the economic front. Even with al-Bashir gone, Sudan's economy worsened in 2019, with citizens facing spiraling inflation, long queues for basic commodities and frequent power outages (Salih 2019). Further, Sudan retained its position on the United States' list of State Sponsors of Terrorism, prohibiting most foreign direct investment into the country. As a result, Sudan's ailing economy was blocked from most sources of funding from the International Monetary Fund (IMF), the World Bank and other financial institutions. Since inflation and shrinking incomes were the main catalysts for al-Bashir's removal, the transitional government needs to rapidly consolidate the economy, in order to retain popular support until the 2022 elections.

Intensifying these problems are the continued armed conflicts in the Blue Nile, Kordofan and Darfur regions that pose further dangers to democratisation. On 4 May 2020 government forces dispersed unarmed protesters in Darfur by firing live bullets and teargas, reportedly killing an 18 year-old and injuring others in the process (Africa Centre for Justice and Peace Studies et al 2019). The troops were members of Sudan's Rapid Support Forces (RSF), a paramilitary group linked to the grave crimes in Darfur, which earned al-Bashir a warrant of arrest from the International Criminal Court (ICC). The RSF's commander, Mohamed Hamdan 'Hemeti', now serves as a member of the Sovereignty Council, and is widely believed to have eclipsed Hamdok to become Sudan's *de facto* leader (Amid 2019). Since al-Bashir's removal, RSF troops have been linked to the destruction of at least 45 villages, and a bloody crackdown in Khartoum that killed almost 100 peaceful protestors in only three days (Salih 2019). If left unchecked, this violence could jeopardise the country's transition towards democracy.

Despite the impact of major setbacks, Sudan spent most of 2019 relatively on course for the long-term goal of civilian rule in 2022. However, the country's economic crisis, which worsened in 2019, and stands to be compounded by the effects of COVID-19 in 2020, means that the transitional government has a difficult task ahead of itself. These economic pressures, coupled with mounting civil tension, mean that Prime Minister Hamdok (and his shadow Hemeti) need to act quickly to meet their high expectations and to safeguard the revolution.

4 Nullification of elections in Malawi and its implications for democracy

On 21 May 2019 Malawi held presidential, parliamentary and local government elections. Seven candidates were vying for the presidency, but the main contenders were Arthur Peter Mutharika, Lazarus McCarthy Chakwera and Saulos Klaus Chilima. Mutharika, the incumbent President, was declared the winner of the presidential elections and sworn in on 27 May 2019 with 38,57 per cent of the vote. He was closely followed by Chakwera with 35,41 per cent and Chilima with 20,24 per cent of the votes (Malawi Electoral Commission 2019). Chakwera and Chilima challenged the election results in court. Their case was certified as a constitutional matter for determination by the three High Court judges sitting as a Constitutional Court. The Constitutional Court annulled the elections and ordered fresh presidential elections within 150 days (Constitutional Court 2019). The annulment of the elections was unprecedented in Malawi. It was only the second time for elections to be annulled in Africa following the annulment in Kenya in 2017 (Nyarko & Makunya 2018: 149). For the reasons explained below, the judgment by the Constitutional Court may be described as a massive win for democracy.

The Court held that voters have a right to vote in elections that are free and fair and that this right is central in a democracy (Constitutional Court 2019: 413-415); further, that the state has a correlative obligation to ensure that the electoral system is credible and the procedures are capable of guaranteeing free and fair elections (Constitutional Court 2019: 413-415). The Court furthermore stated that if elections are marred by irregularities that are widespread, systematic and grave, the results of such elections cannot be trusted as a true reflection of the will of the voters (Constitutional Court 2019: 413-415). The Court noted various irregularities and anomalies in the 2019 presidential elections and ordered a nullification of the elections (Constitutional Court 2019: 416). Relatedly, this judgment served as a moment of introspection into the role of international independent observers as they declared that the election was free and fair despite the glaring irregularities proved in court (Hartley & Mills 2010).

The judgment was also celebrated as a sign of judicial independence. The independence of the judiciary has been cited as an important element of democracy (O'Donell 2004: 3; Diamond & Morlino 2004: 23). Indeed, the Malawian courts have played a significant role in upholding integrity in electoral processes and have therefore been described as 'a democratic stronghold' (Gloppen & Kanyongolo 2011: 44). Although others have expressed concerns about interference in the effectiveness and independence of the judiciary by the executive (International Bar Association's Human Rights Institute 2012: 43), the Court dispelled such fears in this case by deciding to annul the election of the then head of the executive. Corruption has also been feared as a threat to judicial independence (Kanyongolo 2004: 20). It was indeed reported that, prior to delivery of the judgment, a prominent businessman with ties to the ruling Democratic Progressive Party attempted to bribe the judges (Matonga 2020). The judges refused the bribe and reported it to the Chief Justice who in turn reported it to the Anti-Corruption Bureau (Matonga 2020). The Anti-Corruption Bureau arrested the accused person and he was formally charged with offences under the Corrupt Practices Act. The case is ongoing (Kapalamula 2020). Such integrity on the part of the judges is laudable.

After the judgment had been delivered, Mutharika delivered a speech and used populist rhetoric to rile the people against the judiciary by saying '[l]ike many Malawians … we consider the judgement as a serious subversion of justice, an attack on our democratic systems and an attempt to undermine the will of the people … this judgment inaugurates the death of our democracy' (Mutharika 2020). The Electoral Commission and Mutharika lodged an appeal against the judgment to the Supreme Court of Appeal but the appeal was not successful (Supreme Court of Appeal 2020). Fresh elections were held in Malawi on 23 June 2020 amidst a lack of funding (Kayira 2020), frustration of electoral processes by the executive and parliamentarians belonging to the ruling party (Khamula 2020), and attempted interference with the judiciary by the executive which issued a notice sending the Chief Justice on forced leave pending retirement (*The Guardian* 2020). Lazarus Chakwera defeated the incumbent President Mutharika in the fresh elections with 58,57 per cent and was sworn in as President on 28 June 2020 (BBC 2020).

The involvement of civil society in the electoral process was also notable. A vibrant civil society has been recognised as a prerequisite for democracy (Chinsinga 2010: 56). Civil society organised demonstrations spanning over weeks in defence of electoral justice (Pensulo 2020). The organisers of the demonstrations, however, were threatened by the authorities and one of the leaders was attacked with petrol bombs at his residence in what was perceived as an attempt to silence him (Amnesty 2019). President Mutharika, who was also commander-in-chief of the

Malawi Defence Force (MDF), ordered the MDF and Malawi Police Service to stop the demonstrations 'with all the necessary force' (Sangala 2019). Despite the threats of violence and destruction of property during some of the demonstrations, the demonstrations continued and the relentlessness of the people was unprecedented. All in all, it can only be hoped that the strides in Malawi point to a wave of judicial independence and strengthening of democratic institutions in Malawi and in Africa.

5 Killings and persecution of persons with albinism in Malawi

In the year 2019 the killing and persecution of persons with albinism (PWAs) continued in Malawi. As at February 2019, the reported cases had risen to 163 from 107 reported in 2017 (Amnesty International 2019). The violation of rights of PWAs in Malawi has been a persistent problem and PWAs have experienced 'not just higher levels of stigmatisation and discrimination, but also human rights violations of a much higher magnitude, including extreme acts of violence and killings' (Kapindu 2018: 3). PWAs are attacked as it is believed that their body parts have great powers (Mswela 2017: 115). It is also believed that body parts of PWAs can help politicians win elections; hence the violence tends to increase during election periods (Office of the High Commissioner for Human Rights 2019). The attacks on persons with albinism are not unique to Malawi as they have also been reported in the central, eastern and southern parts of Africa (Thuku 2011).

As the attacks against PWAs continued without any concerted action by the government to stop them, PWAs sought the intervention of the President. A meeting was thus scheduled between PWAs and the President to discuss the concerns and protection of PWAs. However, the President cancelled the meeting. In a desperate attempt to get the President to grant them audience and address issues affecting them, the PWAs organised a peaceful protest (Khamula 2019). However, police officers clobbered the protesters and the president of their association was assaulted by the police and hospitalised (Khamula 2019). Eight PWAs and a journalist were arrested (Khamula 2019). Thirteen PWAs were injured during the protests (Phimbi 2019). There was no justification for the use of excess force on the unarmed protesters, which constituted a further breach of the rights of PWAs to a peaceful protest, dignity and freedom of expression.

Subsequently, the then President Mutharika appointed a commission of inquiry effective on 4 March 2019 to investigate the incidents of violence against PWAs (Kanjere 2019). The commission was tasked with producing a report on 30 April 2019. However, as at 28 March 2020 the commission had not yet produced the report (MBC Online 2020). Therefore, there has been no tangible outcome from the establishment of the commission.

In parallel, on 9 September 2019 the government allocated K1 billion, approximately US $1 356 852, of the national budget towards the construction of houses for PWAs and the implementation of the National Action Plan on Persons with Albinism in Malawi, 2018-2022 launched in 2018 (Ministry of Finance 2019: 32). However, apart from the distribution of personal security alarms to PWAs by the government (Masina 2019), there have been no reports on what the government has done to implement the plan and the houses have not yet been constructed.

As for the prosecution of perpetrators of violence against PWAs, it has been noted that 'in spite of reforming the Penal Code and Anatomy Act in 2016, the number of attacks in Malawi has not lowered and due to poor law enforcement and judicial capacities, perpetrators are rarely identified, brought to justice, or convicted' (European Parliament 2017). The circumstances do not seem to have changed because although some arrests and convictions have been made, the majority of the crimes remain unresolved. In 2019 the courts imposed the death sentence on four accused persons apparently to deter such acts (Aljazeera 2019). However, there was an unreasonable delay in prosecuting the crimes. For example, the incident implicating the three accused persons who were subsequently sentenced to death occurred in 2015 and took four years to prosecute.

Another problem is that the justice system currently is focused on punishing the offender and not giving psychological or other assistance to the victim. Therefore, apart from the apparent complacency or lack of political will to protect persons with albinism, the justice system needs to be overhauled so that it results in a thorough and speedy resolution of the cases as well as support to the victims. It goes without saying that there is urgency in addressing violations of the rights of PWAs.

6 Right to equality and sexual minorities: Tales from Botswana, Angola and Kenya

The criminalisation of homosexual acts in Angola, Botswana and Kenya is anchored on colonial penal codes. The struggle for the decriminalisation of homosexuality in these three countries has taken several years of street demonstrations, petitions to parliament and court battles. Despite having taken a long time, 2019 seems to be a breakthrough year for the LGBTIQ in Botswana and Angola. However, Kenya missed the opportunity to unchain itself from the colonial penal code.

6.1 Angola: Success along the parliamentary route

Typically, the victories won by African sexual minorities are won in the courts, not the legislature (Ebobrah 2012). Barring a few exceptions the judiciary is more readily approached by LGBTIQ activists, who invoke

constitutional principles to secure a favourable judgment (Singh 2009). In contrast to the courts, the legislature usually is far less accepting of sexual minorities, a pattern broken by Angola on 23 January 2019 which is a memorable day for human rights in Angola. This is the day when the National Assembly voted to do away with the criminalisation of same-sex relations. Angola's old Penal Code (articles 70 and 71) prohibited consensual homosexual acts against 'the order of nature'. Just as in other African states, this law was inherited from Portugal, Angola's colonial master. This Penal Code allowed the unwarranted scrutiny of the private lives of the LGBTIQ community. Unlike the case in the other two countries, the process to repeal these two laws was through the legislature, thereby escaping the counter-majoritarian argument faced by the court.

Parliament correctly appreciated its role, which includes the enactment of laws to protect the minorities and advancing democracy and human rights. Angola stands out as one of the rare instances where an African legislature, at its own initiative, brought the LGBTIQ community under the protection of the law. The new Penal Code is an achievement towards eliminating discrimination based on sexuality in Angola. Although this is a remarkable step, Angola should translate the repeal of the colonial penal code to concrete measures for protecting minorities.

6.2 Botswana: Success along the judicial route

On 11 June 2019 the High Court of Botswana declared the criminalisation of same-sex relations unconstitutional. Botswana, as in the case of other African countries, inherited a colonial penal code that criminalised 'acts against nature' (*Letsweletse Motshidiemang v Attorney-General* [2019] MAHGB-000591-16)' (*Legabibo* case)). The *Legabibo* case is an array of human rights hope in Africa. First, the Court recognised that the enumerated grounds prohibiting discrimination were not conclusive, hence acknowledging analogous grounds such as sexuality (Legabibo 2019: para 158). Second, the Court correctly recognised indirect discrimination. The Court noted that although the provisions (sections 164 and 165 of the Penal Code) appeared neutral, in effect they were discriminatory. Third, the Court noted that public opinion or morality can never be a justification for limiting a right (paras 186-189). The three reasons established the Legabibo moment, a moment promising the actual realisation of human rights.

The *Legabibo* case offers an opportunity for focusing on the rights of LGBTIQ from the peripheral status they have for a long time occupied. For many years the LGBTIQ community has endured systemic and institutionalised discrimination. The departure provided by the Court reinforces the emerging wave of democratisation and respect for LGBTIQ rights. This will assist in realising the LGBTIQ community's much-

tumbled rights such as access to health care and equality of employment opportunities among all sexualities. From many angles, the decision is a promise of a new dawn in Africa. Just as the South African Constitutional Court in 1998 (National Coalition for Gay and Lesbian Equality), the Botswana High Court decried discrimination against the LGBTIQ community. Notwithstanding these achievements, it is disturbing that the Attorney-General decided to lodge a notice of appeal to challenge this decision.

6.3 Kenya: Failure of the judicial route

Although Kenya has one of the most progressive constitutions on the continent, some of its legislations are remnants of the colonial period. One such legislation is section 162 of the Penal Code, which has been described as archaic and colonial legislation. This section criminalises 'carnal knowledge against order of nature' which has been used to brutalise the LGBTIQ community through prosecutions. Beyond prosecution this section has been used to bolster state-sponsored homophobia, as exemplified in Criminal Case 207 of 2015, in which the accused persons were arrested on suspicion of engaging in what was described as 'carnal knowledge against order of nature'. On application from the prosecution, the resident magistrate ordered the accused to be subjected to anal examination. When this decision was challenged at the Court of Appeal, the Court held that 'the examination was not only unconstitutional but unreasonable, and totally unnecessary' (*COI & Another v Chief Magistrate Ukunda Law Courts & 4 Others* [2018] eKLR). Comparable to Kenya, in Nigeria 47 men are undergoing a trial before the Lagos Court. They were charged with public displays of affection with members of the same sex. They were arrested in 2018 after they had been found in a hotel room during a raid by the police. The police alleged that they were engaged in a 'gay initiation party'. The accused persons claimed that they were at a birthday party.

The abuse of section 162 of the Penal Code has given rise to the case of *EG & 7 Others v Attorney-General; DKM & 9 Others* (Interested Parties); Katiba Institute & Another (*amicus curiae*) (*Eric Gitari* case) challenging its constitutionality. The *Eric Gitari* case is a demonstration of the betrayal of LGBTIQ by the Kenyan judiciary. The Court rejected the indirect discrimination caused by section 162 of the Penal Code despite article 27(4) of the Constitution guaranteeing the principle of non-discrimination in broad terms. Section 162 of the Penal Code is worded in similar terms as Botswana and South Africa where the courts have held that the sections were discriminatory. What was more shocking is the convolution of same-sex marriage with the criminalisation of the LGBTIQ. The court was of the view that since the Constitution allows marriage between opposite sex

that means recognising LGBTIQ persons is in violation of the Constitution (*Eric Gitari*: para 396).

Where does this leave the LGBTIQ community? The Court sanctioned the discrimination against minorities, hence rubber-stamping the culture of marginalising LGBTIQ persons.

While in the year 2019 the sexual minorities rights in Africa made considerable strides, Africa lags behind regarding these rights. The year saw two countries decriminalise consensual same-sex relations which is a positive move towards the respect of the rights of sexual minorities. Kenya missed an opportunity to correct the wrong of state-sponsored homophobia.

7 Xenophobia in South Africa

South Africa has long been one of the most inhospitable environments for African immigrants (Classen 2017). During 2019, an election year, virtually all South Africa's political parties increased their anti-immigrant rhetoric (Chutel 2019). While senior politicians across the political spectrum were responsible for some measure of xenophobic statements, 2019 witnessed a few stand-out cases, well deserving of a mention.

Despite its 'strong' pan-Africanist origins, senior members of the ruling party, the African National Congress (ANC), used their 2019 election campaigns to scapegoat African immigrants for South Africa's soaring unemployment, chart-topping crime rate, and rising drug abuse in urban centres such as Johannesburg and Tshwane (Davis 2019). In June 2019 Gauteng MEC for Community Safety, Faith Mazibuko, remarked: 'We condemn all criminal elements hellbent on undermining the rule of the law in this country and making this country ungovernable. We can't co-govern with criminals, especially foreign nationals who want to turn our country into a lawless Banana Republic' (Bornman 2019). Her views were echoed by former Health Minister, Dr Aaron Motsoaledi, who blamed the country's public health crisis on a wave of immigrants 'overburdening' the system.

However, the problem is systemic – responsibility hardly lies with the ANC alone. The Democratic Alliance (DA), South Africa's liberal majority white-led political party, has also made a major contribution to the rising nationalist sentiment in the country. Its campaign slogan 'All South Africans First' is a pertinent example (Egbejule 2019). While not as severe as Mazibuko's statements, the DA's slogan is strikingly similar to US President Donald Trump's 'America First' one-liner, another highly-effective dog whistle for anti-immigrant attitudes. Even outside of the pressure of the election campaign, many politicians continued their xenophobic rhetoric.

Earlier in 2018 Herman Mashaba asked an immigrant, '[Are we] going to sit back and allow people like you to bring us Ebolas (*sic*) in the name of small business[?] Health of our people first.' (Bornman 2019).

South Africa's White Paper on International Migration demonstrates that Afrophobic sentiments persist in even the highest rungs of state policy making. The document, approved by the government in March 2017, separates immigrants into 'worthy' and 'unworthy' individuals. Wealthy foreigners, viewed as skilled and financially secure, are welcome to enter the country and are encouraged to stay permanently. Poor and unskilled immigrants, predominantly those from the African continent, will be prevented from entering the country 'even if this is labelled anti-African behaviour,' as the former Minister of Home Affairs, Hlengiwe Mkhize, pointed out (Bendile 2017). South African Afrophobia, then, is not closeted, or unseen; rather it forms deliberate state policy, perpetuated by first-time mayors in local government all the way to sitting ministers in the President's cabinet. This trend continued in 2019, with dangerous effects for the many black, poor immigrants resident in the country.

8 The shrinking civil space: Killing, detention, persecution and torture of journalists, Anglophones and human rights defenders in Cameroon

The year 2019 saw Cameroon intensify attacks on freedom of expression, especially the rights of journalists and opposition leaders to freely express themselves (US Department of State 2020). This interference with the freedom of expression has harmed the realisation of other rights such as free and fair elections in both the presidential and parliamentary elections. Further, the human rights situation in Cameroon is complicated by the double violation of human rights emanating from the separatist groups and the government. However, what has caused the enormous uproar is the inhumane treatment, torture and unlawful killing of journalists and human rights defenders The crackdowns on journalists, opposition leaders and human rights defenders have shrunk further an already shrunk civil space. Since the controversial winning of the seventh term of Paul Biya in 2018, the government has been keen to silence alternative voices, hence polarising the country. This was compounded by the volatile situation of the Anglophone Cameroonians' fight for independence that raises a serious legitimacy challenge to Biya's government.

The government of Cameroon has marginalised Anglophone Cameroonians in several ways. The state has imposed on Anglophones a Francophone legal system, language and education, thereby erasing their identity (Lunn & Brooke-Holland 2019). This has taken the shape of appointments of French-trained judges, teachers and government administrators. In turn, the Anglophones feel excluded, leading to calls

for self-determination and secession. In response, the Cameroonian government has reacted heavily with the military being accused of extra-judicial killings, enforced disappearances, torture and rape (Willis et al 2019). This conflict has left 1 850 people dead and 530 000 internally-displaced persons as of mid-2019 (International Crisis Group 2019). The Cameroon military was accused of using rape and sexual assault as a weapon of war, which has exacerbated the suffering of women (Young 2019). The latest development in this conflict was the call for dialogue which has led to the release of Anglophone leaders agitating for self-determination. However, the standstill remains with the government maintaining that self-determination is off the table and the Anglophones stating that the only point of dialogue should be self-determination (Aljazeera 2019).

The Cameroonian government is also responsible for enforced disappearances and the killing of journalists (African Freedom of Expression Exchange 2019). The attack on journalists is demonstrated by the arrest and killing of Samuel Ajieka, commonly known as Wazizi (Human Rights Watch 2019). It is alleged that the police arrested Wazizi on 2 August 2019 in Buea, in the south-west region of Cameroon, for allegedly collaborating with separatists (BBC 2020). Wazizi was then transferred to a military base where he was held incommunicado until his death (BBC 2020). For 10 months the Cameroonian government covered up the gruesome killing of Wazizi. For the entire period of his detention Wazizi was not charged with any offence or placed before a court of law, which manifests the unlawfulness of his arrest.

The other front of the attack on freedom of expression is the persecution by the government and kidnapping by the militia. The case of rapper Gaston Serval, commonly known as Valsero, personifies this affront on freedom of expression (PEN 2019). Valsero was arrested on 26 January 2019 during a demonstration organised by the opposition. The government charged Valsero in a military tribunal with insurrection, inciting the public, hostility to the homeland, and rebellion against the state, among others (Russel 2019). The punishment for all these offences is the death penalty, although Cameroon *de facto* is abolitionist (York 2019). After 10 months of detention, the President of Cameroon on 5 October 2019 announced that he would release some opposition leaders, which led to the release of Valsero (Lukong 2019). The police in Cameroon arrested Paul Chouta, a journalist, for criminal defamation, hate speech and false news (Committee to Protect Journalists 2019). This emanated from a complaint made by Calixthe Beyala alleging that Paul had posted a video of Beyala arguing with someone. Paul was denied bail and sent to the maximum security prison awaiting trial. It is believed that the denial of bail and overloading charges is caused by Paul's criticism of the government (Committee to Protect Journalists 2019).

In another case a militia group kidnapped Mary Namondo, a journalist with Radio Bonakanda, a local radio station (Takambou 2019). Mary was released on 5 September 2019 after Eric Tawat, a journalist, had negotiated the release. Similarly, Macmillan Ambe was kidnapped by armed groups after he criticised the call for people not to take their children to school (All Africa 2019).

In sum, in 2019 Cameroon increased the crackdown on journalists and human rights defenders, which is an affront to freedom of expression. This situation has been aggravated by the conflicts arising from the Anglophones' fight for self-determination (Muguoh 2019). Although the government has indicated its willingness to enter into dialogue, the hardline positions from the government and pro-self-determination groups will undermine the dialogue process. This hardline position questions the commitment of the government to end the conflict. Additionally, the dialogue between the government and pro-self-determination groups cannot be successful if freedom of expression is stifled. Currently, the human rights situation in Cameroon is characterised by attacks on human rights defenders and journalists. As demonstrated above, the attacks are emanating from the government and armed groups, which exposes journalists and human rights defenders to two fronts of attacks, thereby further undermining already stifled freedom of expression. Cameroon should not only respect freedom of expression but also create an environment conducive to freedom of expression thriving by providing security for journalists and human rights defenders.

9 Violent extremism and conflict in the West African region: Mass displacement, killings especially of children, and destruction of properties

Children in Mali were among the worst affected by the resurgence of terrorist groups such as al-Qaida, Boko Haram and the Movement for Unity and Jihadist in West Africa (MUJOA). The conflict waged by these groups was exacerbated by the inter-ethnic conflicts that spilled over into its borders creating further instability.

During the first six months of 2019 inter-community conflict in Mali claimed 150 children with around 75 injured (Maclean 2019). The same period saw 600 civilians killed due to ethnic conflicts majorly arising in the Mopti region (Maclean 2019). The death toll for 2019 doubled compared to 300 people killed in 2018, demonstrating that the situation in Mali is worsening (Maclean 2019). There are reports that the Jihadists have intensified the recruitment of children to carry out the attacks. According to *The Guardian*, 2019 was a bad year for the rights of children since the number of children recruited doubled (Maclean 2019). Also, most casualties are civilians who are enduring three fronts of attacks from the

military, ethnic militia and armed groups. The situation in Mali has been aggravated by the combination of ethnic conflict arising from the scramble for water, land and grazing and violent extremism caused by the Jihadists.

One deadly attack occurred in June 2019, when ethnic militias attacked a Dogon village killing 95 people and 19 others disappearing (Aljazeera 2019). This massacre of the Dogon wiped out an entire village together with their animals. Earlier in March 2019 people claiming to be Dogoni had killed 160 members of the Fulani ethnic group (Aljazeera 2019). The killings spread in Yoro where 35 civilians were killed in June 2019 and Gangafani where 38 civilians were killed in the area of the Mopti region (*The Defence Post* 2019). The Islamic State Jihadists killed 49 soldiers in November 2019 (Euronews with Reuters, AFP 2019). Beyond the killings, the attacks have caused the displacement of approximately 202 000 people by July 2019 (Relief web 2019).

As in the case of Mali, Burkina Faso has witnessed an exponential rise of armed Jihadists. It is reported that in 2019 approximately 1,2 million people were in dire need of assistance due to the constant terrorist attacks (Mednick 2019). To demonstrate the killings, on 29 April 2019 armed Jihadists killed a pastor and five faithful, while on 12 May 2019 another church was attacked with the Jihadists killing 6 worshippers (AP News 2019). There also was an attack in Soum province, which claimed 35 civilians, the majority being women (Aljazeera 2019). The first three months of 2019 saw 186 people killed in Burkina Faso (Maslin Nir 2019).

Boko Haram has gained ground in Chad killing and causing mayhem throughout the country. Soldiers and civilians have fallen victim to the deadly attacks of Boko Haram. For instance, on 22 March 2019 Boko Haram killed 30 people in Dangdala and Bouhama in Chad (Ajakaye 2019). In December 2019 Boko Haram Jihadists attacked Kaiga village in Western Chad killing 14 people and kidnapping 13 others. The security agencies have responded heavily, often accused of using excessive force. Similarly, the Jihadists have made sustained attacks in Nigeria, killing members of the security forces, and causing serious damage to property and the livelihood of people. One such example is the attack in Borno state in Nigeria where the Jihadists killed 16 people on 5 October 2019 (GardaWorld 2019). This was later followed by another attack on Christmas Eve, when Jihadists attacked Borno state killing seven people and abducting a girl (AFP 2019). During these attacks the Jihadists steal food and burn houses, thereby not only seriously disturbing people's livelihoods but also threatening the right to life.

The local Jihadist groups have widened their sphere in West Africa, the most affected areas being Burkina Faso, Mali, Niger, Nigeria and Côte d'Ivoire (Benedikter & Ouedraogo 2019). The reaction of these states has been the securitisation of the state with the security agencies being accused

of human rights violations in the process of combating terrorism. In effect, the states' abuses under the guise of counter-terrorism measures have been counter-productive often providing terrorists with an opportunity to exploit the situation by giving messages of solidarity and offering a cause. The counter-terrorism measures have compounded the situation by playing into hands of the terrorist agenda.

West Africa has been hard hit by the terrorist attacks with Burkina Faso, Mali and Niger accounting for 4 000 deaths in 2019 (UN News, 2020). The extremist groups are also expanding their sphere in West Africa from their traditional operating zones of Mali, Niger, Nigeria, Burkina Faso and Chad to Benin, Ghana and Togo (Reliefweb 2019). One of the expansionist missions was seen on 1 May 2019 abducting tourists in Benin (Reliefweb 2019). In addition to lodging attacks on these countries these extremist groups have adopted abduction, especially of women, as a form of violence (UN Press 2019). They take women for forced marriages and labour in addition to using them as sex slaves where they are gang-raped by the extremists (UN Press 2019). This violence against women has gone on unchecked for so long to the extent that it is becoming an embedded feature of the armed conflict (Ecoma Alaga 2019) Therefore, these intensified attacks in West Africa call for urgent intervention to avert further suffering, especially that of women, and the loss of lives.

10 Civil strife in Ethiopia

10.1 Creeping authoritarianism in the wake of the June assassinations

In 2018 Ethiopia's Prime Minister Abiy Ahmed made history as he closed torture sites, clamped down on corruption and struck an historic peace deal with Eritrea (Abbink 2019). However, 2019 also saw Ethiopia's human rights record veer off the path set out Ahmed's first year in office. Authorities spent most of the year reacting to internal strife, starting with a botched putsch by rogue officers in Ethiopia's military.

The incident took place on 22 June 2019, when armed men gunned down Ambachew Mekonnen, President of the Amhara federal region, and a close ally of Abiy's government (Crisis Group 2019). Hours later a bodyguard shot and killed a senior commander in Ethiopia's military. Ethiopian intelligence linked the attacks to an attempted *coup* masterminded by Brigadier-General Asamnew Tsige, the head of Amhara's security forces. Internet lines went dead for ten days after the incident, to buy the military time to root out other collaborators from its ranks (AP 2019).

While the assassination attempts were rapidly suppressed, they lay bare the extent of the country's political crisis. Since taking office in April 2018 Ahmed carried out significant reforms at breakneck speed. This overdue but sudden change upset the *status quo*, opening up a Pandora's box of ethnic tensions (Fabricius, Peter & Knight 2019). The most significant of these has been felt in by the weakened Ethiopian People's Revolutionary Democratic Front (EPRDF), a decade-old ethno-regionalist alliance of four parties that has since the 1990s controlled Ethiopian politics. The assassinations triggered a resurgence of repressive tactics by state officials, which saw old terrorism laws reinvoked to stifle dissent.

While Ethiopia's restrictive 2009 Anti-Terrorism Proclamation was rewritten in 2020, the old draft remained in force for 2019, as Parliament debated reforms. The 2009 Proclamation contained overly-broad definitions of terrorist acts. Article 6 of the 2009 Proclamation, dealing with the 'encouragement of terrorism' makes the publication of statements 'likely to be understood as encouraging terrorist acts' punishable by 10 to 20 years in prison. Merely a week after Mekonnen's *coup* Ahmed's government used the 2009 Proclamation to hold dozens of members of the National Movement of Amhara, an ethnonationalist political party, in police custody under the ATP's remand provisions (France24 2019). In the same week a prominent journalist and five associates were arrested under the same provision. They were held in custody for more than two months before being released unconditionally.

10.2 Self-determination and violence in Sidama

Beyond the slight scaling-back of civil liberties, 2019 also saw several developments that impacted on the right of self-determination. In 2018 members of the Sidama ethnic group made a request to the federal government to secede from the Southern Nations, Nationalities and Peoples' Region (SNNPR), the fourth largest region in the country (Matfess 2019). When government failed to meet the constitutionally-mandated deadline for a referendum on 18 July 2019, the activists threatened to move unilaterally and carve out a 'Sidama Regional State' within Ethiopia's borders (International Crisis Group 2019).

The federal government failed to organise a vote within the time limit, sparking major protests in Adassa, the SNNPR's capital. At the end of the violence local police reported a total of 53 deaths, mass displacement, and significant property damage (Kiruga 2019). The region was placed under federal security control, only for another clash to break out between civilians and state forces, which saw 153 civilians lose their lives, with police affecting more than 2 000 arrests (Sidama Human Rights Activists 2020). Eventually, in November 2019 the federal government held the referendum, which proceeded peacefully, with a near universal turnout:

98,52 per cent of voters supported the creation of the new federal region. However, by mid-2020 Ethiopia had still failed to give effect to the self-determination of the Sidama people. While it is still too soon to tell, it is likely that if Ahmed's government fails to meet the Sidamas' high expectations around the new region, the timeline for its establishment, and its meaningful inclusion in Ethiopia's economy, unrest similar to 2019's violence could easily break out.

11 Ebola outbreak amidst armed conflict in the Democratic Republic of Congo

The deadly Ebola virus struck again in the Democratic Republic of the Congo (DRC) for the tenth time claiming lives and causing untold suffering (Reliefweb 2019). This tenth outbreak was the second deadliest outbreak after West Africa 2014-2016 (Reliefweb 2019). This time it was concentrated in North Kivu and Ituri areas of DRC which also faces the scourge of war. What started as an outbreak in August 2018 soon evolved into a public health emergency of international concern on 17 July 2019 (European Centre for Disease Prevention and Control 2020). According to the Ministry of Health of the DRC the total number of cases as at November 2019 was 3 274 with 2 185 deaths (Reliefweb 2019). The situation in DRC was exacerbated by the depleted health systems posing a greater health risk (WHO 2019). The health system in the DRC is characterised by inadequate infrastructure, poor human resources and numerous armed attacks on healthcare providers, which hampered the quick and effective response to Ebola.

The fight against Ebola in the DRC was hampered by the numerous armed attacks. One such attack claimed the life of Dr Richard Mouko from Cameroon who was killed by the militia (VOA 2019). Authorities believed that the reason for the attacks was because the locals thought that the foreigners were bringing Ebola to the DRC (VOA 2019). In another attack, on 28 November 2019, four health workers were killed and five injured. Overall, in 2019 there were more than 300 attacks on health workers causing the death of six people and injuring 70 others (Burke 2019). Apart from the health workers, patients have also been attacked in the course of seeking medical treatment, causing them to shun the health centres (Burke 2019). The sustained attacks caused Doctors Without Borders (MSF) to evacuate their doctors from Eastern DRC after their treatment centres had been attacked by armed groups (Aljazeera 2019). The Ebola situation in the DRC was compounded by the armed conflict, which aided its spread.

12 Conclusion

The year 2019 was replete with moments of both hope and despair for human rights and democratisation in Africa. Hope was resuscitated for girls in Egypt, Tanzania, Zimbabwe, the Kingdom of Eswatini and Mozambique where significant strides were made in the elimination of child marriages. The ECOWAS Court of Justice also upheld the rights of girls by ruling that the practice of banning pregnant girls from mainstream schools was discriminatory. Africa also made progress in upholding LGBTIQ rights as homosexuality was decriminalised in Angola by Parliament and in Botswana by the High Court. On the democratic front, gains were made in Malawi where the Court nullified contested presidential elections.

Africa also recorded some partial gains for human rights and democracy. In Sudan, the law that restricted the presence of women in public spaces was repealed although other laws that violate the rights of women are yet to be repealed. There was modest progress in the ratification of the African Women's Protocol by African countries. Kenya's High Court also reaffirmed the constitutionality of abortion but restricted it to instances where the life of the pregnant woman is at risk. In Kenya the criminalisation of homosexuality was unsuccessfully contested but the attempt signals hope for the future.

Moments of despair in 2019 include the growing suspicion about and resistance to supranational adjudication, in particular that of the International Criminal Court and the African Court by African countries. Violent conflicts and ethnic violence resulting in massive human rights violations also persisted in Mali, Burkina Faso, Ethiopia, Somalia, Sudan and South Sudan. The resurgence of terrorist groups in West Africa led to mass displacement, the killings of especially children and the destruction of properties. Persons with albinism continued to face persecution in Malawi, with no concerted action by the government towards their protection. Cameroon came into the limelight for killings and the detention and torture of journalists, Anglophones and human rights defenders. In South Africa, immigrants were subjected to xenophobic attacks and this was perpetuated by citizens, mayors in local government and even ministers in the President's cabinet. Africa has a huge task ahead to eliminate these ills.

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I Ait Youssef, R Alsheikh Ali, E Comaro, E Diana, S Lavigne Delville, N Maaninou, M Pannunzio & C van der Werf 'A contradictory 2019 in the Arab world: The heralds of a second Arab Spring in times of increased vulnerability and upgraded authoritarianism' (2020) 4 *Global Campus Human Rights Journal* 230-262
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A contradictory 2019 in the Arab world: The heralds of a second Arab Spring in times of increased vulnerability and upgraded authoritarianism

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Abstract: *During the year 2019 mass mobilisations broke out throughout the Arab region, with protestors calling for regime change and denouncing mismanagement, corruption and the lack of basic services and human rights in countries as diverse as Algeria, Sudan, Lebanon, Iraq and Egypt. In some cases they were violently opposed and quelled; in others they brought about a transitional process. These democratic processes and authoritarian reactions were accompanied by an important case of democratic consolidation in Tunisia and peaceful transfer of power in Mauritania. Some observers saw in these movements the sparks of a second Arab Spring, while others noted an upgrading of authoritarianism, through different repression techniques against protesters, activists and civil society organisations. Security forces and tribunals have been used for repression, but so have new constitutional and legislative texts that have shifted the balance of power in favour of the executive and the military. The repression of cyberspace was extended through new technological tools that allow for the monitoring, tracking and silencing of dissenting voices. Beyond these two opposing dynamics, the socio-economic situation in many countries across the region deteriorated, increasing the vulnerability of groups such as women, children, stateless persons and refugees. The socio-economic situation has also provided several local, national, regional and international actors with a means to exercise economic violence that typically impact on the most vulnerable, depriving them of their most basic human rights or allowing them only conditional access to these rights.*

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Key words: *democratisation; authoritarianism; cyber control; socio-economic violence; refugees; protests, human rights; Arab Spring; oppression; arrests*

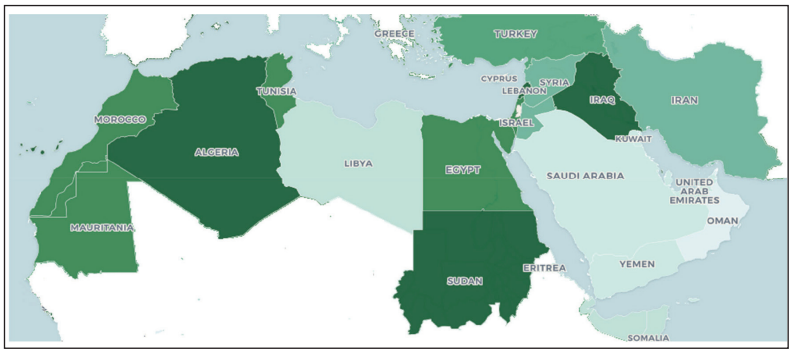
1 Introduction

Two opposing analytical frameworks – gradual liberalisation and democratisation and resilience of authoritarianism – dominate the literature on the Arab region. In this vast literature Rivetti proposes a combined approach that shows the coexistence and overlap of the two perspectives (Rivetti 2015). Adopting this approach, we look into significant political events that occurred in 2019, namely, the new protest movements across many countries in the region, while identifying responses that comply with previous trends, notably repressive mechanisms and power consolidation in the region, as well as the socio-economic effects of a protracted crisis. Although not exhaustive, the events and dynamics discussed in this article allow us to identify and better understand the nature of the new trend that emerged in 2019, with the multiplication of mass mobilisations that could be regarded as a second wave of democratisation swiping through the Arab world. The article draws on an extensive literature review of local and international media and academic articles, reports of human rights monitoring bodies and intergovernmental organisations. It also includes data from direct participatory observation, that of the protest movement in Lebanon.

2 The sparks of a second Arab Spring

In response to various socio-economic, political and human rights issues, a new cycle of protests shook the Middle East and North Africa throughout 2019, as the map in Figure 1 shows. From Sudan to Algeria, Lebanon to Iraq, Egypt to Iran, massive protest movements showed the signs of an end to the 'Arab Winter' with its resurgence of authoritarianism, absolute monarchies, state collapse and radical Islamic contestation. Although national contexts differ, a sense of frustration and injustice stemming from worsening living conditions, endemic corruption and state violence, leading people from all walks of society to take to the streets eight years after the Arab Spring. Governments rapidly reacted to this situation and opted for different repressive tactics with some commonalities from a rhetoric of division and fear, to direct violence, and other forms of control such as internet shutdowns.

Figure 1: Map of Protest Intensity (light green – low protest intensity to dark green – high protest intensity) (The GDELT project 2019)



2.1 Contesting military regimes

Sudan and Algeria have two of the oldest surviving military regimes in the region. Massive protest movements shook these regimes to the core and brought down the heads of state in both countries while engaging the military in a transition process.

2.1.1 Sudan: Toppling a 30 year-long authoritarian rule and the multiple challenges of transition

Protests started in Sudan in December 2019 in a context of dramatically-rising living costs and austerity measures. The movement was political from the outset, with people denouncing corruption and calling for an end to military rule and the resignation of President Omar al-Bashir who had since 1989 been in power. Offices of the ruling party and national security were also targeted. This was not the first time the regime had been challenged. In 2012 and 2013 protests mainly took place in peripheral regions, and they were violently subdued. This time, the country witnessed 'the wealthy classes of Khartoum finally converging with the peripheries' (Chevrillon-Guibert et al 2019). Organisations such as the Sudanese Professional Association were structuring the movement. A sit-in near the army headquarters in Khartoum became the epicentre of the protest movement, with demonstrators joining from all over the country in a spirit of national unity upholding striking slogans such as 'We are all Darfur'.

The government responded by using tear gas and live ammunition, detaining activists, censoring media and on 22 February 2019 declaring a state of national emergency (Human Rights Watch 2019a). The persistence of the peaceful contestation eventually led to the resignation

of al-Bashir on 11 April, ousted by the Sudanese armed forces. Protesters remained mobilised to put 'pressure on the new military council to hand power to civilian rule and demanded justice for past crimes' (Henry & Wabwire, Human Rights Watch 2019: 3). Sudanese security forces, led by paramilitary Rapid Support Forces (RSF), continued violent crackdowns culminating on 3 June in a deadly attack on a protest area, with shootings, beatings and sexual assaults against women (BBC Africa 2019; UN News 2019), while bodies were dumped into the Nile river. Over 120 people were killed, more than 700 were wounded and dozens more disappeared. Security forces also implemented a near-total restriction to internet services (Human Rights Watch 2019a).

Negotiations between the Transitional Military Council and civil opposition groups gathered under the banner of the Forces of Freedom and Change (FFC), reached a power sharing agreement via the creation of a mixed Sovereign Council. The Constitutional Declaration regarding the Transitional Authority was signed on 17 August and Abdalla Hamdok became the first civilian Prime Minister of Sudan since 1989. On 29 November two major laws dismantled the military-Islamist al-Ingaz ('Salvation') regime set up by al-Bashir, and dissolved the National Congress Party to 'preserve the dignity of Sudanese people after years of tyranny' (France 24 2019). These measures met the demands of the FFC and civil protests calling for justice for victims of the former regime (RFI 2019a), although a number of issues remained at stake within the transitional process. Indeed, the country's resources (oil, gold, agro-pastoral resources) remain in the hands of the military and the security apparatus (Lavergne 2019). Moreover, foreign economic support from non-democratic states could undermine the democratic process. Justice, and the fate of marginalised regions of the country, certainly remain a major issue of concern. Transitional justice and the recognition of 'grave human rights violations committed against the Sudanese' are elements that support negotiations and the democratic transitional process (Dabanga News 2019). Yet, while the Declaration mentioned a Transitional Justice Commission, it did not detail its composition and mandate. The fact that the armed forces remain in power, including the RSF responsible for crimes committed in Darfur as well as the 3 June massacre, may cast doubt on the achievement of justice, in addition to the fact that the Declaration did not address the issue of peace in Darfur, the Nuba Mountains and Blue South Nile. Nevertheless, the Prime Minister took an important symbolic step, visiting camps in el-Fasher, North Darfur (RFI 2019a). It is also to be noted that women's groups, who played a leading role in the movement, called for more equal representation in the transitional government (Sudan Tribune 2019).

2.1.2 Algeria: The call for a 'complete change of the political system'

In February 2019 the Algerian *hirak* (also called the 'Revolution of smiles') was triggered by the bid of 81 year-old President Abdelaziz Bouteflika for a fifth term as President. First heard in stadiums, slogans were later taken up by hundreds of thousands of Algerians. In response to messages posted on social networks (Sereni 2019) demonstrations took place in more than 40 cities, 'rooted in popular neighbourhoods and dominated by a young generation of activists' rejecting any representation (Bella 2019: 1). Protesters peacefully demanded the departure of the regime each Friday despite the President's attempt to appease the movement by promising a new Constitution once re-elected. On 2 April 2019 Bouteflika resigned under the pressure of the street and the army chief of staff and Deputy Defence Minister General Ahmed Gaid Salah. While Senate President Abdelkader Bensalah became President, General Gaid Salah wielded effective power (Human Rights Watch 2019b). As in Sudan, the fall of the main figure did not weaken the mobilisation or the growing repression of protesters. The protestors continued to demand genuine democracy as well as 'a fairer management of resources, an end to corruption and the effective application of the principle of sovereignty' (Benderra et al 2020: 3). Authorities had to concede and proceed to the reshuffling government, arresting ministers and businessmen close to the deposed administration as well as officials of the political police. The protesters continued to oppose the newly-set elections and demand the resignation of the interim President and Prime Minister.

From the beginning of June the authorities used repressive tools 'from the logic of intimidation to the logic of prison', relying on the 'vague and elastic provisions of the Criminal Code' such as the notion of 'undermining national unity' (France24 2020: 1). Arrests often reflected procedural violations and the invasion of privacy (houses, mailboxes, social media) as well as the physical abuse of women (Human Rights Watch 2019c). Between June and October authorities arrested and charged 86 persons, accusing them of 'harming the integrity of the national territory' (Human Rights Watch 2019c), on the ground that the 41 arrested people were holding or possessing the Amazigh flag (Human Rights Watch 2019c). The government's rhetoric to justify the repression raises the spectre of infiltration, division and destabilisation to discredit protest movements. The crackdown further escalated on students as well as on the *hirak* leaders with several arrests in September (Meriem-Benziane 2019). Journalists also came under increased pressure, through suspensions, blocked websites, arrests and judiciary harassment. Overall, at least 300 people were arbitrarily arrested during the *hirak* (Amnesty International 2019a). These arrests only amplified the mobilisations, which also questioned the legitimacy of Parliament (Guemar et al 2019).

2.2 Mass demonstrations denouncing power-sharing formulas

Lebanon and Iraq witnessed massive movements of protests in the autumn of 2019 contesting the *mouhasasa* system that governs the two multi-confessional Middle Eastern states in which different political groups share power and state resources while claiming to represent one of the nation's constitutive groups.

2.2.1 Lebanon

On 17 October 2019 the longest and most widespread protest movement in the history of Lebanon erupted, following the publication of the government's proposed regressive tax reforms that included a tax on voice over internet protocol (IP) services. Considering that Lebanon has one of the highest prices for phone services worldwide (Byblos Bank 2015: 2), in combination with a looming economic crisis and high corruption rates, this sparked anger across the country. Even though the tax reforms were soon withdrawn, civil disobedience campaigns continued to grow and spread throughout the country, ranging from road blockages across to sit-ins at political, judicial and economic institutions and politicians' homes. Many areas around Lebanon were reclaimed as public spaces in which multiple civic activities were initiated, such as public discussion, debate fora, and even guerrilla environmentalisms introducing urban gardening and coordinated recycling activities (Anderson 2019).

In contrast to Lebanon's earlier protest movements, as in 2005 against the Syrian occupation or against the garbage crisis in 2015, the October uprising is characterised by its grassroots and leaderless character, its multiple hotspots spread throughout the country, including peripheral areas. The diversity of the protesters is evident from their diverse political and sectarian identities, but also through the inclusion of 'unemployed youth, frustrated civil servants, university and school students and middle-class business people' (Karam 2019). A striking example of this was the symbolic human chain formed on 27 October that stretched from North to South Lebanon, exemplifying how all communities were united in their demands against the sectarian political establishment.

The October uprising revealed the political system as a flawed consociational system due to clientelism and its failure in providing basic government services (Issam Fares Institute for Public Policy and International Affairs 2019). Accordingly, the protests demanded the resignation of the government, which occurred on 29 October. They also called for the formation of a technocratic independent cabinet, the drafting of a new electoral law and early parliamentary elections. Many groups in the protests emphasised that a new electoral law ought to be non-sectarian in nature and based on equal representation. Furthermore, a 'transparent

and productive public sector' is a widely agreed upon demand (Issam Fares Institute for Public Policy and International Affairs 2019). The protestors also demanded an independent judiciary and accountability of corrupt politicians, and an economic rescue plan with the goal of restructuring national debt, reforming the banking sector and recovering stolen funds. Finally, there were calls for new socio-economic policies, the consolidation of public services, gender equality and environmental regulations and planning.

2.2.2 Iraq

Similarly to Lebanon, the protests in Iraq erupted in October, ushering one of many similarities between the two protest movements. Indeed, the non-sectarian nature of the protesters took centre stage, as well as their rejection of the political elite and their power-sharing agreement called *Muhasasa* (Halawa 2020). Mass demonstrations against political corruption and the government's failure to provide basic services has for many years been recurring, yet it reached a peak 'in terms of size and ideational coherence' in 2019 (Dodge & Mansour 2020: 58). Besides local syndicates, including lawyers and engineers, many students and even school children took to the streets (Al-Nashmi 2019). It comes as no surprise in a country where 60 per cent of the population is under the age of 25 and youth unemployment at 36 per cent (Jiyad 2020).

Iraqi protesters used roadblocks to prevent government employees from getting to their work and blocking roads to the sites of major importance to the economy, such as oil fields or ports (Aboulenein & Jalabi 2019). The decision to focus on oil fields was meant to underline the stark contrast in between its oil wealth and the government's failure in providing basic services from clean water to electricity. As the protests were countered with increasing violence, 'their demands radicalised and expanded to encompass a program for the transformation of the whole system', asking for the 'resignation of the current government and replacement by an independent non-party caretaker administration', a new electoral law, new laws concerning sources of funding for political parties and UN supervision in new national elections (Dodge & Mansour 2020: 65).

The protesters succeeded in getting former Prime Minister Adel Abdul-Mahdi to resign in October. In order to end the monopoly of power of the current political establishment, protestors are calling for an electoral law with a 'full individual candidacy system' (Halawa 2020) to replace the current broad proportional presentation system. Another demand has been to end foreign meddling in Iraqi affairs by the United States of America and Iran (Loveluck 2020). Ironically, the government accused protesters of foreign influence in an attempt to challenge their legitimacy (Dodge & Mansour 2020: 66). Another counter-tactic of the authorities

was a two-week internet black-out followed by a ban on social media websites (Al Jazeera 2019a). One can note that the government identity tactics and mobilisation of symbolic capital failed.

A major contrast between Lebanon and Iraq is the degree of violence facing protesters. While protests in Lebanon have generally been peaceful, repression has led in Iraq to about 600 casualties in 2019 (Halawa 2020). Both the state's security forces and militia groups escape with impunity for their violent crackdown on protesters (Alaaldin 2020), and their violation of their right to freedom (Human Rights Watch 2020a). Moreover, journalists were prevented from documenting protests or corruption cases, sometimes through detention or incarceration (ANHRI 2020).

2.3 Quelled protest movements

In both Iran and Egypt, new contestation movements appeared in 2019 after years of relative silence. They were met with fierce clampdowns, showing the extent of resilience of the current regimes and what the tactics they resort to in order to remain in power.

2.3.1 Iran

In the Islamic Republic of Iran protests flared up in 2019 when the fuel price suddenly increased by 50 per cent (UN 2019a), adding to the long-term frustrations regarding the structural economic crisis, low public trust towards Hassan Rouhani's government and violent political repressions. On 15 November between 120 000 and 200 000 demonstrators took the streets in over 40 cities; a higher number than in the December 2017 and January 2018 protests, but lower than in the 2008 'Green movement'. According to official data, protesters mostly belonged to the weaker socio-economic layer of society (Zimmt & Raz 2020), mostly comprised of jobless citizens and unpaid workers. Verified video footage shows evidence of 'severe use of violence' by the Islamic Revolutionary Guard Corps and Basij militia, carrying field executions (Ahwaz Human Rights 2019a), endorsed by Ayatollah Khamenei in an address aired on television urging them to 'implement their tasks' against 'thugs' (NCR Iran 2019). The systematic use of lethal forces on unarmed protesters in protests in Iran has become 'a matter of state policy', violating the Iranian Constitution regarding public gatherings and marches (article 27). When the protest erupted, the Iranian government immediately shut down internet and telephone services in Tehran, Mashhad and Shiraz to prevent the sharing of information and evidence of state violence for one week (Netblock 2019a). Such a shutdown is the most severe recorded in the country since the election of Hassan Rouhani in 2013 (Netblock 2019a). According to UN estimates, at least 7 000 people were arrested while casualties amounted to 208 citizens in five days, including women and children (Office of the

United Nations High Commissioner for Human Rights 2019), with high casualties in Khuzestan province (Ahwaz Human Rights 2019b).

Experts shared concerns regarding arbitrary arrests, unfair trials, lack of access to lawyers, poor conditions of detention, intimidation, and confessions under duress, as well as death penalty sentences, when senior officials predicted 'severe punishment' of protestors. On 26 November Minister of the Interior Abdolreza Rahmani-Fazl strongly denounced important material damages targeting institutions and public structures including banks and religious sites, while General Hossein Salami, head of Iran's Revolutionary Guards, accused the US and its allies of pouring oil onto the fire.

The frustration of the Iranian people might impact voter turnout in the 2020 parliamentary elections, affecting Rouhani's coalition of moderate reformists and the legitimacy of the regime. However, the strengthening of conservative forces in Parliament could lead to further radicalisation and polarisation, increasing internal pressure and complicating Rouhani's foreign and domestic agenda, without offering a satisfactory solution to the increasing economic crisis and popular discontent (Zimmt & Raz 2020). As shown by the slogans chanted by the crowds such as 'Reformist or conservative, the game is over', 'Death to the dictator', new uprisings could appear, denouncing the system as a whole rather than referring to a specific political camp. Moreover, systematic repressions over the last years did not stifle protests and therefore might increase the unity of different social categories against the Islamic Republic itself (Jiyad 2020: 2).

2.3.2 Egypt

On 20, 21 and 27 September 2019 protests took place across Egypt denouncing corruption, basic rights violations and austerity measures including subsidy cuts and price increases for basic goods in a context of constant poverty increase (*The New York Times* 2019). A YouTube call by businessman in exile, Mohammad Ali, followed by other activists sparked the first protests that gathered 2 000 people in eight cities including Cairo and Alexandria (Al Jazeera 2019b). The protesters called for the ousting of President Abdel Fattah el-Sisi (Al Jazeera 2019c), allegedly shaking the government 'to its core' and setting of a 'full-throttle clampdown' launched by the authorities 'to crush demonstrations and intimidate activists, journalists and others into silence' (Amnesty International 2019b). Egyptian security forces used lethal force and live ammunition against those who dared to take to the streets (Michaelson 2019). By 26 September the protests were met with the largest mass arrests conducted under el-Sisi's regime, with over 2 000 protestors and 111 minors apprehended (Mada Masr 2019). Arrests became systematic and generalised, targeting activists, professional lawyers or journalists, or any individuals alleged to

have taken part in protests. Prominent opposition figures were detained, 'despite no indication that any were involved with the new wave of dissent' (Michaelson 2019: 2). Cyber-control was one of the tools used to asphyxiate the movement, in line with expanding repressive methods facilitated by the law passed in 2013 aimed at increasing restrictions on Egypt's internet (Netblocks 2019b), combined with local mainstream media denying protests, sharing fake news and discrediting foreign media (Magdi 2019). While not addressing the protests directly, President al-Sisi during his speech at the UN General Assembly on 25 September (State Information System 2019: 5) promoted a global framework to counter terrorism, justifying the intensified control over public institutions through his reshuffling of the army, bureaucracy and intelligence services.

Socio-economic despair and frustration led Egyptians to question the political system and could lead to larger protests coming from the disadvantaged social groups as 32,5 per cent of the population lives below the poverty line (CAPMAS 2019). Even if the protests movements in both Iran and Egypt seem to have been quelled in 2019, one can expect them to reappear if the economic situation continues to worsen.

2.4 Democratic hopes through elections

In North Africa hopes are rising with signs of democratic consolidation in Tunisia and an unexpected presidential election in Mauritania. Nonetheless, both countries still face important challenges on their path to democratic consolidation.

2.4.1 Tunisia

Since ousting former President Zine El Abidine Ben Ali during 2011, Tunisia has become somewhat of an outlier in the region in terms of democratic transition. The planned parliamentary elections of October 2019 and the early presidential elections of September and October 2019, following the passing of President Beji Caid Essebsi in July, constituted a test to Tunisia's democracy (Democracy Reporting International (DRI) 2019).

An interesting trend in these elections was the use of social networks in political campaigning. Even though Tunisia ranks best in the region as far as press freedom is concerned (Repucci et al 2019), the political effects of social networks should not be overlooked. Facebook was the main source of information on electoral matters during these elections (Democracy Reporting International (DRI) 2019b: 3). It is to be noted that electoral campaigning on social media generally ignored electoral regulations by continuing political, sometimes covert, communication during the electoral silence period, yet none actively supporting the eventual winner of the presidential elections, Kais Saied.

Following the October parliamentary elections, Ennahda, a moderate Islamic party, became the largest party in Parliament, despite losing seats, because of political fragmentation. As for the presidential elections, its candidate lost during the first round to two new figures: Nabil Karoui, who spent most of the campaign period in prison for money laundering, and Kais Saied, a constitutional law specialist and 'a political outsider' (Freedom House 2020a). The latter emerged victorious with 72 per cent of votes and with a remarkable support base among young voters (Allahoum 2019). His inaugural speech included a pledge to 'honor Tunisia's obligations under international law' whereas as a candidate he had made statements opposing gender equality in inheritance law, favoured the criminalisation of homosexuality and defended the death penalty (Guellali 2019).

Interestingly, the population's optimism in the democratic process increased this year, as a nationwide poll concluded that 70 per cent of Tunisians 'think ordinary people can influence decisions in their country' (International Republican Institute 2020). On the other hand, faith in the government's will to address the needs of the population remained low, with corruption being perceived as a significant cause (International Republican Institute 2019).

2.4.2 Mauritania: First democratic steps towards human rights protection?

On 22 June 2019 the Islamic Republic of Mauritania for the first time since the declaration of independence on 28 November 1960 held free elections, raising hope that the new head of state would ensure human rights protection for all citizens (Human Rights Watch 2020d). President Ould Abdel Aziz stepped aside after two mandates of five years. His decision ensured the respect of the constitutional two-term political limit, and paved the way for a peaceful transition towards a democratically-elected government (Mauritania Constitution art 26/28). Mohamad Ould Ghazouani won the presidential elections with a first-round victory by universal direct suffrage with 52 per cent of the votes. The new President is a member of the Union for the Republic, the strongest political party in Mauritania (Melcangi 2019) which positions itself as an ally of the West against Islamist militants. If elections were held in the presence of an electoral observation mission from the African Union (AU) (AU 2019), the opposition still denounced fraud (RFI 2019b) and appealed for their annulment. Moreover, the authorities' decision not to welcome foreign observers was strongly criticised. Concerns were also raised about the military background of the new President, former ministry of defence and chief of staff under Abdel Aziz's presidency. His links could undermine the separation of powers. On 23 June protests broke out and led to the arrest and detention of at least two journalists and one local activist, as well as the sentencing of six activists to six months' imprisonment and

fines for taking part in the protests, vandalism, and peace disturbance. The government also took restrictive measures by cutting off internet services, which were only restored on 3 July (Human Rights Watch 2019d).

While entering a transitional period, Mauritania has to tackle long-standing difficulties and challenges fragmenting and fragilising its society, such as slavery practices, gender-based violence, the persistence of marginalised social groups (CERD/C/MRT/CO/8-14), and ethno-racial divisions (Human Rights Watch 2019d).

3 Authoritarianism upgraded

The consolidation of authoritarian regimes affected many countries in the region and assumed different forms: from repressive measures involving security forces and the courts to more sophisticated legal instruments such as constitutional amendments, anti-cybercrime legislation and state of emergency laws.

3.1 Repressive actions against opposition

In Egypt and Syria political opposition and civil activism have been countered through different repressive means, such as enforced disappearances, detention and even executions. Courts and security forces have played an important role in this process.

3.1.1 Egypt

Human Right Watch summarised the situation of Egypt in 2019 as being the 'worst human rights crisis in decades', as the country continues to experience the suppression of rights and civil liberties, widespread arrests of political opponents, particularly against the Muslim brotherhood, but even of seculars and liberals. The Egyptian Commission of Rights and Freedoms documented over 2 200 arrests of critics, satirists and political opponents by the Egyptian Security Forces (ESF). At the beginning of November 2019 the number increased to 3 800, with a total of 60 000 political prisoners. These activists have reportedly been subjected to torture, forced disappearances, extra-judicial killings, arbitrary arrests and illegal detention (Mandour 2019), followed by prolonged pre-trial detentions (Al-Monitor 2020). On 17 June 2019 the overthrown President Mohamed Morsi died in detention, with critics blaming the poor detention conditions for his death.

As stated earlier, the September demonstrations were met by a wave of arrests. Under the guise of counter-terrorism, activists and journalists have been prosecuted for participating in unauthorised protests, membership of

a terrorist or banned group, and harming national security and public peace. The Director of the Adalah Centre for Rights and Freedoms, Mohamed el-Baqer, was even arrested for providing legal aid to political detainees that participated in the demonstrations demanding the resignation of the Egyptian President. After being put in preventive detention, he was eventually transferred to Tora prison, a maximum security prison notorious for its inhumane conditions, where he is facing charges similar to those of fellow lawyer and prominent women rights activist Mahienour el-Masry (Front Line Defenders 2020). Some other prominent cases include Asmaa Dabees, a leading feminist (FIDH 2019) and human rights lawyer Ibrahim Metwally, who remains in police custody even after the Cairo Criminal Court had found him not guilty on 14 October 2019 (OHCHR 2019).

Recommendations submitted during the UN Universal Periodic Review (UPR) of Egypt in November 2019 requested the opening of investigation on the use of torture and other ill-treatment by security forces, as well as on detention conditions, arbitrary travel bans and the judicial harassment of human rights activists (Report of the Working Group on the Universal Periodic Review 2020:10).

3.1.2 Syria

Although the Syrian Constitution of 2012 in article 42 enshrined freedom of speech and in article 43 that of the press, in practice these freedoms were greatly restricted in government-held areas in 2019. Syrian security forces have arrested hundreds of activists, former opposition leaders and their family members in areas retaken from anti-government groups around Damascus and Daraa, even after they had signed reconciliation agreements with authorities protecting them arrest (Human Rights Watch 2019e). Local organisations, including Syrians for Truth and Justice and the Office of Daraa Martyrs, have documented at least 500 arrests in these areas since August (Human Rights Watch 2019e). Courts also participate in these dynamics, using the notions of 'weakening national sentiment', and 'undermining state prestige' as tools to criminalise anti-government expression (Fares 2019). Journalists are targeted by both regime forces and extremist groups. In 2019 at least seven journalists were killed in Syria (Committee to Protect Journalists 2019b).

Non-state actors and Jihadi groups also use repressive means. Hay'et Tahrir al-Sham, an al-Qaeda affiliate predominantly active in Idlib, arbitrarily arrested numerous residents in areas under its control (Human Rights Watch 2020e). On 11 November 2019 its officers threatened to kill journalists as part of their response to protestors in Idlib province (Orient Net 2019). Two photo journalists, Omar Haj Kadour, who works for *AFP*, and Ibrahim Khatib, who works for the *BBC* and the Turkish news agency *Anadolu*, have been beaten (Reporters Without Borders 2019a). On 22

August 2019 this Jihadi group arrested two citizen journalists: Mohammad Daboul, who worked for the Idlib Media Centre, a local news agency, and Fateh Raslan, a reporter for the Step Feed News website, who was released after having pledged never to work for a media outlet 'opposed to the revolution' (Reporters Without Borders 2019a).

3.2 Constitutional and legal tactics to consolidated authoritarianism

Notwithstanding the fact that human rights principles are enshrined in their constitutions, governments have used constitutional amendments in 2019 to shift the balance of power, reinforcing the executive and sometimes the military. This trend was also supported in the case of Egypt by the renewal of the state of emergency law that seems to usher a return to a permanent state of emergency. Syria, on the other hand, seems to have opted this year for a constitutionally-based peace process in line with United Nations Security Council Resolution 2254 of 2015, formally working towards a new constitution and internationally-supervised elections.

Egypt oversaw an important constitutional amendment in 2019, allowing the President to stay in power until 2030 without having to step down at the end of his second term in office in 2022. This constitutional reform benefited from substantial support by the pro-government bloc in Parliament and a public referendum closely monitored by authorities, accompanied by a strong media campaign 'Do the Right Thing', threats, bribes and a general crackdown on political dissent (The Tahrir Institute for Middle East Policy 2019). Critics believe that this measure will undermine the separation of powers, while expanding President el-Sisi's power, and also that of the military (ISS PSC Report 2019). Indeed, under his rule the independence of the judiciary has been further curtailed through its subordination to the executive while its jurisdiction has been eroded by military courts, imposing a new type of tougher delegative authoritarian rule (Springborg 2015).

Another threat to the separation of powers and civil liberties came from the State of Emergency Law. It remained in effect in Egypt in 2019. Lifted in 2012, following the overthrow of Hosni Mubarak, it was reintroduced in 2017 for a three-month period following a terrorist attack, and has ever since regularly been renewed. State of emergency laws are regarded as a serious threat to freedoms and human rights as they authorise the censorship of newspapers, arbitrary arrests and torture, search without warrants, the detention of suspects without charges, and trials of civilians in military courts (Human Rights Watch 2019).

The Union of the Comoros is a multi-party constitutional republic estimated to be 'partly free' with a score of 50/100 in the Freedom

in the World index. Its President, Azali Assoumani, was re-elected for a fourth term as head of the Union in 2019 following a highly-contested presidential election. Protests against these elections and their results were banned and were met with violence by security forces. Opposition leaders have been detained for claiming voting irregularities (MENA Rights Group 2019a), while journalists and media outlets have been targeted (Committee to Protect Journalists 2019a). Charges against them included defamation, disturbing public order, incitement to violence, offence against the head of state, insulting the magistrate, forgery, and use of false materials.

The country also suffers harsh and life-threatening conditions in its prisons and detention centres, with numerous allegations of torture. Although prohibited by law and the Constitution, cases of arbitrary detention and killings are still regularly reported in the Indian Ocean nation, where court orders are unpredictable and inconsistently enforced; corruption by the judiciary and government officials remains a widespread phenomenon (Melzer OHCHR Special Rapporteur 2019) as courts rarely sentence or fine convicted perpetrators. Hence, the non-enforcement of existing laws and a lack of transparency has a negative impact on civil and political rights.

The formation of a Constitutional Committee on 23 September 2019 was hailed as the first real breakthrough in the Syrian peace process and a turning point for this war-torn country (Mehchy 2019a). It was the result of almost two years of consultations and long debates over the names of the representatives of civil society and the UN's role in their selection (Seibert 2019). The Committee's structure consists of 'equal co-chairs', one from the government, the other from the opposition (UN 2019b). The Committee has two bodies, one smaller and one expanded. The smaller body has 45 members, 15 members nominated by each of the government, the High Negotiations Committee that represents the Syrian opposition, and civil society (Mehchy 2019a). The expanded body has 150 members, 50 members representing each of the government, the opposition and civil society. The smaller body's role is to prepare, draft, and present proposals to the expanded body for discussion and adoption with a 75 per cent decision-making threshold. The Constitutional Committee is authorised either to revise the 2012 Constitution or to draft a new Constitution, according to its terms of reference, agreed upon by the government and the opposition (UN 2019b). During its first meeting on 30 October 2019 the constitutional committee allowed the rival sides in the long-running war to sit face-to-face for the first time in almost nine years (Bibbo 2019). The Kurdish administration was excluded from the Committee, which it considers 'unfair', expressing doubts on the success of the constitutional process (Mehchy 2019a) and the willingness of the regime to reform.

3.3 Digital authoritarianism

Some governments have resorted to another degree refinement in a bid to consolidate their power. Indeed, Saudi Arabia, Iran, Jordan and Egypt recently adopted Cyber Criminal legislation and have applied this in 2019 to identify, monitor, and silence opposition.

When the September 2019 protest broke out, the Egyptian government targeted lawyers, human rights activists, journalists and many other figures with direct cyberattacks (Hoffman 2020). Radwa Mohamed, a young activist, was detained by the security forces following the publication of a video against the President and his wife (MEMO Middle East Monitor 2019). According to Amnesty International, police examined protesters' social accounts which in some cases led to their arrest. Reportedly, many minors were also arrested for 'the inappropriate use of social media', even though many of them did not own a smartphone (Amnesty International 2019c). Egypt's Cyber Crime Law of 2018 allows authorities to censor websites when their content is perceived to threaten national security or the economy. This law grants the government broad powers to restrict freedom of expression, infringe on citizens' privacy, and jail online activists (Human Rights Watch 2019f).

According to Human Rights Watch, Jordanian authorities have detained 'over a dozen people' since mid-March. Most of those arrested were part of the *Hirak* political opposition movement, but among them were also journalists and activists. They were all charged under the Cyber Crime Law for insulting the King, undermining the political regime or for online slander (Human Rights Watch 2019g). Human rights activist Ahmed Tabanja was first detained on 17 March for broadcasting on social media the protest of unemployed Jordanians in front of the royal court complex (Human Rights Watch 2020d). He was arrested a second time on 29 March, due to other Facebook posts. He was charged with 'insulting an official agency' and then released on 21 May (Human Rights Watch 2019g).

In 2019 Amnesty International reported the arbitrary detention in Saudi Arabia of 14 people accused of supporting the women's rights movement, such as Samar Badawi, Loujain al-Hathloul, Iman al-Nafjan, Aziza al-Yousef, and Nassima al-Sada. In November 10 other individuals, including writers and intellectuals, were arrested, but most of them were released after a week (Amnesty International 2020). These arrests were based on the Royal Decree of March 2007 approving the Anti-Cyber Crime Law and its vague clause regarding the 'protection of public interest, morals, and common values'. Indeed, bloggers, activists and normal citizens have been persecuted and detained 'for voicing different opinions, insulting public officials, or supporting forces other than the government in power' (Rossini & Green 2015). Saudi Anti-Cyber Crime Law not only targets individuals but also television programmes. In January 2019 the streaming

service Netflix had to withdraw from its streaming service an episode of a comedy show because it focused on the murder of Saudi journalist Jamal Khashoggi and the war in Yemen (Rutemberg 2019).

The Iranian government shut down internet services during the November 2019 protest, in order to block people from sharing information about what was going on in the country (Freedom House 2020b), on the basis of the Computer Crimes Law of 2009. This shutdown lasted for almost a week, and was followed by the arbitrary detention of at least 11 journalists and photo reporters, one of whom for tweeting about the shutdown (Reporters Without Borders 2019b). Moreover, in January 2019 the government attempted to ban the use of Instagram, as it did previously with other social media platforms, such as Facebook, YouTube, Telegram and Twitter (Titcomb 2019).

4 A year of increased vulnerability

2019 witnessed the worsening of certain ongoing crises which further deteriorated the living conditions for the most vulnerable. After examining two categories of vulnerable groups, namely, Women and children and stateless, refugees and displaced, we will look into how economic violence affects the rights of the most vulnerable.

4.1 Women and children

The armed conflict in Yemen has compounded the vulnerability of women and girls and increased gender inequalities. Women suffer gender-based discrimination in the name of cultural and traditional beliefs (Office for the Coordination of Humanitarian Affairs 2019a). Forced marriages, including child marriage, are constantly on the increase and the lack of legal protection for women leaves them exposed to domestic and sexual violence (UN Women 2020). The war added new challenges for women: As men more often are victims of detention or forcible disappearances, many women have become heads of households. This has brought about a shift in the gender roles of Yemeni society that has triggered a patriarchal backlash, as some men feel threatened by the lack of recognition of their primary role within the family, and sometimes use violence as a means of reaffirming their power within their family unit (Amnesty International 2019d). Women activists who have played an important role advocating better rights 'have been threatened, subjected to smear campaigns, beaten and detained' (Human Rights Watch 2019h).

As for children, they have been recruited as soldiers by Houthis, paramilitary forces in Southern Yemen, the Yemeni armed forces, and even foreign powers that have been accused of bringing child mercenaries from Sudan (Varfolomeeva 2019). Children continue to be victims of the conflict

as schools are targeted by air strikes (Human Rights Watch 2019h); 1 800 schools have been declared unfit for use, leaving two million children currently deprived of primary education.

According to the United Nations Children's Fund (UNICEF) children with family links to the Islamic State (IS) fighters are among the world's most vulnerable children, as they suffer multiple forms of discrimination and stigmatisation (UNICEF 2019). The Islamic State lost its final territory in 2019 and Abu Bakr al-Baghdadi, its leader, died during an American air raid in North West Syria. This resulted in the roundup of its combatants and their families in camps. In al-Hol, the largest camp, the population reached approximately 70 000 persons in 2019, 94 per cent of which are women and children, half of the latter being under the age of 12 years (Office for the Coordination of Humanitarian Affairs 2019b). This camp is divided into two parts: The largest part hosts Syrians and Iraqis and the other section is for the families of foreign fighters, from more than 60 different countries.

The issue of IS-linked children made headlines in 2019 when some states, such as Kosovo, Australia, and France, repatriated a few hundred of these children, mainly the sick and orphans. It also drew international attention following the Turkish army's offensive in the north-east of Syria in October 2019, when Kurdish forces lost control over these camps (Save the Children 2019). These children are exposed to serious violations and live in precarious conditions, without access to clean water and healthcare assistance, overcrowding, and unsafe latrine and sewage systems. Both Save the Children and Human Rights Watch reported hundreds of deaths for malnutrition and basic illnesses (diarrhea, infections, pneumonia), in addition to serious mental and psychological diseases. These children have witnessed extreme violence and brutality, and in many cases were victims of recruitment in armed groups and indoctrination. Due to their family ties, they are subjected to stigmatisation, rejection and have difficulties in accessing services or basic needs from aid providers.

On the one hand, these children generally are seen as victims instead of perpetrators, but on the other they are perceived as a 'ticking time bomb' (Capone 2019). This is why few states have actively engaged in the repatriation of their minor nationals, and some have looked into the possibility of revoking their nationality as a measure to ban their return. Few have explored 'the only viable option to ensure their well-being and at the same time neutralise further security threats' (Ní Aoláin 2019: 3).

4.2 Stateless, refugees and internally displaced persons

This part focuses on the issues of the stateless, refugee and displaced communities in specific contexts of the Arab world, namely, the countries

of Kuwait, Syria and Lebanon. The conditions of these particular groups are common to many other countries in the MENA region. However, during the year 2019 the target areas were particularly placed under pressure due to internal imbalances or action policies adopted by neighbouring countries which directly affected the evolution of the phenomenon within domestic borders.

In 2019 outstanding cases of stateless people's protests took place in Kuwait. Between 11 and 14 July 2019 12 protesters calling for Bidoon rights in Tayma and Kuwait City were arrested (Amnesty International 2019d). Two of the detained protesters, Nawaf al-Badr and Mohamad al-Anzi, were referred to the prosecutors on 14 July and were charged with 'national security offences'. Their detention was extended for a further 21 days. The prominent human rights defender, Abdulhakim al-Fadhli, and nine others were referred to the prosecutors on 15 July and faced a range of charges including participation in unlicensed protests, the misuse of communication equipment, the spreading of false news, and other national security offences (Amnesty International 2019e). Others were interrogated but not arrested. The protests broke out after the suicide of a 20 year-old, Ayed Hamad Moudath, who endured severe hardships because of a lack of access to official documents (International Observatory of Human Rights 2019).

The Bidoon (which means 'without' in Arabic) are tribes that were not granted citizenship after Kuwait had gained independence from the United Kingdom in 1961. Their statelessness excludes them from the same social and economic rights enjoyed by Kuwaiti citizens. The situation of the Bidoon in Kuwait is only one manifestation of a regional problem, with around 500 000 people believed to be Bidoon across the whole Gulf region (Geneva Council for Rights and Liberties 2019).

In 2019 the Syrian crisis entered its eighth year, with over 6 million Syrian refugees around the world and around 6,5 million internally-displaced persons (IDMC, as of 31 December 2019).

In Lebanon, Syrian refugees witnessed a progressive degradation of their living conditions, protection guarantees and assistance standards. They faced an increasingly aggressive nationalist and discriminatory political discourse which, especially in 2019, promoted a new narrative in favour of the return of refugees to Syria. Two deportation orders were given concerning Syrians that had entered Lebanon illegally: one by the Supreme Defence Council on 15 April 2019, and one by the General Security on 13 May 2019, putting thousands of refugees at risk of persecution, arrest and deportation to Syria (The Legal Agenda 2019). Human Rights Watch reported that, according to the General Security, 2 731 Syrians were deported between May and August 2019 (Human Rights Watch 2019i). In June 2019 an ultimatum was given to Syrian refugees in North-Eastern

Lebanon to demolish hard shelters, which the authorities consider illegal constructions. Some families began to destroy their own homes and the Lebanese army intervened with massive demolitions, starting from Arsal and extending across the Bekaa Valley (Human Rights Watch 2019i). This order represented an important push factor, strongly affecting refugees and their decision to return to Syria, a tendency that increased in 2019. These decisions are 'a flagrant violation of the Constitution, Lebanese laws and international conventions: allowing deportations to be executed by incompetent authorities, without verification of the risks upon return to Syria and without granting Syrians the right of defence and to resort to the judiciary' (The Legal Agenda 2019). They represent a fundamental turning point in the Lebanese policy towards refugees.

The financial crisis in Lebanon also had a strong impact on refugees. Several programmes of aid provision and cash assistance to refugees have been terminated, leading to major difficulties in coping with the situation for people who rely solely on this support (Asharq al-Awsat 2019; Tuzi 2020).

In Syria massive displacements involved 1,8 million people in 2019, mostly due to the new offensives in the north-east and north-west regions. Most of these new evacuations are secondary or third movements for people who had already during previous years fled from their homes. In Idlib, one of the most disturbing situations reported, new attacks and destruction, including on civilian infrastructures, schools and hospitals, forced people into already-overcrowded camps and some humanitarian actors had to suspend their work. Dire conditions led to several deaths and exposed people to the need for water, food, shelter provision and healthcare assistance (Office for the Coordination of Humanitarian Affairs 2019b). The Idlib case demonstrates how events have evolved in Syria, highlighting that actual peace or the end of the conflict is far from a reality, and that Syrian people, displaced in the country or having sought refuge in neighbouring countries, remain in need of aid and protection.

4.3 Instrumentalised economic violence

Economic violence represents a form of indirect, structural and collective violence used as an instrument by a larger group against another group or set of individuals, in order to achieve political, economic or social objectives (Violence Prevention Alliance 2020). Economic violence could be exerted by the state on the people living within its borders (Kesztyus 2018), any other non-state groups, or even those from a foreign state. Conflict, corruption, misguided socio-economic policies, sanctions and embargoes all are major problems that have a very deep impact on the socio-economic situation of citizens, leading to widening the social and economic inequalities. Syria, Yemen and Iran have witnessed in 2019 a

series of economic challenges and crises that left their citizens struggling to survive. We will look into three types of economic violence: governmental, international and collateral.

4.3.1 Governmental economic violence

In times of war, economic policies may be used as weapons by governments through the re-allocation of expenditure across regions and across sectors of society. The rise in defence expenditure during conflict typically occurs at the expense of social expenditure, causing extreme hardship for the poor (Humphreys 2002). The Syrian civil war has created new opportunities for corruption for the government, armed groups, and the private sector. The regime has reinforced its network and patronage by allocating public resources and implementing policies to benefit favoured industries and companies (Freedom House 2019).

During 2019 Syrians faced a year of consecutive crises that included the gas crisis, the heating fuel crisis, and the auto fuel crisis which started in April 2019 and completely crippled movement in the streets in most of the country (Morgan 2020).The situation rapidly deteriorated in a few months' time, as most Syrians started to feel the effects of the economic crisis in Lebanon that affected bank deposits and money transfers, as well as making it difficult or even impossible to source goods (Morgan 2020). During the last week of 2019 prices increased by 50 per cent for many basic food stuffs (Morgan 2020), and the value of the Syrian currency dropped from 600 Syrian liras to around 940 pounds during the last week of 2019, for one US dollar (Xinhua 2020).

4.3.2 International economic violence

The international community uses sanctions and trade embargoes as a foreign policy weapon. This can have lethal consequences and disproportionally affect the most vulnerable sectors of society. Economic sanctions imposed by the international community to alter the policies of foreign governments are currently targeting Syria and Iran.

In the case of Syria, sanctions have been imposed on various economic sectors, including energy and financial transactions (Mehchy 2019b). On 20 December 2019 the United States President signed into law the Caesar Syria Civilian Protection Act of 2019, providing for sanctions and travel restrictions on those supporting members of the Assad regime. These sanctions increased the cost of imports and therefore raised demand for foreign currencies remittances, estimated at $4,5 million per day. Foreign investments and exports were negatively affected and the supply side of hard currencies inside Syria was reduced (Mehchy 2019b), affecting the lives of millions of citizens already fragile due to nine years of conflict.

On 20 September 2019 the US President announced a new round of sanctions against Iran's national bank, putting under further pressure the economic stability of the country (Sullivan 2019). In his words, the Iranian regime had been targeted by 'the highest level of economic sanctions' by the USA since 2018. These sanctions have had an important economic impact on the country and the government's economic and fiscal policy. The cancellation of fuel subsidies triggered extensive protests in November 2019 (BBC 2019). According to the World Bank, the inflation rate on food items has increased dramatically, particularly affecting people living in rural areas (BBC 2019). Doubts have been expressed about the efficiency of sanctions to alter policies. However, their negative impact on the lives of ordinary civilians is manifest (BBC 2019), especially the most vulnerable. These sanctions have directly impacted the 3 million Afghan refugees in Iran and the 10 million Iranians affected by the destructive 2019 floods. According to the Norwegian Refugee Council (NRC), the sanctions imposed by the US on Iran were so comprehensive that banks were unwilling to facilitate transfers for humanitarian work (NRC Iran 2019).

4.3.3 Collateral economic violence

For decades aid agencies have been accused of worsening the situation in countries undergoing conflict, not only because they generally work in contexts in which the whole system is corrupted, but also due to their need to often cooperate with perpetrators of human rights violations in order to allow the delivery of aid to local communities (Humphreys 2002). We will examine how humanitarian aid is used for economic violence in Yemen and Syria.

In Yemen the war ravaging the country has transformed it into a humanitarian disaster marked by widespread hunger, a cholera epidemic, and economic collapse (Slemrod 2020). According to recent UN figures, 80 per cent of Yemen's 24 million population need humanitarian assistance (Lee 2020). Humanitarian aid response has long been plagued by accusations of interference by both rival sides claiming that a significant amount of money and supplies are wasted and that projects and contracts are influenced by political factors (Slemrod 2020). In 2019 the Supreme Council for Management and Coordination of Humanitarian Affairs and International Cooperation managed by the Houthis issued a decree that would require two percent of all non-governmental organisation (NGO) aid budgets to go to the authorities (Lee 2020). The tax that has been proposed to cover the costs of transporting aid to civilians instead may likely be used as funding for the war (Lee 2020). In June 2019 the World Food Programme announced that it would suspend its operations in Houthi-controlled areas if the group does not agree to implement a biometrics system expected to prevent aid fraud (The New Humanitarian 2019). The lack of action to solve the problem of aid operation left 850 000

of Sana'a population without food and aid until the Houthis agreed to the conditions of international aid (Slemrod 2020). Bureaucracy, obstruction and interference are another factor in the struggle of the aid operation in Yemen. According to UN figures, the number of incidents from restrictions on movement to violence against aid workers increased from 299 to 502 between June and September 2019 throughout the country (Slemrod 2020).

In Syria, due to the nine years of ongoing civil war, more than 80 per cent of people today live below the poverty line (Makki 2018). Humanitarian aid reportedly was extended or withheld based on recipients' demonstration of political loyalty to the government (Freedom House 2019). 'According to the United Nations, government forces did not approve half of their requests to humanitarian missions nor help with monitoring, assessing and accompanying aid deliveries, and providing security, logistics and administrative support' (Amnesty International 2019e). In Rukban camp near the border with Jordan, humanitarian access was obstructed, despite the dire humanitarian conditions (Amnesty International 2019). Approximately 18 000 individuals left the camp for government-held areas. Evacuees had to pay for their evacuation, and they ended up in displacement centres. Those lacking financial resources or unable to secure transportation out of Rukban remained behind (Human Rights Watch 2020c). Corruption is also widespread in opposition-held areas. Some rebel commanders have been accused of looting, extortion and theft. Local administrators and activists complain that little of the international aid that is given to opposition representatives abroad seems to reach them, raising suspicions of illicit gains (Freedom House 2019).

5 Conclusion

Unprecedented mobilisations, in their scale, pacifism, creativity, and resilience, marked 2019, unravelling in a context of deteriorating socio-economic conditions and saturation from decades of authoritarianism, corruption and contempt. Young people and women played a leading role in challenging exclusionary powers. The number and extent of the protests movements seem to announce a second Arab Spring. Massive demonstrations took hold in six countries across the region, some bringing about the fall of the military leader and kicking off a transitional process, while others brought down the civilian government without the adoption of a clear road map that would reform the political system.

Protests across the region were met with varying degrees of violence, sometimes quelling the uprising and at other times accompanying the transition. Indeed, governments and political forces in many countries across the region consolidated their power through different means: resorting to direct repressive actions against the opposition through

the police and tribunals, or resorting to more sophisticated methods such as shifting the institutional power balance through constitutional amendments or introducing legal instruments to subvert constitutional principles, such as counter-terrorism laws, state of emergency laws and anti-cyber-criminality legislation.

The continuation of wars and violent conflicts in many countries, added to the economic challenges that many of these countries face, has considerably increased the vulnerability of many sectors of their population, notably women, children, the stateless, refugees and displaced persons. We have also looked into how economic violence is used by national and international actors to serve their purposes and how it invariably negatively impacts the most vulnerable sectors of society.

The democratic consolidation in Tunisia and the democratic transitions in Algeria, Sudan and Mauritania offer models and lessons to other countries in the region. In Sudan and Algeria protest movements became increasingly structured over time, were able to deal with the military institutions that removed the President, and succeeded in engaging the military in a transitional process. In countries such as Lebanon and Iraq the popular movements that broke out in September led to the resignation of the governments but not yet to a transitional process, while in the war-torn countries of the region very few signs of a peace transition were apparent. Only the coming year will tell in which direction the many transitions witnessed in 2019 will go, towards democratic or authoritarian consolidation.

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Selected regional developments in human rights and democratisation in the Asia Pacific during 2019: Prospects turned into plights

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Abstract: *The international community marking the anniversaries of international organisations and treaty bodies, along with the realisation of human rights bolstered by technology, opened windows for upholding human rights and democratisation in the Asia Pacific. However, despite these prospects, the use of technology as a pretext of national security and impeding freedom of expression, assembly and association, as well as increasing mob violence and lynching, suggest that the development of human rights and democratisation in the Asia Pacific continued its downward trend in the year 2019. With elections in some parts of the Asia Pacific, concerns about upholding human rights in the present and future were raised. States that have ratified human rights treaties, and are part of regional mechanisms that advocate upholding human rights, remain reluctant to fulfil their duties. Although the steps taken by regional mechanisms along the UN are positive in upholding and advocating human rights, the consequences of those steps remain unsatisfactory.*

Key words: *human rights; democratisation, Asia Pacific; technology; freedom of expression; freedom of assembly; workers' rights; elections; regional bodies*

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1 Introduction

In 2019 the international community marked the anniversaries of treaty bodies and international organisations, such as the International Labour Organisation (ILO), providing some grounds for optimism about the progress of human rights and democratisation in the Asia Pacific. During the year the status of workers' rights was re-evaluated. The year was also marked by the realisation of human rights bolstered by the advancement of digital technology. The realisation was especially evident during the protests in Hong Kong, which resonated with many. Similar protests took place in countries such as India and Malaysia. However, a number of countries were quick to impede the exercise of the right to freedom of expression by turning to digital control, internet shutdowns, and invoking restrictions on national laws based on national security. The rights of women and the lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ) community remain undervalued. International human rights standards call for societies without discrimination. Mob violence and lynching are still prevalent in parts of the Asia Pacific where people are beaten, sometimes to death, for having different religious or political views. The elections throughout the region saw the undermining of human rights and democracy. However, the actions of regional bodies and the holding of elections did bring about some positive shift in upholding human rights.

The diversity amid the shared history of existence gives the Asia Pacific region a unique prospect for upholding human rights. Realising the growth of the countries in the Asia Pacific is possible if the region together combats existing human rights issues. However, the increasing distrust towards various states, digital control over freedom of expression, obstruction of peaceful assembly and the amplification of nationalism and extremism have led to a deterioration in the plight of human rights and democratisation in the Asia Pacific. Against this backdrop, this overview summarises some of the most pertinent developments in the Asia Pacific region during 2019. The overview covers the key issues impeding the realisation of human rights in the Asia Pacific, along with new developments in the region, and also examines developments in the sub-regional organisations in the Asia Pacific.

2 Key issues related to human rights

2.1 Hundred-year anniversary of the International Labour Organisation and workers' rights in 2019

With the 100-year anniversary of the International Labour Organisation (ILO), it is timely to assess the status of workers' rights in the Asia Pacific region. Since the foundation of the ILO, there have been considerable

changes in respect of labour in the region. In the early 1900s slavery still prevailed in many parts of the region, alongside its variants of bonded labour in South Asia and indentured labour across South and Southeast Asia as well as the Pacific. Conditions for labourers were poor, and in many countries violent labour strikes were common. Child labour was widespread. Wage discrimination was pervasive, with women earning only a portion of the salaries paid to men. While the ILO may have been relatively quick to respond to these workplace violations with the conventions on minimum wages in the 1920s (Conventions 5, 7, 10 and 25), the Minimum Wage Convention of 1928 (Convention 26) and Forced Labour Convention in the 1930s (Convention 29), these treaties would not see many ratifications in the region until after World War II. Only Japan, Australia and China ratified some of these treaties before the war. Indeed, the Asia Pacific region has the lowest ratifications of the core ILO treaties, with the Convention on Worst Forms of Child Labour (Convention 182) being the only one ratified by all countries, and the conventions on freedom of association having the lowest numbers. Notably, 13 of the 20 countries around the world that have not ratified this Convention are from the Asia Pacific. Unfortunately, the low ratification record is reflected in poor labour protection across the region. This is exemplified in violations of freedom of assembly and the continued practice of trafficking and slavery. Each of these is briefly examined in this part.

The Asia Pacific region has one of the lowest rates of collectivised labour in the world, Southeast Asia perhaps being the worst region. Six of the ten ASEAN countries have unionisation rates of lower than 10 per cent and thus have the lowest rates in the world (ILOSTAT 2020). The country with the highest rate of union membership in the region is China, which is not surprising given that it is a Communist country. However, because trade unions in Communist countries are government bodies, they may not be genuinely independent. As a result, unions in Vietnam, Laos and China may not provide the best conditions for workers. In late 2019 Vietnam's Labour Code was revised to possibly allow independent trade unions, but the 48-hour week and low minimum wage remain intact (Hutt 2019). There is reluctance across the region to recognise independent trade unions and ratify the ILO conventions on collectivised labour. A major reason for this reluctance is the fact that Southeast Asia was a battleground during the Cold War. Anti-Communist regimes, which in Southeast Asia primarily were military dictatorships, were harsh on members of trade unions. Later, when the region developed economically, it used cheap labour to attract foreign direct investments, with the result that there was little incentive to allow unionisation. As a result, laws on the rights to a trade union remain weak. In South Asia, the link between unions and political parties results in multiple, competing unions (Kamala 2007: 8). In Southeast Asia, the laws on establishing trade unions often are restrictive. Both Myanmar and Thailand link unions to a workplace, resulting in many smaller unions

that are difficult to organise into collective strikes, especially in Myanmar (Zajak 2017: 4; Park 2014: 5). In Thailand a significant problem is the difficulty for migrant workers to join a trade union, even though there are around 4 to 5 million migrant workers (Chalamwong 2020).

Across the region, a second continuing problem is slavery and trafficking for labour. The Global Slavery Index considers that the major trafficking in the world occurs in the Asia Pacific, with 66 per cent of forced labour in the world present in the Asia Pacific.[1] The poor performance of the region is also found in the assessment of countries' efforts to address human trafficking, found in the annual *Trafficking in Persons Report* (US State Dept 2019). These rankings place most Asia Pacific countries in the lower tiers (tier 2 and 3) with only five countries (four from East Asia and the Philippines) found in the top tier. Five of the 22 countries from the bottom tier are from the Asia Pacific. Why has trafficking and slavery remained such a problem in the region during 2019? As mentioned above, there is a long legacy of slavery, indentured labour and bonded labour. In some areas in South Asia, this practice has not been totally eliminated, with an estimated 0,4 per cent of the working population in forced labour (ILO 2017: 6).

In response to this poor record of counter-trafficking in 2019, there have been some developments across the region. Historically, trafficking has focused on women trafficked into sexual slavery. While this may be the most exploitative form of trafficking, current data shows that it is not the dominant form of trafficking: Labour trafficking stands at 64 per cent, and sex trafficking at 19 per cent (ILO 2017). As a result, more organisations are developing counter-trafficking programmes related to forced labour. This is evident in the quite drastic change in focus of the Trafficking in Persons Report. Initially this report almost exclusively focused on sex trafficking. In the first Trafficking in Persons Report of 2001 it is stated that '[according] to reliable estimates, as the Congress has noted, at least 700 000 persons, especially women and children, are trafficked each year across international borders'. Trafficking is defined almost entirely as women and children being taken across the border for commercial sex. Compare this with the 2019 Trafficking in Persons Report, where the following conclusion appears: 'The past five years have witnessed an exponential growth in initiatives focused on eradicating exploitative labour recruitment practices, developing models for fair recruitment, and changing industry standards in hiring practices' (US Dept of State 2019: 26). The Trafficking in Persons Report, which for most of its history has been recognised as a more conservative account of trafficking focusing closely on sex trafficking, is now advocating better monitoring of the

1 There is much debate about the methodology of the Global Slavery Index in its measurements. See Gallagher (2014)

workplace and workers' rights. This change in direction is also seen in the growing role of trade unions in counter-trafficking, and the international concern about male trafficking victims, particularly in the fish processing sector. Finally, the international legal framework is strong; the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children enjoys near-universal ratification across the region; regional treaties exist in South and Southeast Asia; and most countries have harmonised their national laws to the international standards.

2.2 Digital control and freedom of expression

Freedom of expression has been protected and internationally recognised as one of the fundamental principles of human rights. It is also enshrined in the national laws as fundamental rights in many countries across the globe. The Universal Declaration of Human Rights (Universal Declaration) proclaims that all people have the right to exercise their freedom of expression, and 'hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers' (Universal Declaration art 19). In the context of globalisation, the dawn of digital media has brought out substantial achievements and opportunities. The advancement in digital technologies has helped in the realisation of human rights. However, with its benefits, the world of digitisation at the same time has brought forth some challenges. It has helped in reshaping the relationship between the authorities and the public sphere, allowing people's thoughts to be available to a diverse audience. Some people regard freedom of expression through digital media in today's context as being one of the strengths of democracy.

Rights are not always absolute. Therefore, they need to be understood in their relative terms. Freedom of expression entails duties and responsibilitie. These are subject to conditions as prescribed by law, which nevertheless must be carried out with necessity and proportionality in a democratic society in order to maintain its function and social order (Europe, 1950). Increasingly intolerant content in digital platforms, claiming to reinforce freedom of expression, poses a threat to the social order. It cannot be overlooked that governments, through digital control, try to control and limit people's right to expression. Governments in the Asia Pacific region have enacted and maintained numerous laws and policies that restrict the general public's right to freedom of information (Pacific 2019). Moreover, the arbitrary arrest, detention and prosecution of journalists and activists have become a prominent tool to silence them. Following the revocation of article 370 in India, Jammu and Kashmir saw a massive increase in government control of internet freedom (Sankalp & Fayaz, 2020). The Editors Guild of India claimed that government limited press freedom by exerting political pressure (Bureau of Democracy 2019). Media freedom came under attack in Australia when the Australian Federal Police raided

a journalist's home and a media organisation's headquarters. Anti-protest laws were enacted in Queensland, criminalising peaceful protest tactics and infringing Queenslanders' rights to freedom of expression, association and peaceful assembly (Centre 2019). Patterns of abuse with censorship in the name of national security have been used, without legal basis, by countries such as Myanmar, Philippines, Vietnam and Indonesia – resulting in a full or partial shutdown of the internet (Sivaprakasam 2019). In Nepal, Bills concerning the media council, mass communication and information technology are still under scrutiny and subject to considerable criticism with the restriction of freedom of expression (Subedi 2020).

In this sense the application of coercive laws to restrict people's freedom of expression is contrary to the norms of human rights. In recent days trends have emerged of governments curbing freedom of expression through laws imposing digital control to mitigate criticism.

2.3 Freedom of peaceful assembly

The right to freedom of peaceful association (also freedom of peaceful assembly) accompanies the right to freedom of expression. The Universal Declaration proclaims the right to freedom of peaceful assembly and association. States have a responsibility to protect individuals' right to peaceful assembly. Facilitating associations or assemblies for carrying out peaceful demonstrations to express their views freely are the core obligations of the authorities. However, governments often violate the freedom of peaceful assembly as a method of suppressing any dissent towards itself or its policies. Usually, human right defenders and journalists use online platforms to exercise freedom of expression, assembly, association along with other rights (Sivaprakasam 2019). Along with a full or partial ban on the internet, digital control of freedom of expression in Asian countries has also led to the violation of freedom of peaceful assembly. The Gulf Centre for Human Rights reported that peaceful protestors in Iraq were increasingly being kidnapped and tortured because of their participation in anti-government protests (GCHR 2019). Peaceful protests in Hong Kong with regard to the Extradition Bill to mainland China were one of the focal issues of human rights scholars and defenders. As time progressed, both the police and peaceful protests became more violent (International 2020). In Bangladesh police blocked the opposition party from holding rallies (International 2020). Countries such as India and Malaysia also put a hold on freedom of peaceful assembly and association.

Similar to the limitation on freedom of expression, governments use national security to suppress any dissent in the form of demonstration or assembly. While national security may be a legitimate concern of states, arbitrarily detaining protestors or using force against them is a violation of human rights. Principle 12 of the Basic Principles on Use of

Force allows individuals to participate in lawful assemblies. Even while policing unlawful assemblies, police must avoid using force (UNODC 1990). Governments in the Asia Pacific region have generally neglected to provide any legal basis for their crackdown on exercising freedom of peaceful assembly. This negligence demonstrates that human rights may be continuing in a dangerous pattern of continuous violation.

2.4 Rights of women and the LGBTIQ community

Women and the LGBTIQ community are marginalised and have for a long time been fighting for their rights. Many countries in the Asia Pacific have established laws and policies that protect women and the LGBTIQ community from discrimination and promote gender equality. Nevertheless, these laws and policies are not implemented properly. Eight countries in the Asia Pacific still criminalise homosexual conduct, including Myanmar, Malaysia, Singapore, Pakistan, Sri-Lanka and Bhutan. While considerable efforts are being made in Bhutan to overturn the existing rule, the law still penalises same-sex relations. Taiwan adopted legislation to recognise the rights of same-sex couples on 17 May 2019, making it the first jurisdiction in Asia to do so. It set a precedent to the other countries in the Asia Pacific in terms of protecting the minority from persecution and protecting their rights (Knight 2019).

The World Health Organisation (WTO) has removed LGBTIQ as gender identity disorder from its diagnostic manual. This step indeed is positive and liberating for transgender people worldwide (Human Rights Watch 2019a). Nepal does not require diagnoses and has improved the legal recognition. In contrast, Japan still requires a mental health diagnosis to change one's name or legal gender marker by law. This contrast in recognition of a person also shows how the interest of the citizens is not always prioritised, hindering the right of people to freely express their identity. Most countries in the Asia Pacific have ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). UN Women advocated women's land and property rights to enhance women's economic security and rights. The rights of women seem to be developing and improving, but at a languid pace. Although the law gives women equal opportunities, they are yet to be implemented. There are gaps and loopholes in national laws in terms of addressing violence against women and people of the LGBTIQ community.

2.5 Counter-terrorism and security

Terrorism has an impact on human rights with devastating consequences for the enjoyment of the right to life, liberty and integrity (OHCHR 2008). Security and the protection of every individual is a fundamental obligation of any government. Thus, they should protect their citizens

from any threat and take decisive measures to prevent against any attack of terrorism. Thus, counter-terrorism measures can affect the enjoyment of human rights. In April 2019 Sri Lanka was the victim of suicide bomb blasts in churches and hotels in three cities killing 267 people. Human Rights Watch reported that the government gave compensation to the victims and arrested persons responsible for the attack (Human Rights Watch 2019b).

On 28 March 2019 the United Nations (UN) Security Council approved Resolution 2462, which prevents and combats the financing of terrorism, and requires all UN members to criminalise financial assistance to terrorist individuals or groups. The financial assistance was to be criminalised even if the aid was indirect and provided in the absence of a link to a specific terrorist act (Terrorism et al 2017). Several attacks in the Asia Pacific have led to questions about the security and the safety of individuals. Counter-terrorism measures are being adopted with detailed scrutiny over the national laws surrounding the security of its people. The steps taken to strengthen security measures point towards a positive direction in the preservation of human rights. However, the trend of governments to use national security as pretext to suppress its opposition is disturbing. Instances such as labelling protesters as terrorist organisations, as occurred in Kazakhstan, enforce countries in the Asia Pacific to strike a balance between taking counter-terrorism measures and effectually implementing them.

2.6 Mob violence and lynching

The law provides for security in order to maintain harmony in society. However, in many cases people go beyond the law and disrupt the norms of peaceful coexistence. They do so by assembling in a violent and turbulent manner to harm, injure or even kill people without a fair trial. During 2019, mob violence affected Hong Kong, India, Sri-Lanka and Indonesia. In Hong Kong more than 400 men dressed in white T-shirts and suspected of being part of a triad society (or organised crime) attacked passengers in the Yuen Long station. These included pro-democracy protestors (BBC 2019a). In India there were a total of 107 mob lynching incidents. They were results of clashes between of extremist and religious ideologies. The criminal justice system of India has been criticised for its failure to institute a proper investigation into people involved in mob lynching. A Nepalese parliamentarian was sentenced to life imprisonment by the district court of Kathmandu for involvement in the incident where eight police personnel and a toddler were lynched in 2015 (India 2019). There was an eruption of violent mob attacks against members of Sri Lanka's Muslim minority and migrants after the 2019 bomb blast (Human Rights Watch 2019b).

Mob violence and lynching in the Asia Pacific saw the violation of people's enjoyment of their right to life and dignity along with other human rights. Violence and lynching against a minority or a party bearing contrasting views are prevalent. These instances of violence question the countries' efforts to combat systematic violence and protect individual's rights.

3 Democratisation

3.1 Overview of democratic trends

As far as democratisation is concerned, it has been a mixture of regression and progression, as a global trend, including in Asian countries (The Economist 2020c). The regression has taken the form of increased populism in leadership marked by the exclusion of minority groups, prioritising pragmatic economic policy over political rights, and an increase in undermining freedom of expression. This part explores the main trends in democracy in Asia, which covers democratic trends and elections. Democracy is seen from five main indicators, namely, electoral process and pluralism; the functioning of government; political participation; democratic political culture; and civil liberties. These criteria are often used in democracy assessment (The Economist 2020c).

Freedom of expression is a foundation of democracy. Yet, during 2019 many Asias states shut down internet connections in conflicting areas to limit the spread of firsthand news to the public (Human Right Watch 2020a). They often did this under the pretext of public security and to minimise disinformation commonly spread during the crisis. Shutting down connections is a new form of censorship, and this is an obstacle to maintaining a democratic culture. Some social unrest occurred in Indonesia, for example in May 2019, shortly before the official announcement of the election result. The violent unrest led to the death of six people. During the conflict in Papua (Eastern Indonesia) the internet connection was throttled and shut down. This shut-down affected the entire country, as WhatsApp was difficult to access (*The Jakarta Post* 2019). Under the pretext of curbing disinformation the Indonesian government did this. In the Papuan case, an Indonesia journalist from the Independent Alliance protested and argued that shutting down the internet in Papua had worsened disinformation (Idris 2019).

Myanmar did the same during the conflict in Rakhine and Chin State for months (Thu Thu and Sam 2020). The UN Human Rights Council condemned this by stating that it is a violation of international human rights law to intentionally prevent or disrupt access to or dissemination of information through online platforms. The Bangladeshi government issued

the Digital Security Act (DSA) in 2019. This Act controls and monitors not only media but also bloggers, writers and commentators on social media. This has created a 'climate of fear in the industry' as mentioned in the Reuter's report (Choudhury 2019). After the bombing in Srilanka in Easter 2019, the government shut down Facebook, WhatsApp, Instagram, YouTube and Snapchat to stop the spread of misinformation. The Act also allows arrest without warrant. The Chinese government demanded that the creators of a messaging and browser application company include government filtering (Human Right Watch 2020a). In a nutshell, in many countries in Asia freedom of expression is under threat. The trend of shutting down internet connections seems to have become a pattern to solve ongoing conflicts in many countries in Asia based on national security and curbing disinformation. With the rise in importance of online news, shutting down the internet certainly lead to a serious erosion of freedom of expression.

India, the largest democratic country in the world, was exposed to severe criticism that some of its decisions had a bias towards majority groups, neglecting minorities. The decision to end the 70-year special status of Jammu and Kashmir provinces in North East India, on the border with Pakistan, under the pretext of a security issue was subjected to ambivalence and criticism in the international community (*The Economist*, 2019a). The reluctance of the Assam provincial government to acknowledge the citizenship of two million Muslim people in the National Register Citizens (NRC) programme is also matter for condemnation (*The Economist* 2019b). The enactment of the Citizenship Amendment Bill (CAB), according to critics, aims to marginalise Muslims (BBC 2019c).

A lack of protection of ethnic minority groups in Myanmar was perpetuated in 2019. The Myanmar national election takes place in 2020, but many experts speculate that the NLD Party, led by Aung San Suu Kie, will have a similar political orientation towards minority groups. Human Right Watch (2020c) reports that the South Korean government has not done enough to protect sexual minority groups (LGBTs), due to pressure from Conservative Christian anti-LGBT groups. A pride parade was cancelled in Busan due to a lack of permits. Nevertheless, the Constitutional Court has decriminalised abortion, marking significant progress. Duterte of the Philippines continues to terrorise his own citizens through the war on drugs.

3.2 Elections and democracy in Asia

At least four countries in Asia held their elections in 2019: Thailand, Indonesia, Philippines and India (*Nikkei Asian Review* 2019). A trend of 'illiberal democracy' is evident in many Asian countries, including in the Philippines, Indonesia and Sri Lanka, which saw the return

of Gotabaya Rajapaksa to politics (Crabtree 2019), as well as in India. These 'illiberal democracies' are marked by at least three features, namely, prioritising economic development over human rights principles (such as the protection of minority groups and ensuring political rights); the centralisation of power in the executive body; and a strong presence of family or oligarchy power that controls politics.

In Thailand, Prime Minister General Prayut Chan-o-cha won the election and started serving his second term. According to Human Right Watch (2020b) he is likely to continue his disregard for human rights principles, as has occurred in his five years of military rule. The military junta restricts freedom of expression. Many activists, academics and public figures have become victims of human rights violations. A new progressive party, and anti-military junta called Phak Anakhot Mai, known in English as the Future Forward Party, was born. Thanathorn Juangroongruangkit, a young politician with a business background, founded the party together with academics from Thammasat University. Three million people, predominantly youths, voted for this party. This new party garnered 65 seats which brought high hopes, although the Constitutional Court disbanded the party in February 2020. The party is accused of violating election regulations, specifically financial rules, to overthrown the kingdom of Thailand. However, the court found no evidence of the latter (Gunia 2020).

Indonesia also held its elections in 2019. Joko Widodo continued his second term after having been re-elected, defeating his contender Prabowo Subianto and Sandiaga Uno, with a margin of 1 per cent. He continued his first term programme focusing on economic development through a giant project of infrastructure development. In the social arena, there has been an increase of social polarisation based on Islamic conservatism in the form of intolerance towards diversity (Savirani 2020).

President Duterte of the Philippines held his mid-term election. He still has a high approval rating of 78 per cent, despite having procrastinated on infrastructure projects, and farmers' dissatisfaction on rice import policies (Bautista 2020: 275). Duterte has focused on building 'state-building fundamentals' including public order, infrastructure and service, over a values-based agenda such as human rights.

An incumbent also won the election in Afghanistan, which took place in September 2019. Afghanistan is a country with 37 million people, of whom only 9,3 million are registered to vote, and the voter turnout was a mere 25 per cent of registered voters. Mr Abdullah won the election by defeating Ashraf Gani. The low voter turn-out is explained by the security issue in the country. The Taliban has threatened to attack polling stations. Citizens also felt a lack of enthusiasm for the candidates (BBC 2019b). The local election in Hong Kong was a subject of great interest with the

ongoing protest for the withdrawal of the Extradition Bill and the standoff between police and students in the days leading up to the election.

Violence, albeit isolated, during elections violates the electoral rights of people. The suppression of journalists and attacks on campaigners, the opposition and peaceful protestors also violate people's right to engage in the political sphere. The curtailment of freedom of expression, movement and assembly of its opposition, critics and human rights defenders by the existing government constitutes the violation of human rights and a threat to democratisation. From the overview above, it is evident that elections, as one indicator of democracy, are held in a relatively peaceful manner. However, these peaceful elections only serve a minimum impact on human rights practice. What has happened seems to be a parallel of stronger institutionalisation of election and an increased trend of human rights abuse by the state.

4 Update on regional bodies

4.1 Association of Southeast Asian Nations

The ten-member Association of Southeast Asian Nations (ASEAN) was established in 1967. Its Intergovernmental Commission on Human Rights (AICHR) gives abundant references to upholding and protecting human rights, but human rights protection is porous in the region (Kliem 2019). As noted above, many countries in the region continue to violate rights, but this is not addressed by the Commission: Cambodia held people in detention on politically-motivated convictions; Indonesia saw an uprising in the West Papua provinces; Myanmar has the Rohingya crisis; and Singapore, Thailand and the Philippines restrict freedom of expression, using existing laws to penalise people (Post 2020). The 34th ASEAN Summit highlighted many human rights violations taking place across the region. However, even with the AICHR in place, the non-interference and respect of the ASEAN countries have failed to address the human rights violations prevalent in the region.

4.2 South Asian Association for Regional Cooperation

The South Asian Association for Regional Cooperation (SAARC) marked its 35th anniversary in 2019. The association was established to strengthen collective self-reliance, promote active collaboration and mutual assistance and promote South Asian welfare. SAARC is one of the oldest, trusted and respected association in Asia, yet its functions concerning the protection of human rights in South Asia remains unsatisfactory. Human rights violations manifested in diverse gruesome forms such as torture, arbitrary detention, extra-judicial killings, forced labour, child marriage,

which are widespread in the region (Junejo 2017). All these human right violations prevail over democratisation. Often criticised for the lack of a human rights mechanism in SAARC, the failure to address the same depicts its inadequate role in addressing these violations. The principle of non-interference and the exclusion of contentious issues enshrined in the SAARC Charter (article 2) possibly is one of the reasons why SAARC still has not adopted a necessary mechanism to address the violation of human rights. A lack of unanimity on the part of the SAARC nations to hold and attend the already deferred SAARC Summit exhibits its idleness regarding critical issues surrounding South Asia.

4.3 Pacific Island Forum

In 2019 there were significant developments in the area of human rights in the Pacific Islands States. Fiji was appointed to the Human Rights Council (HRC), the very first time a Pacific Island national has taken up a position on the HRC (Kumar 2018). It won the election with a firm majority of 187 votes. Although there were no competing countries for its position, Fiji was the only Asia Pacific state that stood for the election which did not release any voluntary pledges. In the 2019 elections for positions to be taken up in 2020, the Marshall Islands joined Fiji as the second country elected, winning in a competitive election that saw Iraq as the Asia Pacific country which did not receive the necessary votes. Upon entrance to the HRC, Fiji has ratified two core treaties, the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) and the Convention for the Protection of All Persons from Enforced Disappearance (CED). This reflects positive movements towards ratification of human rights treaties across the Pacific with Kiribati and Samoa ratifying the Convention against Torture (CAT), and the Marshall Islands (probably to ensure its election to the HRC) ratifying CERD, the CEDAW Optional Protocol, and two protocols to the Convention on the Rights of the Child (CRC) on the Sale of Children and Individual Communications. The five core treaties and three optional protocols that were ratified across this region go some way towards reducing the abysmal record of ratification from the Pacific Islands. Across the Pacific, except for the Marshall Islands, states have ratified nine or fewer of the 18 treaties and optional protocols, which is one of the worst records of ratification for a region in the world. Another development in Fiji was the establishment of the Institute of Human Rights Research in cooperation with the Office of the High Commissioner for Human Rights (OHCHR), the University of Fiji, and the Pacific Island Development Forum. The Institute will be a research centre and forum for debate around human rights issues (RNZ 2019). There is some debate about the efficacy of the Institute, given that Fiji has a low tolerance for freedom of expression and criticism of the government. Fiji also faces criticism about police brutality, with 129 cases reported in

2019 (Xinhua 2019). Both these issues were discussed when Fiji had its Universal Periodic Review in November 2019.

The Pacific Island Forum (PIF) celebrated its 50th meeting in Tuvalu in August 2019. The PIF does not prioritise human rights as there is no body directly responsible for rights. However, rights issues are discussed as part of critical issues for the region, including climate change, the situation in West Papua and the impact of nuclear testing in the region (PIF 2019). These are the only instances where human rights were mentioned in the 50th PIF, as human rights are viewed more as a diplomatic tool. Human rights organisations in the region raise other critical issues such as poverty, migrant worker rights, violence against women and police brutality. However, these matters are not part of the discussion and planning by the PIF.

5 Update on role of United Nations

Countries in Asia-Pacific are progressing on a path of holistic development. A majority of the countries are members of the UN and are also party to several UN treaties. CEDAW and CRC are essential treaties that protect human rights of the most vulnerable and marginalised group. Many Asia Pacific countries have ratified these treaties, although the human rights situation of women, the LGBTIQ community and children's rights is deplorable. The refugee crisis in this region is yet to be adequately handled. Children in the Asia Pacific region are vulnerable to gross violations of their rights, including violence, sexual exploitation, trafficking and being involved as child labourers. On the 30th anniversary of CRC, ASEAN and its member states have joined with the United Nations Children's Fund (UNICEF) to highlight ways in which to consider how children's rights across the region can be met.

Although there are several human right treaties to which the Asia Pacific countries are party, only a few people across the region benefit from exercising their rights.

6 Conclusion

The elections and re-elections of the governments in the Asia Pacific countries coupled with the marking of essential dates in the international and regional community gave a faint glimmer of hope for upholding human rights and the trends of democratisation. The realisation of human rights was evident through the cohort of people involved in human rights activism and the use of peaceful assembly for protests. This realisation bolstered through the advancement of technology. These developments were conceived as prospects that would serve as the windows to upholding human rights and development in the Asia Pacific. However, while

important events and dates were being marked; the reality of the situation looked grim. Despite the continuous demand to improve workers' rights in the Asia Pacific, it maintains the lowest rates of collectivised labour in the world.

Legislation and policies were adopted under the pretext of national security and combating terrorism only to impose digital curbing people's freedom of expression and freedom of peaceful assembly. The rights of women and the LGBTIQ communities require proper implementation mechanisms despite the laws enacted in some countries. However, in some societies the LGBTIQ community is still being disrespected. Women still face stigma despite the collective efforts of the legal and social communities. Minorities' rights are in peril, with mob violence and lynching directed towards them. The regional mechanisms at times show signs of progress. However, the geopolitical nature of relationship tends to backtrack the crucial aspect – human rights and democratisation.

Every time it seems as if the countries in the Asia Pacific would collectively take a step forward in the protection of human rights and towards greater democratisation, they take two steps back by allowing prejudice to flourish, by maintaining a lack of human rights mechanisms, and by curbing accountability in the Asia Pacific. Such was the case in the year 2019. The development of human rights and democratisation in the Asia Pacific saw prospects turning to plights.

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