

# Recent developments in sub-Saharan Africa during 2018

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**Abstract:** *This article highlights selected developments in democracy and human rights in Africa during 2018. While highlighting the progress that Africa has made in relation to democracy in countries such as Ethiopia, Angola, South Africa and Sierra Leone, it demonstrates how the situations in Uganda, Cameroon and Togo continued to be an attack on democracy. It also explains how, despite the lack of focus on democracy in the African Continental Free Trade Agreement, this Agreement can lead to more democratic governance with respect for the rule of law in African countries. It then focuses on developments within the African Commission on Human and Peoples' Rights, the African Court on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child. In 2018 these judicial and quasi-judicial human rights institutions have handed down decisions or adopted soft laws with a view to better protecting human rights across the continent.*

**Key words:** *democracy; human rights; African Commission on Human and Peoples' Rights; African Committee of Experts on the Rights and Welfare of the Child; African Court on Human and Peoples' Rights; communications*

## 1 Introduction

This article highlights selected developments regarding democracy and human rights in Africa in the year 2018. It first analyses accounts of progress, recession and stagnation concerning democracy at the African level. Second, it assesses developments within the judicial and human rights institutions of the African Union (AU), including the African Commission on Human and Peoples' Rights (African Commission), the African Court on Human and Peoples' Rights (African Court) and the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee). The final part concludes the article.

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## 2 Democracy in Africa in 2018: Accounts of progress, recession and stagnation

On a continent comprising 55 countries a single, overarching story is unlikely to make much sense on any theme, much less on the contested concept and practice of democracy. In 2018, as before, the tale of democracy was mixed, with some countries on the continent witnessing gains, others recession and many stagnating. Freedom House (2019: 12) captures the diverse dynamics aptly, noting both 'historic openings' and 'creeping restrictions'. According to the rankings for sub-Saharan Africa, 18 per cent of the population live in countries that are categorised as 'free', 43 per cent in 'partly free' and 39 per cent in 'not free' countries.

This part provides a snippet of the most notable accounts of democratic progress and set-back on the continent during 2018. While the focus is on countries with significant movements in the democracy spectrum, it is also important to mention developments in some countries with critical implications. In particular, in May 2018 Mozambique amended its Constitution to implement a token of decentralisation of political powers with a view to responding to regionalised political preferences and to enable the end of intractable, long-running low-level conflict (Kössler 2018). These changes could enhance political inclusivity, participation and accountability. Tunisia's local elections in May 2018 returned almost half female local council members and more than 37 per cent youth members, thanks to a new election law (Mekki 2018). In July 2018 Zimbabwe for the first time in four decades held elections without long-time leader Robert Mugabe (Feldstein 2018). Burundian President Pierre Nkurunziza has pledged to step down at the end of his current term, guaranteeing a peaceful change of faces at the top (News24 2018), despite the adoption of a new Constitution that potentially allows him to again run for office. In contrast, in May 2018 President Azali Assoumani of Comoros orchestrated a constitutional amendment allowing him to run again and concentrating power in the national government and the presidency (Parmentier 2018). He was re-elected in a controversial election in July 2019 that saw leading opposition figures arrested. While the excitement often is focused on the obvious examples, these and similar developments contribute to or undermine the reach, inclusivity and consolidation of democracy, and therefore deserve continued mention.

### 2.1 Hopes for democratic progress

The year 2018 witnessed notable high-profile changes of leadership in many corners of the continent, from South Africa to Ethiopia and from Angola to Sierra Leone. According to Freedom House's 2018 Freedom in the World report, three of the six countries that recorded most progress in the world are from Africa (Angola, Ethiopia and The Gambia). These changes of faces in the highest political offices have sparked hope and momentum for democratic gains.

Perhaps the most dramatic account of political transition in 2018 occurred in Ethiopia. Following months of protests and intra-party power struggle, Hailemariam Desalegn resigned as Prime Minister in February 2018, and in April 2018 Parliament confirmed Abiy Ahmed as the replacement (TRT World 2018). The new Prime Minister ordered the release of political prisoners, recognised opposition groups as legitimate

political contenders, invited exiled politicians to the country and initiated a reform drive that has captured continental and global eyes. Abiy also appointed women to half of the cabinet positions, and saw the appointment of the first women president, chief justice and head of the National Electoral Board. Crucially, an advisory council was established under the office of the Attorney-General to reform laws critical to democratic dispensation, including the election law and the law establishing the Electoral Board, as well as laws governing civil society organisations (CSOs), the media and terrorism. The much-criticised CSO law has been replaced and a new law regulating the Electoral Board has been adopted. New election and media laws are also in the pipeline and are expected to be adopted before the next elections, planned for May 2020. In the meantime, new private printing and broadcasting media have mushroomed and prominent exiled media houses have established offices in the country. The Committee to Protect Journalists announced that at the end of 2018 Ethiopia had no journalists in prison, the first since 2004 (Dahir 2018). However, the ongoing transition has not been without hiccups and its success is far from certain. The loosening of government control has led to serious instances of breakdown of law and order, mob justice, inter-ethnic competition and conflict and large-scale internal displacement. This situation has led to the postponement of the national census and has prompted calls for the delay of the May 2020 elections, with unpredictable consequences for the country's democratic trajectory. The government of Abiy Ahmed must find ways of taming unprecedented levels of ethnic nationalism and mobilisation and re-establish its monopoly of violence to provide a stable basis for democratic transition.

Another country that has seen an unprecedented change of leadership is Angola. After 38 years in power, President Dos Santos stepped down in August 2017 and, in September 2018, resigned as head of the ruling party, People's Movement for the Liberation of Angola (MPLA). After taking power under largely low expectations, his replacement, President Joao Lourenco, has taken significant measures most notably against corruption and the dismantling of the extensive economic empire of the family of the former President, as well as in enhancing the level of judicial independence (Powell 2018). Progress in the overall democratic trajectory would require measures to ease systematic pressure and disadvantages on opposition groups, CSOs and the media.

While Ethiopia and Angola's status in Freedom House's democracy index remains 'not free', the two countries received specific mention as among the most improved in 2018.

After years of scandals involving corruption and mismanagement, President Jacob Zuma of South Africa was forced to resign from his position in February 2018. The ruling party, the African National Congress (ANC), orchestrated the transition, which (re)confirmed the capacity of constitutional and political institutions to manage the contested but largely orderly transition. Zuma's replacement, Cyril Ramaphosa, who has been beleaguered by a controversial political past, notably in connection with the killing of miners in Marikana in 2012, nevertheless is seen as a reformer (Jeffery 2019). In the April 2019 elections the ANC, with Ramaphosa as the flag-bearer, won a parliamentary majority. Parliament subsequently confirmed Ramaphosa as President (Al Jazeera 2019). An advance in South Africa's democratic

credentials would require significant introspection and the dismantling of the political culture, institutional environment and impunity that has allowed and enabled the thriving of high-level corruption.

While the transitions in the above three countries occurred within the same ruling parties, Sierra Leone witnessed the ascendance into power of the main opposition party (Al Jazeera 2018). President Ernest Bai Koroma was barred from running for President due to term limits. Despite reports of attempts to remove term limits, Koroma stepped down as constitutionally required. His party therefore had to nominate a replacement to run for the March 2018 presidential election. Samura Kamara was nominated as the flag-bearer of the ruling party but lost to the main opposition candidate Julius Maada Bio in a run-off election. The Sierra Leonean story affirms the importance of term limits in enhancing the chances of democratic transition and consolidation. Evidence suggests that the chances of victory of opposition groups are higher in cases where the incumbent President does not run for election (Posner & Young 2018). Term limits help to break the 'incumbency advantage' and provide opportunities for relatively free and fair elections and democratic transitions.

## 2.2 Democratic stagnation and recession

The signs of progress in some African countries have been accompanied by stagnation and recession in others, especially those under long-term incumbents.

Hopes for democratic transition in Uganda have been dashed following a constitutional amendment that removed age limits on presidential candidates to allow long-time incumbent President Yoweri Museveni to run unencumbered (Ssemogerere 2018). Museveni has ruled Uganda since 1986. In 2005 he orchestrated the removal of presidential term limits to enable him to run again. The latest amendment, which the courts have found compatible with the Constitution (Biryabarema 2019), implies that Museveni is likely to lead the country for the foreseeable future. The ease with which Museveni has deployed constitutional amendment procedures to undermine limits on the presidency demonstrates the need for stronger protection of certain vulnerable constitutional provisions (Abebe 2019). In combination with attacks on opposition hopefuls, notably musician-turned-politician Bob Wine, and restrictions on the media and CSOs, Uganda has effectively cemented its authoritarian reputation, as evidenced in the transition from 'partly free' to 'not free' in the Freedom House categorisation.

Another long-time ruler, Cameroon's Paul Biya, was declared the winner of the presidential elections in October 2018 (De Marie Heungoup 2019). The 86 year-old President is now serving his seventh term and has ruled the country since 1982. Despite his old age, there are no public talks of succession and the consequences of a sudden passing of the ageing President remain unpredictable. Biya's regime has successfully undermined opposition groups and independent voices, undermining any hopes for a democratic future. These challenges to democratic progress have exacerbated tensions arising from demands for self-determination from Cameroon's Anglophone regions. The inability of the political process and state institutions to resolve the tension has led to an intractable armed conflict and a brutal state crackdown on Anglophone regions. Cameroon's

long-term stability requires significant willingness and efforts to address the related twin problems of democratisation and a level of autonomy and inclusion for all groups.

Hopes for democratic progress have also faded in Togo, which since August 2017 has seen significant popular protests. The main protest demand has been an end to the rule of the Gnassingbé family, which has governed the country for decades. President Faure Gnassingbé took power following the passing of his father, the long-time leader Gnassingbé Eyadéma. Opposition groups have been seeking the reinstatement of the 1992 Constitution which imposed two term limits on the presidency and the stepping down of Faure Gnassingbé, as well as reforms to several critical institutions, including the electoral commission and constitutional court, as a precondition for free and fair elections (Bado 2019). Nevertheless, the Togolese government resisted these reforms and instead proposed constitutional reforms that could keep Faure Gnassingbé for at least two more terms. An initial attempt to enact these amendments failed in September 2017 as the ruling party could not garner the necessary parliamentary vote to avoid a referendum on the proposals. While the government indicated that a referendum would be held, this did not materialise. Following the mediation efforts of the Economic Community of West African States (ECOWAS), plans were made for institutional reforms and delayed elections. However, the necessary constitutional and institutional reforms were not enacted and opposition groups boycotted legislative elections organised in December 2018. Under pressure from ECOWAS, the government postponed the planned referendum on constitutional amendments. Nevertheless, the opposition boycott allowed the ruling party to achieve a landslide victory in the December elections giving it the required numbers to amend the Constitution without the need for a referendum. Indeed, in May 2019 Parliament overwhelmingly approved the amendments (*Daily Mail* 2019). Under the amendments Faure Gnassingbé can run for two more terms. The amendments also give full immunity to all ex-presidents and limit the term of parliamentarians to two six-year terms. The changes have provided a veneer of constitutional legitimacy and consolidated Togo's authoritarian regime.

### **2.3 The African Continental Free Trade Agreement and prospects for democratisation**

Perhaps the most notable progress at the African level in 2018 was the adoption of the African Continental Free Trade Agreement (AfCFTA). Following the deposit of the required number of 22 ratifications, the Agreement entered into force in May 2019. As at June 2019, 24 countries have ratified and 52 of the 55 African countries have signed the Agreement. While the principal focus of the Agreement is the facilitation of trade in goods and services, it is likely to have implications for the rule of law, democracy (Fagbayibo 2019) and anti-corruption (Iheukwumere 2019) measures. Despite the lack of explicit reference to adherence to democratic norms in the Agreement, the successful implementation of cross-border trade requires confidence in the legal systems of each country. The existence of rule of law and anti-corruption measures are necessary for the equal treatment of businesses from across the continent. In the long term, rule of law measures could facilitate the conditions for democratic consolidation. Accordingly, the potential implications of the implementation of the Agreement to democratic consolidation requires

further engagement among policy makers, academics and research institutions.

### 3 Judicial and human rights institutions at the African Union level

The African Union (AU) has three judicial and human rights institutions, namely, the African Court, the African Commission and the African Children's Committee. This part elaborates on selected developments within each institution during 2018.

#### 3.1 African Commission on Human and Peoples' Rights

Following the declaration of the AU Assembly in June 2016 regarding 2017-2026 as the Human and Peoples' Rights Decade in Africa, the period under review has seen a renewed commitment by a number of states towards fulfilling their obligations under the African Charter. The various measures undertaken by member states are due in part to the active role played by the African Commission as the premier organ in the promotion and protection of human rights in Africa. However, backsliding by several states and the ensuing rise of attacks on the Commission's independence underscore the still persistent gaps in its legal and administrative structure and its tenuous footing within the broader AU framework.

For the specific period under review, several crucial developments were identified as relating to the work of the African Commission. In its biannual Activity Reports for 2018, namely, the 44th and 45th Activity Reports, the African Commission highlighted various positive and negative developments concerning human rights in Africa. Specific areas of focus in this respect concern the ratification or lack thereof of international instruments by member states to the African Charter, the adoption of national laws as well as general state conduct. Additionally, the Commission often lists communications considered during these periods and publishes the contents of those decided on the merits or otherwise finalised.

As relates to its protective mandate, specifically the consideration of communications/complaints, during the period under review the African Commission was seized of 41 communications, issuing provisional measures in seven; declared around nine communications admissible and two inadmissible for non-exhaustion of domestic remedies, among other factors; and decided two communications on the merits.

Only one of the two communications decided on the merits, *Kwoyelo Thomas v Uganda*, was publicly available. The complainants alleged therein that the victim (Thomas Kwoyelo) was a child soldier, abducted by the Lord's Resistance Army (LRA) in 1987 in Northern Uganda. The complainants further alleged that in March 2009 the victim was shot and severely wounded on the battlefield in the Democratic Republic of the Congo (DRC). The victim was also allegedly abducted from a hospital while recovering from his injuries and held at a private residence in Uganda, where he was subjected to torture and inhumane treatment for three months, and denied access to legal representation and next of kin. In June 2009 and August 2010 the victim was charged with several offences under the Ugandan Penal Code and the Ugandan Geneva Conventions Act

of 1964 respectively. Consequently, the victim applied for amnesty under Uganda's 2000 Amnesty Act. The Ugandan Amnesty Commission declared that the victim was eligible for amnesty but Uganda's Director of Public Prosecutions (DPP) refused to issue an amnesty certificate. The matter was brought to the attention of the Ugandan Constitutional Court, which decided in favour of the victim declaring that he qualified for amnesty and called for the cessation of the trial against the victim.

In response, the Ugandan government filed two applications with the Supreme Court seeking an interim order for the stay of execution of the consequential orders arising from the Constitutional Court's decision. Notwithstanding this, the International Criminal Division of the High Court of Uganda (ICD) proceeded to discontinue the victim's trial but Uganda refused to release the victim from detention. The High Court thereafter issued an order of *mandamus* to compel the Chairperson of the Amnesty Commission and the DPP to grant amnesty to the victim, to no avail. On 30 March 2012, the Supreme Court of Uganda stayed the execution of all consequential orders arising from the decision of the Constitutional Court. The complainants argued that the said decision of the Supreme Court had been adopted without reason and that the lack of quorum led to delays in finalising the appeal, thereby prolonging the victim's indefinite detention. Accordingly, the complainants alleged violations of the rights to equal protection before the law, non-discrimination, liberty and security of the person, as well as the right to be protected from torture, cruel, inhumane and degrading treatment as guaranteed in articles 2, 3, 4, 5, 6, 7(1)(a), (b), (d), 16 and 26 of the African Charter.

In its analysis, the African Commission observed that the victim had been captured while in active combat, during a non-international armed conflict, and thus the African Charter and the rules of international humanitarian law (IHL) would have concurrent application in the matter. The African Commission reasoned that in such instances it would only find violations on the African Charter but that the rules of IHL would serve as the standard for assessing the alleged violations. On the alleged violation of article 3, the African Commission observed that the victim was the only defendant before the Ugandan Amnesty Commission whose application had been rejected even though the amnesty requests of 24 000 other applicants had been granted. Additionally, the African Commission observed that Uganda's Amnesty Act provided blanket amnesty for those who 'renounced rebellion' notwithstanding the nature and seriousness of their crimes. Accordingly, the African Commission found a violation of article 3(2) of the African Charter due to Uganda's differential application of the Amnesty Act which, it claimed, occurred 'without any reasonable justification or explanation'. The African Commission also held that the state violated article 7(1)(a) and partially violated article 7(1)(d) of the African Charter due to the failure of the Supreme Court to provide reasons for staying the execution of the orders of the Constitutional Court and the unjustified delay in the hearing of the appeal before the Supreme Court. The African Commission found that the state had not violated articles 4, 5, 7(1)(b), (d), 16 and 26 of the African Charter as the complainant's claims therein were not reasonably established/supported.

Notably, the above communication is the first instance where the African Commission addressed the issue of amnesties in detail. The

African Commission in the section referenced as *obiter dictum* addressed the compatibility of the use of amnesty with the rights guaranteed in the African Charter. The Commission held that 'blanket or unconditional amnesties that prevent investigations ... are not consistent with the provisions of the African Charter', particularly where perpetrators are alleged to have violated those serious crimes referred to in article 4(h) of the AU Constitutive Act. The African Commission's jurisprudence in this respect serves as an important normative development in the area of transitional justice. Additionally, the African Commission's decision to address in *obiter* a matter otherwise unrelated to the contentions between the parties provides an exciting avenue for the development of African human rights jurisprudence, specifically those issues that are rarely litigated.

### 3.1.1 Positive developments

As regards positive developments, the African Commission highlighted the ratification of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol) by South Sudan, Ethiopia and Tunisia as increasing the number of state parties to 42; the ratification of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons (Older Persons Protocol) by the Kingdom of Lesotho; and the ratification of various United Nations (UN) instruments by state parties, including the Republic of The Gambia, which also deposited its declaration under article 34(6) of the Protocol to the African Charter on the Establishment of the African Court, enabling individuals and CSOs to directly refer matters to the Court.

Another aspect of the African Commission's work relates to the normative development of the law under the African Charter. The most important normative developments in the respective period were its adoption of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Citizens to Social Security and Protection (Social Security Protocol); and the Study on Transitional Justice in Africa, which provides much-needed guidance to state parties on fulfilling their obligations under the African Charter during periods of transition. Additionally, the AU Assembly adopted the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa (African Disability Rights Protocol) in January 2018. The two Protocols serve as landmark instruments and were developed in collaboration with the AU Commission. Indeed, the adoption of the Disability Rights Protocol illuminates an oft-misunderstood field of human rights while the Protocol on Social Protection, once adopted by the AU Assembly, will effectively contribute to extending coverage for the vast majority of people in Africa that are otherwise not covered by any social protection provisions. Disturbingly, however, the use of 'citizens' in the title of the Social Protection Protocol seems to exclude other classes of persons. Bearing in mind the often-deplorable conditions of non-citizens in African states, the seemingly restrictive application could have deleterious effects. However, pending adoption by the AU Assembly and subsequent publication of the Protocol, the nature and effect of the prospective qualification cannot be appropriately discussed.



With regard to national judgments and the adoption of national laws, the African Commission highlighted the abolition of the death penalty in Burkina Faso and the proposed abolition in The Gambia; the decriminalisation of abortion in Rwanda; the adoption of a law against racial discrimination in Tunisia; the decriminalisation of defamation in the Kingdom of Lesotho and Rwanda, including the enactment by Seychelles of the Access to Information Act; the promulgation of a new Mining Code by the DRC in March 2018; and the decision of the High Court of Kenya in April 2018 which held that the installation of the Device Management System on mobile phone platforms would breach privacy and consumer rights. The Commission also highlighted the peaceful presidential elections in Egypt, Liberia and Sierra Leone, including the publication of an election date in the DRC.

### 3.1.2 *Areas of concern*

The areas of concerns highlighted in the African Commission's Activity Reports were the continued non-ratification of its instruments, the low levels of state reporting under the African Charter and the African Women's Protocol and the sparse implementation of its decisions and recommendations on communications/complaints, provisional measures and letters of urgent appeal. Substantive issues included the rise in conflict-related violations in Cameroon, Mali, Somalia, Libya and other parts of the Sahel; the extension of the death penalty in Mauritania and its continued use in Botswana, Egypt, Nigeria, Somalia and Sudan; attacks on press freedom in Kenya, Benin, Gabon and Mali, including the persistent shutting down of the internet and social media in Ethiopia, Chad, Cameroon and the DRC. Other issues included the humanitarian crisis in refugee camps in Cameroon following the flow of refugees from Nigeria and Central African Republic; post-electoral protests following the recent presidential elections in Mali; xenophobic attacks in South Africa; and frequent reprisals against human rights defenders in the DRC and Egypt. Structurally, due to inadequate staffing the African Commission continues to struggle to implement its mandates, an issue that has less to do with inadequate finances and more to do with the sluggish recruitment processes at the AU Commission. Consequently, the African Commission has failed to recruit a single staff member under the Pan-African Programme (PANAF) notwithstanding funding from the European Union (EU) for this purpose. The African Commission has repeatedly requested autonomy in recruiting staff, to no avail.

Another pressing concern relates to recent questions surrounding the African Commission's independence following its withdrawal of observer status from the non-governmental organisation (NGO) Coalition of African Lesbians (CAL). The African Commission's decision was adopted pursuant to Executive Council Decision EX.CL/Dec1015(XXXIII) of June 2018 on the recommendations of the Joint Retreat of the Commission and the Permanent Representative Council (PRC) which reiterated previous requests by the Executive Council for the withdrawal of CAL's observer status. Notably, where previous Executive Council decisions had requested the same, the African Commission had responded by avowing that CAL's observer status was 'properly' obtained and that the African Commission was committed to protecting the rights in the African Charter 'without any discrimination because of status or other circumstances'. Following a backlash against the African Commission by AU policy organs over the

Commission's perceived recalcitrance, the latter was requested to hold a Joint Retreat with the PRC in June 2018 resulting in the above-referenced decision. Accordingly, during its 24th extraordinary session, the Commission adopted a decision on the withdrawal of the observer status granted to CAL and notified the latter thereafter.

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

The African Court is the continental court established by the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights. Its mandate is to complement the mandate of the African Commission and to monitor the implementation of the African Charter and other human rights documents ratified by African countries. In 2018 the African Court delivered 18 judgments. For the purposes of this article, the case of the *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 Mali (APDF & IHRDA v Mali)* is discussed since it is the first time that any institution at the AU level has made a decision on the provisions of the African Women's Protocol.

The complainants in this case, APDF and IHRDA, alleged that, measured through the lens of human rights instruments, the 2011 Malian Family Code has many defects. First, it reduces the minimum age of marriage for females to 16, while retaining 18 for males, with even an exception for a girl to be married at 15 contrary to article 2 of the African Children's Charter and article 6(b) of the African Women's Protocol. Second, the Code neither obliges religious ministers to obtain both parties' consent prior to their marriage nor requires the presence of both parties at the ceremony, which transgresses article 6(a) of the African Women's Protocol and articles 16(a) and (b) of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). Third, it recognises the application of Mali's Islamic law in matters of inheritance, which gives women and girls half of what men receive, contrary to article 21(2) of the African Women's Protocol. Fourth, the Code sanctions Islamic law in Mali, which takes the position that children born out of wedlock are only entitled to inheritance if their parents so desire, contrary to articles 3 and 4(1) of the African Children's Charter. Finally, the applicants claimed that by introducing the Code, Mali had failed to comply with its positive obligation in eliminating traditions and customs that are harmful towards women and children as provided under article 1(3) of the African Children's Charter, article 2(2) of the African Women's Protocol and article 5(a) of CEDAW.

Responding to the allegations, the government of Mali stressed that its laws must mirror the 'social, cultural and religious realities' in the country and argued that it would be ridiculous to adopt laws that would be difficult to execute. It also strengthened its argument by stating that the Code was flexible in that the testator is free to manage their inheritance in other ways, for instance, according to the Code rules or their will, above and beyond religious or customary law, if they wish to do so. It further contended that the discontent and strife that had halted the promulgation of the prior 2009 Family Code, which enshrined an 'equal share for men and women with the participation of the children born out of wedlock in the devolution of estate on the same footing as the legitimate child' had

created a situation of fear 'where it felt it was not able to provide greater rights to women and children in family matters'.

After hearing both sides of the debate, the Court adopted and sanctioned the allegations of the applicants entirely and pronounced that the Code had transgressed all the alleged treaty provisions. In doing so, it rejected Mali's justification concerning the flexibility of the Code, saying that 'the Family Code in Mali enshrines religious and customary law as the applicable regime in the absence of any other legal regime'. The Court also vetoed Mali's argument that 'the established rules must not eclipse social, cultural and religious realities' within the country, recalling Mali's commitments to eliminate discrimination against women and children irrespective of existing cultural and religious practices and beliefs. The Court then ordered the government of Mali to amend the Code, harmonise its law with the international treaties, and inform and educate its people as to the rights and obligations enshrined therein.

This decision of the Court is noteworthy not only for being the first pronouncement by the Court on women's and children's rights, but also for upholding the obligation of states to adopt legislation, policies and practical measures to eliminate discrimination against women and children irrespective of existing cultural and religious practices and beliefs. The judgment will also have positive implications for women and children in other African states that adopt Islamic law either partially or fully as their legal regime. Further, given that the Court's decision is binding, its willingness to rule on the African Children's Charter, irrespective of its connection to a right stipulated under the African Charter, has the potential to strengthen the effective implementation of the African Children's Charter, thereby contributing to the realisation of children's rights on the continent.

That said, given that in Mali earlier efforts to comply with the provisions of the family law with human rights standards caused large-scale civil unrest; and following the Court's judgment, the Muslim associations of Mali regarded the Court's decision as an outrage to Mali's social and religious values and called on citizens to 'take action to save the country from this danger'. The Court should open dialogue with Mali and other states as well as non-state actors to implement the decision without disturbing public order.

### 3.3 African Committee of Experts on the Rights and Welfare of the Child

The African Children's Committee is the human rights organ of the AU that oversees the implementation of the rights and welfare of the child in Africa. This part focuses on developments within the African Children's Committee as it concerns communications, general comments and studies.

#### 3.3.1 *Communications*

In terms of jurisprudence, the African Children's Committee becomes the first human rights monitoring body in the African human rights system to pronounce itself on the complicated issue of statelessness that arises in the process of state secession. The communication was submitted by two NGOs, the Centre of Justice and Peace Studies and People's Legal Aid

Centre (the complainants) on behalf of Ms Imam Hassan Benjamin against the government of the Sudan (*Iman v Sudan*).

Iman, who resides in Sudan, was born from a Sudanese mother, Hawa Ibrahim Abd al-Karim, and a South Sudanese father, Hasan Benjamin Daoud, in Alhasaheisa, a small town to the south of Khartoum. Upon completion of primary and secondary education, Ms Iman decided to apply for a university education. However, she could not do so as the university's enrolment rules required a person to have a national identity number, which she did not have. She then filed an application for a national identity card with Sudan's civil registration department. Her case was referred to the Aliens Persons department, stating that she no longer was a Sudanese citizen as her father's last name showed that he was from the Baria tribe, Yei district, what now is South Sudan, and that he would have become a South Sudanese national upon separation as per the 2011 amendments of the Sudan Nationality Act of 1994 which called for, among others, the automatic revocation of Sudanese nationality of those who *de facto or de jure* became citizens of the Republic of South Sudan with the effect that Sudanese nationality of a minor child would be rescinded when the nationality of one's 'responsible father' is revoked. The Act also proscribed dual nationality with South Sudan even though dual nationality with other countries is allowed.

The revocation of Ms Iman's Sudanese nationality occurred irrespective of the fact that her mother was Sudanese and her father, who had held Sudanese nationality and lived in Al-hasaheesa town of Sudan, where he married and served in the police force, passed away before the secession of South Sudan. So the only surviving parent at that time was her mother, who is a Sudanese.

On these bases, the complainants requested the African Children's Committee to declare that Sudan has transgressed the provisions of the African Children's Charter, specifically article 3 on the principle of non-discrimination, article 4 on the principle of the best interests of the child, and articles 6(3) and 6(4) on the right to acquire nationality and the obligation to prevent statelessness. The complainants also claimed, among others, consequential violation of the right to education.

In response, the Sudanese government contended that following the amendments made to the Act in 2005, a child was entitled to acquire Sudanese nationality from his or her Sudanese mother, on an equal footing with a Sudanese father. The respondent state further contended that section 10(2) of the Act, which provides for automatic revocation of Sudanese nationality of those who became citizens of South Sudan, does not have any discriminatory purposes, but rather is the result of political and legal arrangements, which South Sudan has also been applying.

After hearing both sides of the debate, the African Children's Committee found Sudan in violation of several obligations, notably protection against arbitrary deprivation of nationality, discrimination and against deprivation of access to education. On discrimination, the Children's Committee ruled that the Act was not aligned with the African Children's Charter as it states that every Sudanese can have dual nationality except the nationality of South Sudan, and this amounts to discrimination on the basis of country of origin. In this regard, the African Children's Committee rejected the respondent state's argument that South

Sudan is also doing the same to Sudanese nationals, stressing that state parties' obligations with regard to the African Children's Charter were not dependent on reciprocity. The African Children's Committee also found gender-based discrimination because while children of a South Sudanese mother and a Sudanese father have no difficulty acquiring Sudanese nationality, children born to South Sudanese fathers and Sudanese mothers are at risk of statelessness as they are required to go through an administrative process to be considered a Sudanese national by birth. Further, the African Children's Committee pronounced that the revocation of Iman's Sudanese nationality constituted arbitrary deprivation under articles 6(3) and 6(4) of the African Children's Charter because her father was not alive. Besides, Iman's father could not be considered a South Sudanese national *de jure* or *de facto* since at the time of his death there was no concept of South Sudanese nationality as he passed away before the secession of South Sudan. As regards education, the African Children's Committee ruled that the withdrawal of Ms Iman's Sudanese nationality denied her the opportunity to attend a higher education institution, and so violated article 11 of the African Children's Charter.

This decision of the African Children's Committee has paramount importance not only for being the first of its kind in the African human rights system to address the questions of nationality arising from the process of state secession, and providing relief to Iman, who was facing the risk of statelessness, but also for its positive implication for the rest of the children in a similar situation as the risk of statelessness in Sudan.

The African Children's Committee also made another ground-breaking judicial pronouncement in the year 2018 in the case of *Institute for Human Rights and Development in Africa and Finders Group Initiative (complainants) on behalf of TFA v the Government of Republic of Cameroon (TFA v Cameroon)*. This case concerned a 10 year-old child, identified as TFA, who was allegedly raped on 9, 12, 15 and 16 April 2012 in Bamenda, Cameroon, by Angwah Jephther, a wealthy and prominent man in the area. According to the complainants, even though TFA's family reported the crime to the local police, no measure was taken to detain the suspect, and the police took three months to file their investigation report. The examining magistrate rejected the case for lack of evidence despite the existence of convincing medical evidence that TFA had been raped and the fact that she also managed to identify the suspect's house as the crime scene. Furthermore, the examining magistrate refused to provide a copy of its written decision and hence the victim's counsel was unable to file an appeal. Moreover, TFA's counsel and her aunt were sued for defamation when they commented on the errors in the investigation. The complainants approached the African Children's Committee, asserting that the state's failure to adequately investigate the rape, or to allow an appeal against the magistrate's decision, violated several provisions of the African Children's Charter.

Even though the government of Cameroon contended that an appeal was underway to challenge the decision of the magistrate, the African Children's Committee denounced the argument stating that the appeal was unduly prolonged and was not in line with the best interests of the child. The African Children's Committee also rejected the respondent state's submission that psychosocial support had been given to the victim and her family, because in the view of the African Children's Committee the

government had failed to produce any reliable evidence to verify its claim. On these bases, the African Children's Committee declared that the respondent state's failure to bring the perpetrator to justice and provide the necessary support to the victim over the course of the five years indicated its failure to act with due diligence to investigate, prosecute and punish the perpetrator within a reasonable time and hence violated its obligation under article 1 of African Children's Charter. The African Children's Committee also found that the respondent state's lack of due diligence transgressed the non-discrimination principle of the African Children's Charter, stating that the crime of rape against the victim constituted gender-based violence, a form of gender-based discrimination in view of developments in international human rights law. It reached this conclusion considering the fact that the social subordination of women which causes and legitimises gender-based violence, which in turn affects women and nullifies the enjoyment of several of their human rights, by itself constituted gender-based discrimination. Finally, the African Children's Committee held that the respondent state contravened its obligation under article 16 of the African Children's Charter which, in its view, required state parties to undertake a thorough investigation and ensure that adequate compensation is given to the victims of child abuse and torture. The African Children's Committee therefore recommended that the government of Cameroon takes necessary measures to redress the violations of the African Children's Charter, including immediately bringing the offender to justice; paying the sum of 50 million CFA to TFA as compensation; and enacting and implementing legislation that eliminates all forms of violence against children.

The findings of the African Children's Committee in this case are noteworthy not only for being the first case of sexual violence on a minor decided at the regional level, but also for being a major plus to human rights jurisprudence in Africa. The African Children's Committee's interpretation of the due diligence standard in this communication is a deviation from the decision of the African Commission on sexual violence in the case of *Equality Now v Ethiopia*, where it held that a state's failure to investigate the sexual assault of a 13 year-old minor was a transgression of a state's due diligence obligations but did not amount to discrimination since the complainant failed to show a similarly situated person that benefited from better state protection.

### 3.3.2 General Comment

The African Children's Committee adopted its fifth General Comment on State Party Obligations under article 1 of the African Children's Charter in 2018. The General Comment is guided by the four core principles of the African Children's Charter, namely, non-discrimination; devotion to the best interests of the child; the right to life, survival and development; and the right to participation of children. Given that article 1 relates to all rights and protection contained in the African Children's Charter, the role of the General Comment to ensure the realisation of children's rights, thereby improving the living realities of children in Africa is beyond doubt. While it helps the African Children's Committee to expound its understanding of state party obligations under the African Children's Charter, it is important for making the same well understood by both governmental and non-governmental actors.

The General Comment sanctions that the rights set forth in the African Children's Charter are interdependent and inextricably intertwined, and socio-economic rights are justiciable in the same way as civil and political rights. It also makes clear that there is no reference in article 1 to the 'progressive realisation of rights,' or to the degree of realisation within the 'maximum extent'. Hence, states cannot invoke a lack of resources to justify non-implementation of the rights and standards in the African Children's Charter. The General Comment calls on state parties to comply at least with previously agreed targets relating to social spending such as the Abuja Declaration, which requires 15 per cent of gross domestic product (GDP) spending on health services and the Dakar Declaration which sets 9 per cent of GDP spending on education.

The General Comment further stresses that the meaning of the terms 'shall recognise' under article 1 is peremptory, underling the rights-based approach so that the implementation of the rights set forth in the African Children's Charter should not be seen as a charitable process. Of importance is that the General Comment also explains what 'legislative and other measures' entail pursuant to article 1 of the African Children's Charter.

### 3.3.3 *Studies*

Another important promotional activity of the African Children's Committee in 2018 is the launch of its comprehensive study entitled 'Mapping children on the move within Africa'. The study was undertaken following concerns around the continuous growing movement of children within Africa and respective challenges that they are facing while on the move. The finding of the study gives a synopsis of the situation of children on the move within Africa. It specifically provides an overview of the routes that children move in to and from the continent, pushing and pulling factors of the children on the move, challenges they are facing, normative and institutional mechanisms of African states to protect children on the move, and a way forward.

Regarding migration routes, the study mapped three main routes, which are routes within the Horn of Africa and out of the region, routes through the West and Central Africa into North Africa and the West African routes. Regarding the reasons why they move, the study recognised different pushing and pulling factors including conflict and insecurity, illegal activities such as smuggling, trafficking, economic and social factors such as poverty, forced marriage, climate change and a lack of education.

As far as challenges are concerned, the study found many issues such as discrimination, economic or sexual exploitation, neglect and violence, arbitrary arrest and deportation, loss of identity, name and nationality and denial of education and health service. Furthermore, on policy and institutional mechanisms, despite some sporadic efforts, there are weak legal and institutional mechanisms in various African states to safeguard children on the move. This relates to a lack of vibrant institutional standing on the concept of children on the move, the inadequacy of the legal regime to address challenges faced by children on the move, the absence of effective and efficient systems to trace children on the move, the lack of regional coordination and the existence of a one-size-fits-all method to deal with children on the move. Finally, as a solution the African Children's Committee called on member states, including state of

origin, transit and destination countries, to regard children on the move as children first irrespective of the reasons why they leave their homes, where they come from or where they are and how they got there; and to take all necessary measures, such as legislative and administrative measures, and provide all the support and facilities that children on the move need to thrive. If the recommendations of the study are effectively implemented, it has the potential to significantly improve the situation of children on the move in the African continent.

#### 4 Conclusion

Overall, the developments in relation to democracy in Africa in 2018 reveal mixed outcomes, continuing the pre-2018 trend of what Cheeseman (2018) called the 'divided continent'. There has been evidence of a transition from authoritarianism towards a hopeful democratic beginning (Angola, Ethiopia, The Gambia); democratic progress (Sierra Leone, Burkina Faso); stagnation (Zimbabwe); and a relative decline (Tanzania and Zambia). While progress has been slow and opposition groups have faced pressure including in some of Africa's stable countries, such as Zambia, Senegal, Tanzania and Benin, and Africa's relatively low democratic standing, the continent has largely avoided the democratic recession narrative that has beset established democracies in other parts of the world. In fact, with the relative openings in some of the continents influential and formerly authoritarian states, such as Angola, Ethiopia, and recently the DRC, and potentially Algeria and Sudan, the trajectory may well be towards an African progress in democracy. Indeed, the 2019 Report of Varieties of Democracy Institute (V-Democracy), indicates that Africa is the only region that has avoided extensive 'autocratisation' in the form of substantial and significant worsening on the scale of liberal democracy. Nevertheless, the continent continues to be ranked among the worst in the world. Political leaders, regional and sub-regional organisations, civil society groups and, most importantly, the people of the continent should continue to push for the establishment and consolidation of democracy.

As for the judicial and human rights institutions at the AU level, there have been several positive developments such as cases/communications decided on issues of women's rights such as child marriage, inheritance rights and harmful practices, children's rights, statelessness, rape and discrimination. Moreover, soft laws in the form of General Comments and studies have been adopted by the institutions to guide states in the implementation of the provisions of the human rights instruments. These steps, including the progressive interpretation of the law in the case of statelessness and the obligations of the state, demonstrate that the judicial and human rights institutions at the AU level are progressing in terms of monitoring the implementation of human rights on the continent. However, these steps are minimal compared to the mountain of challenges that human rights in Africa face. Hence, these institutions must speed up their efforts to implement their mandates and keep adopting a progressive approach when interpreting the provisions of the law.



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