
AFRICA POLICY JOURNAL

at the John F. Kennedy School of Government, Harvard University



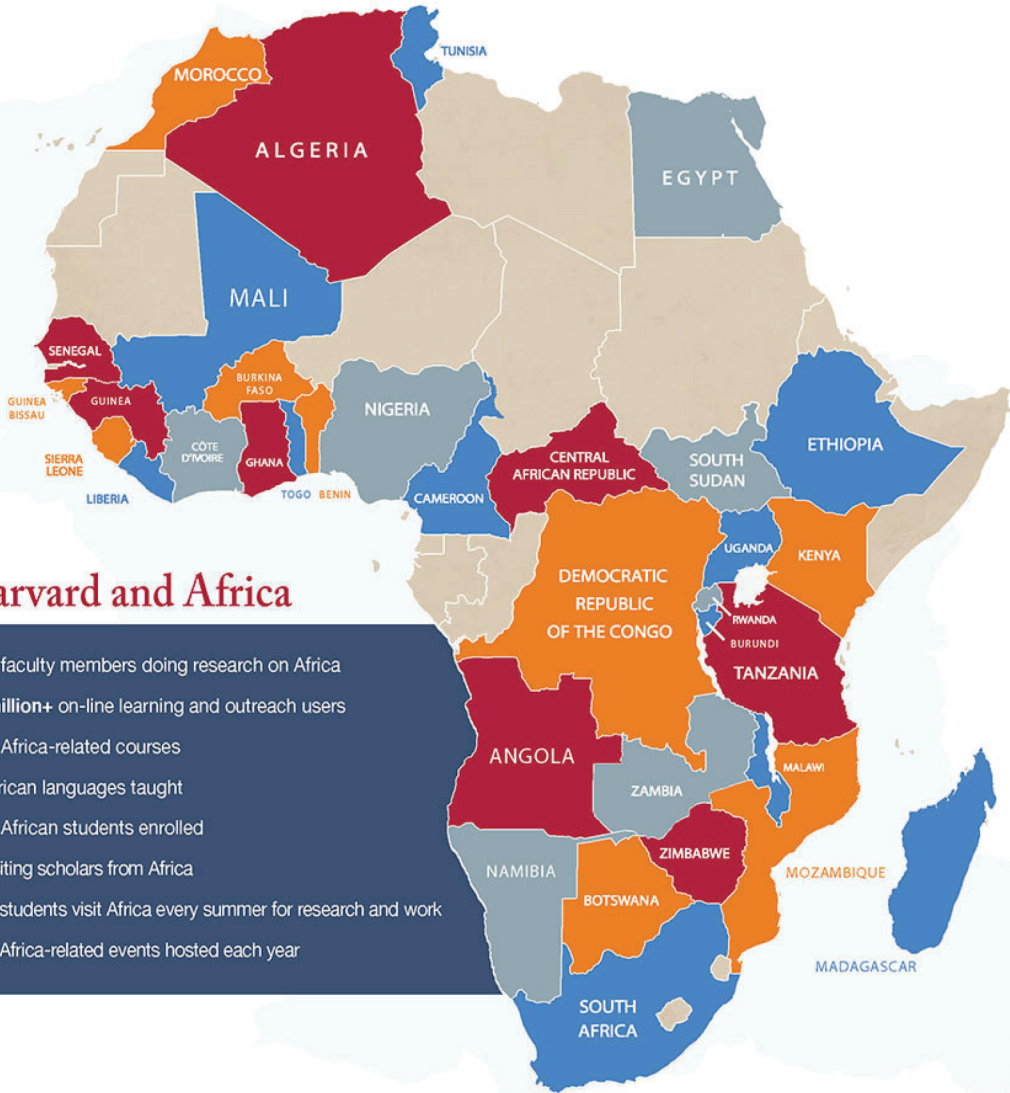
2015-2016 | Volume XI

An HKS Student Publication



CENTER FOR AFRICAN STUDIES

HARVARD UNIVERSITY | africa.harvard.edu



Harvard and Africa

- 500+ faculty members doing research on Africa
- 1.2 million+ on-line learning and outreach users
- 400+ Africa-related courses
- 39 African languages taught
- 300+ African students enrolled
- 80 visiting scholars from Africa
- 200+ students visit Africa every summer for research and work
- 200+ Africa-related events hosted each year

Where Harvard and Africa Meet

AFRICA POLICY JOURNAL

at the John F. Kennedy School of Government, Harvard University

The Harvard University *Africa Policy Journal* (APJ) is a student-run publication dedicated to promoting dialogue about African policy and current affairs in the realms of governance, law, education, business, health, design, and culture. The journal was initially started in 2006 by students at the John F. Kennedy School of Government at Harvard University, but has recently expanded to encompass all the schools of Harvard University. With its online platform (<http://apj.fas.harvard.edu>) and annual print publications, the APJ acts as a hub for timely debate, opinion, research, and analysis.

All views expressed in the *Africa Policy Journal* are those of the authors or interviewees only and do not represent the views of Harvard University, the John F. Kennedy School of Government, the staff of the *Africa Policy Journal*, the Faculty Advisory Board of the *Africa Policy Journal*, or any associates of the journal.

Cover design and layout by Gabrielle Roman.

© 2016 by the President and Fellows of Harvard College. All rights reserved. Except as otherwise specified, no article or portion herein is to be reproduced or adapted to other works without the expressed written consent of the editors of the *Africa Policy Journal*.

SUBSCRIPTIONS AVAILABLE

Interested in African policy? Subscribe to the *Africa Policy Journal* (APJ) at the John F. Kennedy School of Government at Harvard University. The *Africa Policy Journal* is the only scholarly publication in the United States dedicated to African policy in the realms of governance, development, the environment, and culture. Volume 11 of the *Africa Policy Journal*, released in Spring 2016, covers, among other topics, election financing in Nigeria, land rights and slum development in Nairobi, and refugee rights in East Africa.

Subscriptions are available for students, libraries, institutions, and individuals. Discounts are available if subscribing to at least two John F. Kennedy School of Government at Harvard University journals, including the *Africa Policy Journal*, *Women's Policy Journal of Harvard*, *Asian American Policy Review*, *Harvard Journal of African American Public Policy*, *Harvard Journal of Hispanic Policy*, *LGBTQ Policy Journal at the Harvard Kennedy School*, and *Kennedy School Review*.

ALICIA BELLO is a **Co-EDITOR-IN-CHIEF** of the *Africa Policy Journal* (APJ) and a joint degree candidate at John F. Kennedy School of Government at Harvard University and Harvard Law School. She is a member of the Law and International Development Society and conducts research on social entrepreneurship and innovation in Africa at Harvard. Bello previously worked on governance programs at the National Democratic Institute in Washington, DC, and provided input on governance proposals and programming in the Central and West Africa region. She is the co-founder of JELYPals, an online platform that uses education and technology to bridge the divide between African and African American youth. She graduated with high honors from Spelman College in 2011.

DEVON MAYLIE is a **Co-EDITOR-IN-CHIEF** of the *Africa Policy Journal*. She is a second year Master of Public Policy (MPP) student at the John F. Kennedy School of Government at Harvard University. Before coming to Harvard Kennedy School (HKS), Maylie was a journalist with the *Wall Street Journal*, based in Johannesburg, South Africa. She covered major companies, both domestic and multinational, with a focus on mining, energy, and consumer goods. She also covered government policy and elections in Zimbabwe and South Africa.

CAROLYNE MAKUMI is the **MANAGING EDITOR** of the *Africa Policy Journal*. She is a second year MPP student at the John F. Kennedy School of Government at Harvard University. She worked at the World Bank headquarters in Washington, DC, prior to joining the Harvard Kennedy School. Makumi graduated with high honors from Georgetown University in 2012.

MARY-JEAN NLEYA is the **SENIOR EDITOR FOR OP-EDS** of the *Africa Policy Journal*. She is currently a researcher and a student at the Harvard Extension School. Previously, Nleya was an intern, and later a contractor, at the International Criminal Court, The Hague. She has conducted extensive research on legal adjudicative methods to promote women's rights, financial regulations, economic development, and the African Growth and Opportunity Act and its implications on various sub-Saharan African economies. Nleya was most recently engaged in research work for a Southern African microfinance institution on creating cross-cutting solutions (to provide low-income customers a less cumbersome user experience) while complying with Know-Your-Customer / Anti-Money Laundering legislative require-

ments in Malawi, Zambia, and Ghana. Nleya holds a master of laws (LLM) from Harvard Law School and a bachelor of laws (LLB), cum laude, from the University of Pretoria, South Africa.

KATRA SAMBILI is the **PARTNERSHIP LIAISON** of the *Africa Policy Journal* and an Edward S. Mason Fellow. She is a Master in Public Administration (MPA) candidate at the John F. Kennedy School of Government at Harvard University, and is the new visibility chair of the Africa Caucus Board. Sambili previously served as head of secretariat of the National Council on the Administration of Justice in Kenya, and worked with over 30 state and non-state agencies to formulate and review policies and strategies, as well as mobilize resources for the transformation of Kenya's justice sector. Prior to that, she worked with various United Nations (UN) funds and programs,, including UNWomen, UNDP, UNICEF, and the UN Millennium Campaign. Sambili holds a master of science in international development from the University of Birmingham and a bachelor of arts from United States International University-Africa. Sambili is a keen poet and lover of words.

CONTRIBUTORS

MICHAEL ADDANEY is a senior research assistant at the University of Energy and Natural Resources in Ghana. He holds a master of philosophy in human rights and democratization in Africa from the University of Pretoria in South Africa, a postgraduate diploma in education from the University of Cape Coast in Ghana, and a bachelor of science in development planning from the Kwame Nkrumah University of Science and Technology in Ghana. Addaney has worked as a consultant with the African Committee of Experts on the Rights and Welfare of the Child.

MARY WANZA MUTINDA is a lecturer at Strathmore University School of Finance and Applied Economics in Nairobi, Kenya. Mutinda is also the finance team leader in the Improving Access to Justice and Basic Services in the Informal Settlements of Nairobi research project.

NGOZI OKIDEGBE is a former law clerk to Justice Mbuyiseli Madlanga of the Constitutional Court of South Africa. Okidegbe has a BCL/LLB from McGill Faculty of Law with a background in human rights and African constitutionalism. Her research has been presented at several conferences, including the 2014 International AIDS Conference in Melbourne, Australia.

SMITH OTIENO is a graduate assistant at Strathmore Law School and a legal research assistant in the Improving Access to Justice and Basic Services in the Informal Settlements of Nairobi research project.

BUSI RADEBE is a senior executive at Accenture based in South Africa. He grew up in Bekkersdal, a township west of Johannesburg, South Africa. His career started in the gold mining industry in the early 1990s where he became a shift supervisor responsible for managing multiple teams executing underground mining operations. In 2001, Radebe joined Accenture as a business analyst, focusing on the design and implementation of technology systems. He works with a number of clients in the public sector in South Africa. He focuses mainly on the implementation of technology in the area of elections management.

STEVEN SARAO is a lieutenant for the New York City Police Department and assigned to the Office of Management Analysis and Planning (OMAP). Sarao is a graduate of the John. F Kennedy School of Government at Harvard University, a 2014 recipient of the New York City Public Service Fellowship, and a program fellow with Harvard's program in criminal justice and management. The views in the *Africa Policy Journal* are his own and do not represent the New York City Police Department and/or the City of New York.

MARKO SVICEVIC is a fourth-year law student majoring in criminology and postgraduate LLB candidate at the University of Pretoria, South Africa. He is fluent in English and Serbian, and also speaks moderate Russian and Afrikaans. His interests include international law and politics, African philosophy and jurisprudence, journalism, constitutional and statutory interpretation, and forensic criminology. Svcevic is also an editor at *Perdeby*, the largest student newspaper in South Africa, at the University of Pretoria.

ENYINNAYA UCHENNA-EMEZUE is a student at the Nigerian Law School in Bwari, Abuja. He holds a degree in engineering from the

Federal University of Technology in Owerri, Nigeria, and a law degree from the University of Buckingham in the United Kingdom. During his time at Buckingham, he was president of the University of Buckingham Law Society, as well as the founding editor-in-chief of the *Buckingham Student Law Review*. Uchenna-Emezue also holds the Claritas Investment Certification from the Chartered Financial Analyst Institute.

FACULTY ADVISOR

CALESTOUS JUMA is a professor of the practice of international development at the John F. Kennedy School of Government at Harvard University and director of the Science, Technology, and Globalization Project. He directs the Agricultural Innovation in Africa Project, funded by the Bill and Melinda Gates Foundation, and serves as faculty chair of the Innovation for Economic Development executive program. Juma is a former executive secretary of the UN Convention on Biological Diversity and founding director of the African Centre for Technology Studies in Nairobi. He was chancellor for the University of Guyana and has been elected to several scientific academies, including the Royal Society of London, the US National Academy of Sciences, the Academy of Sciences for the Developing World, the UK Royal Academy of Engineering, and the African Academy of Sciences. He has won several international awards for his work on sustainable development. Juma holds a doctorate in science and technology policy studies and has written widely on science, technology, and environment. He serves on the boards of several international bodies and is editor of the *International Journal of Technology and Globalisation* and *International Journal of Biotechnology*. His latest book, *The New Harvest: Agricultural Innovation in Africa*, was published by Oxford University Press in 2011. Juma teaches graduate courses, including Innovation, Development, and Globalization and Technology and Sustainability, and an undergraduate seminar titled *Biotechnology, Sustainability and Public Policy*. He is currently working on a book on resistance to new technologies. Follow @Calestous on Twitter.

ACKNOWLEDGMENTS

We would like to recognize and thank the people who helped produce this year's journal. We thank Martha Foley, assistant director of student services, who provided endless support in our efforts to raise funds and expand the readership of the *Africa Policy Journal* (APJ). We would also like to thank the **Center for African Studies (CAS), the Mossavar-Rahmani Center for Business and Government, the Kennedy School Student Government (KSSG), the Malcolm Wiener Center for Social Policy, and the Africa Caucus at the Harvard Kennedy School (HKS)** for their financial support and encouragement. A special thanks goes to HKS lecturers Richard Parker and Greg Harris for their editing and writing guidance. We also thank Gabrielle Roman, our design editor, and Skyler Lambert, our copy editor, for their work to ensure the journal came together to meet the HKS student journal standards of excellence. Last but not least, we would like to thank all of our contributors who have turned their passions and research on Africa-related topics into well-formed and articulate academic articles and opinion pieces that we are proud to share with our readers.

CAROLYNE MAKUMI

MANAGING EDITOR

SPONSORS AND PARTNERS

The Africa Caucus at the Harvard Kennedy School

The Center for African Studies (CAS)

The Kennedy School Student Government (KSSG)

The Malcolm Wiener Center for Social Policy

The Mossavar-Rahmani Center for Business and Government
(M-RCBG)

CONTENTS

EDITOR'S REMARKS 10

OPINIONS

Pathways to Inclusive Growth: Corner Store 2.0 12
Busi Radebe

Boko Haram: Police Practices, Corruption, and 15
Governance in Nigeria
Steven Sarao

FEATURES

Law and Justice: Reviewing Positive Law in 20
Post-Apartheid South Africa
Marko Svcevic

Regulating the Inflationary Cost of Nigeria's 31
Democracy
Enyinnaya Uchenna-Emezue

Unlocking Financing for Slum Redevelopment: 44
The Case of Mukuru
Mary Wanza Mutinda, Smith Otieno

Redressing HIV/AIDS Discrimination in Nigeria: 56
The Implications of the Anti-Discrimination Act
of 2015
Ngozi Okidegbe

Enhancing the Protection Space for Refugees in 71
Kenya and Uganda
Michael Addaney

INTERVIEWS

Interview with Hakeem Belo-Osagie: Be Bold, 81
Be Courageous

View from Dangote Group: Strategy and Policy for 84
Doing Business in Africa
*Interview with Dangote Group's Chief of Strategy Abdu Mukhtar,
Group Chief Internal Auditor Tope Adedara, and Executive
Director Halima Dangote*

We are excited to present the 2015–2016 edition of the *Africa Policy Journal* (APJ). 2015 was an eventful year for the continent and we are happy to publish a breadth of articles on a range of topics, from elections in Nigeria to refugee rights in Kenya and Uganda. These articles are the product of the hard work of our amazing contributors who have graciously shared their expertise and knowledge of issues in Africa.

We would like to extend a huge thank you to everyone who has helped to make this edition of the journal possible. We'd first like to thank Ngozika Amalu, editor-in-chief of the 2014–2015 edition. She set the bar incredibly high, but we are extremely grateful for her friendship, mentorship, and seemingly infinite wisdom. We'd also like to thank our editing team of Carolyne Makumi and Mary-Jean Nleya. Our team this year was much smaller than usual and we thank them for their tireless dedication. We also thank Katra Sambili who served as our partnerships liaison, helping us to build stronger ties with the distinguished fellows in the Mid-Career Program. We extend our deepest gratitude to the Center for African Studies, which has been a pillar of support for the *APJ* over the past decade. We also thank the many student photographers from around Harvard University that have allowed us to showcase their work.

We've expanded our online site and wish to thank Harvard's Center for International Development for including us in their symposium for inclusive growth, leading to an interesting blog post. We also thank the distinguished visitors to the Harvard campus who took time out of their busy schedules to sit down and speak with us and share their outlook for the continent.

We thank you for reading and hope that you will continue to be our partner in changing the African narrative.

ALICIA E. BELLO

EDITOR-IN-CHIEF

Harvard *Africa Policy Journal*

DEVON MAYLIE

EDITOR-IN-CHIEF

Harvard *Africa Policy Journal*



Kayonza, Rwanda

Photo by Cecily Tyler

Pathways to Inclusive Growth: Corner Store 2.0

By Busi Radebe

BUSI RADEBE grew up in Bekkersdal, a township west of Johannesburg, South Africa. His career started in the gold mining industry in the early 1990s where he became a shift supervisor responsible for managing multiple teams executing underground mining operations. These operations included tunnel development and extraction of gold-bearing mineral resources. In 2001, Radebe joined Accenture as a business analyst focusing on the design and implementation of technology systems. He worked with a number of clients in the public sector in South Africa, mainly concentrating on the implementation of technology in the area of elections management.

Growing up in the 1980s in South Africa, it was common for low-income households to visit the city once a month to buy their supply of groceries. The corner stores catered for their grocery needs throughout the month. For the business owner, a typical customer was not the most sophisticated. You knew your customers by name, and you knew their children. You had a good idea of the products they consumed given the limited variety sold in most corner stores.

The role of corner stores went beyond grocery supplies, however. They were known as places where locals met to socialize. Families with no available cash could purchase their supplies on credit and pay at a later

stage. Most importantly, the owners of these businesses contributed to charity initiatives in their respective communities. It was common for corner-store owners to sponsor local soccer teams or other community initiatives. They invested in the communities where they were doing their business.

Fast forward to the first decade of the 21st century and the world is much different. Many corner stores are shutting down or operating hand-to-mouth. They face major challenges, including serious competition and changing customer needs. Given the growth of the middle class in many communities, the buying power of consumers has improved significantly. Consumers are more

mobile, too; they can go wherever they want to get goods and services. Many economists predict the continued growth of the middle class in the developing world.

The anticipated growth of the middle class and its associated buying power has caught the attention of major retailers. As they search for growth in saturated markets, major retailers are encroaching space that was traditionally dominated by corner stores. It is common to find major retailers partnering with gas stations to pull their geographic footprint closer to the communities served by corner stores. The mushrooming of shopping malls also positions the competition directly against corner stores. Major retailers are running sophisticated supply chain systems that make them more efficient.

Unless corner stores can reinvent themselves, their chances of survival are slim. The demise of corner stores not only affects employment in the communities where they operate, it further entrenches the economic exclusion of small business owners. Perhaps the implementation of smartphone-based technology to streamline business activities in corner stores can change the game. Many corner stores continue to use notebooks and old-school cash registers to record business activity. These outdated methods make it impossible to drive efficient inventory management. Deriving any data

analytics to inform product mix and understanding of customer buying patterns is impossible. The decreasing costs of smartphones present an opportunity to introduce efficient but affordable technology to streamline business activities.

The key differentiator of smartphones is mobility—the ability to connect to a data network and harvest location information. These attributes present an opportunity to introduce aggregation in the supply chain activities of corner stores. Using data connectivity, sales activities of these businesses can be captured in a common cloud database. The location information harvested from the GPS modules in smartphones can be used to identify businesses that operate within the same vicinity. Businesses can be encouraged to form co-operatives that will buy inventory on behalf of affiliated members. The bulk buying of inventory will improve the bargaining power and improve price competitiveness.

In addition to facilitating aggregation, implementation of smartphone technology can also improve the customer experience. Analytics of customer buying patterns will inform the procurement of inventory items that meet customer needs. Businesses will be able to keep the right levels of inventory and remove products that are slow movers. Armed with the right smartphone technol-

ogy, corner stores can also participate in the on-demand economy. Customers can place orders on their smartphones and have goods delivered to their homes. Pickup orders can also be submitted, allowing customers to collect their products from the corner store without wasting time standing in long queues. The introduction of sophisticated loyalty programs can also be realized, thus improving customer retention.

Finally, the introduction of smartphone technology can also enable the creation of ecosystems that revolve around the corner store. Local producers can connect with corner stores to monitor inventory levels of their products at different corner stores in real time. Owners of corner stores can also send electronic orders to local producers and connected delivery services can collect goods from local producers to deliver at the corner store. These connected ecosystems can drive economic growth in the respective communities, thus ensuring sustainability of local businesses.

Radebe presented a longer paper on the potential corner stores have to contribute to economic growth during a symposium on inclusive growth hosted by the Center for International Development at Harvard University, in collaboration with the World Economic Forum's Global Agenda Meta-Council on Inclusive Growth and the MasterCard Center for Inclusive Growth. The symposium's goal was to find sustainable and scalable solutions to foster inclusive growth.

Boko Haram: Police Practices, Corruption, and Governance in Nigeria

Steven Sarao

STEVEN SARAO is a lieutenant for the New York City Police Department and assigned to the Office of Management Analysis and Planning (OMAP). Sarao is a graduate of the John. F Kennedy School of Government at Harvard University, a 2014 recipient of the New York City Public Service Fellowship, and a program fellow with Harvard's program in criminal justice and management. The views in here are his own and do not represent the New York City Police Department and/or the City of New York.

We were off to dinner and drinks during my first visit to Lagos, Nigeria. I was in Lagos to speak at a conference about improving the relationship between police, prosecutors, and the community. The car ride was long—there was traffic, a lot of honking, and then suddenly the power was out and it was dark.

As we approached the next intersection, my host and driver could barely see what was in front of us. Suddenly, a police officer was standing before our car, his hand raised as he attempted to stop our vehicle.

“You could have run me over. My hand was up for you to stop,” the officer said.

The driver apologized, “Sir, I couldn’t see you until I was about three feet in front of you. I stopped,

sir, as soon as I saw you. It’s quite dark. I’m very sorry.”

It appeared to me, at this point in time, that no laws had been broken. But I could see a conflict bubbling. The driver engaged in a conversation with the officer and was asked to present identification. He refused. From my perspective as a member of United States law enforcement this seemed problematic. (I would later learn, however, that handing over your identification is a way to ensure “payment” is made to an officer to release your identification.) After nearly a half hour of negotiations the driver was allowed to leave, with a stern warning to be more careful in the future.

My instincts as a police officer led me to think the driver should have complied with the officer’s request

for his identification. However, I also saw the bigger issue: how a police department functions in a country with so many looming infrastructure gaps. Police officers must have resources and infrastructure to provide adequate services. They must be appropriately compensated, so as not to be tempted to seek “payment.”

The contract between Nigeria and its police officers has not completely been written and the terms lack transparency. One of the largest police departments in the world, the New York City Police Department, has had corruption scandals and investigations nearly every twenty years since its 1844 founding.¹ No agency is blameless. Government requires constant re-engineering and improvement with openness towards positive change.

Most troubling for Nigeria is the total sum of efforts lost to problem-solving and counter-terrorism failures that live within these gaps of infrastructure. For Nigerians the risks are tremendous, and go beyond the weakening of police services. Nigerians must recognize that Boko Haram, an Islamic extremist organization, breathes the air from these gaps. The gaps create “conditions that can radicalize those who feel aggrieved to turn frustration into violence.”² Boko Haram opens these wounds and widens the gap, offering a harsh solution to the country’s problems.

But these problems are ours to solve. The problems of the Nigerian Police Department are not that different from the historical problems of other police departments who have learned from past mistakes and historical errors.

More problematic is a resistance by Nigerians to partner with the Nigerian government because they don’t trust it and sense that the government operates illegally or without honesty and transparency. Government must acknowledge its past mistakes and the community must remain at the negotiation table. Without collaborative efforts, the gap that permits terrorism, organized crime, and other systemic infections to breed, grow, and flourish is widened.

In northern Nigeria, women and girls want an education—one of the basic tenets of freedom and a life without oppression. For Boko Haram, however, this represents the evil of Western thinking and a way of life that counters Sharia law. Boko Haram’s attacks are generated and specifically targeted in an attempt to negatively impact infrastructure and daily life. Freedom, equality, and a life without oppression must become mandates of government. The progressive thinkers must step forward and embrace such fundamental data. These are the best paths to improving policing and governance.

The current mission of the Nigeria Police Force (NPF) is safety, health,

and the order of the state. My conversations with Nigerian police officers strongly suggests that they are well aware of the problems and challenges they face. NPF officers are both members of the community and work for the community.

The mission and vision of the Nigerian Police Force and the history of its development might suggest some potential answers to today's questions about improving police services, as well as Boko Haram. As Daniel Agibiboa, a Nigerian scholar at Oxford University, states, "Many of the members attracted by Boko Haram are enraged at deep-seated socioeconomic and political grievances such as corruption and appalling governance. Their anger has been translated into a religious idiom."³

A hard look at torture and other ill treatment might provide partial answers, while also suggest why Amnesty International, in its recent 2014 report has metaphorically described the temperature in Nigeria as "hell fire."⁴ The NPF must tackle multiple issues at once including improving their work and services and eliminating corrupt practices, all while fighting terrorism. This is a tall order. While terrorism is viewed as a crime to most people, to others it may rest in what Geoffrey Nunberg describes as a "double life": "One man's terrorist is another man's freedom fighter."⁵ These "freedom fighters" don't

want improvements in policing, as it is a threat to their existence.

Order has a particular meaning and may suggest, however, for Boko Haram, an opportunity to revolt against a system that is broken. One Nigerian's horrific experience at a traffic intersection, for instance, is Boko Haram's proof that the system is inoperative. For the leadership of Boko Haram it remains worthwhile to attempt to rip apart society, forcing adherence to Sharia law, without tolerance, without human rights, and without gender equality. The NPF must leverage these problems as an opportunity to gather people together, acknowledge their anger and distrust, and work together to find community-based solutions. For the Nigerian people, the potential is to work alongside the police and other members of the justice community to foster improved relations.

We are approaching an intersection in Nigeria's history, but we cannot remain idle. We must see what improvements exist beyond the darkness and how we can move the direction forward, to improve policing, and close the gap that allows for destruction from both corrupt internal forces as well as external terrorist forces.

Endnotes

1. Grennan, Sean. 2001. "Historical Perspective on Police Corruption in New York City." *Police Misconduct: A Reader for the*

21st Century. Edited by Michael J. Palmiotto. Prentice Hall: Upper Saddle River, NJ..

2. Sheehan, Michael, and Geoff D. Porter. 2014. "The Future Role of U.S. Counter Terrorism Operations in Africa," CTC Sentinel 7 (2), February.

3. Agibiboa, Daniel E. 2013. *Peace at Daggers Drawn?: Boko Haram and the State of Emergency in Nigeria*. Oxford: University of Oxford Press.

4. "'Welcome to Hell Fire': Torture and other Ill-Treatment in Nigeria." 2014. Amnesty International.

5. Nunberg, Geoffrey. 2001. "Head Games / It All Started with Robespierre / 'Terrorism': The History of a Very Frightening Word." SFGate.com. 28 October.



**Kampala, Uganda en route to the
Gaddafi Mosque**
Photo by Cecily Tyler

Law and Justice: Reviewing Positive Law in Post-Apartheid South Africa

Marko Svcevic

MARKO SVICEVIC is a fourth-year law student majoring in criminology and postgraduate LLB candidate at the University of Pretoria, South Africa. He is fluent in English and Serbian, and also speaks moderate Russian and Afrikaans. His interests include international law and politics, African philosophy and jurisprudence, journalism, constitutional and statutory interpretation, and forensic criminology. Svcevic is also an editor at Perdeby, the largest student newspaper in South Africa, at the University of Pretoria.

Abstract

South Africa's legal system is founded on positive law. Positive law restricts itself to the black letter words inculcated in statute books and as a result denies adjudicators from taking into account sociological, psychological, and political aspects of cases. South Africa's adherence to positive law dates back to Apartheid times and continues in post-Apartheid South Africa. This paper argues that South Africa's adherence to positive law is one of the factors that has led to civil unrest in South Africa by looking at a few widely publicized case studies—the #FeesMustFall movement, the Oscar Pistorius trial, and the al-Bashir case. It ultimately advocates a departure from positive law in favor of natural law and a critical interpre-

tative approach to create a more holistic and inclusive system of justice in South Africa.

Introduction: Defining Natural Law and Positive Law

Positive law places an emphasis on the sources of the law, rather than its substance and “merits.”¹ Positive law reinforces a restricted legal culture and continuously endeavors to rid the law of ethical considerations, thus excluding morality from the legal domain.² Legal positivism concerns itself not with whether laws are “good” or “just,” but rather if a legitimate authority has enacted them.

Contrary to positive law and its narrow-minded restrictiveness is natural law. Natural law reinforces

a more critical approach to legal interpretation by the judges and seeks to critically analyze the substance of the law to determine its purpose and relevance in a given society at a given time. Natural law, by its very essence in constructing and interpreting just laws, owes its validity to the ways in which racial disparities, gender inequities, historical contexts, and societal biases shape the way in which the laws ought to be interpreted.³

The Apartheid Regime: Influence of Positive Law in South Africa

Apartheid South Africa's strict adherence to positive law resulted in some of the worst human rights violations in the country's history. Apartheid was a period of racial segregation from 1948 to 1994 for which the main objective was to allow for and maintain white minority rule while prejudicing non-whites. During this period, South Africa was governed under a system of parliamentary sovereignty. In contrast to a system of separation of powers, South Africa's parliament reigned supreme over its judiciary and executive branches, and all written legislation. In this system, positive law enjoyed tremendous appreciation, the advantage resting with parliament's legitimacy to enact, rather than the content of its enactments. In this respect, the laws

were respected because they originated from a legitimate source and no regard was given to their lack of merit as racially discriminatory.

The Truth and Reconciliation Commission (TRC), a body established after the fall of Apartheid, deals with the administration of restorative justice. The TRC documented firsthand accounts of human rights violations committed during the Apartheid regime, with many such violations linked directly to parliament-promulgated legislation. As dictated by positive law, parliamentary sovereignty allowed for legislation to be drafted and promulgated regardless of its justness or fairness (or lack thereof).

Examples of this legislation include the Suppression of Communism Act, passed in 1950, which banned the South African Communist Party.⁴ The General Law Amendment Act of May 1963 allows a police officer to detain, without a warrant, any person suspected of a political crime for a ninety-day period.⁵ Combined with a legal principle called the Sobukwe clause, any person detained for a political crime can be detained for a further twelve months.⁶ The act also gives the president the power to declare certain organizations, such as the African National Congress (ANC)'s *Umkhonto we Sizwe*, unlawful.⁷

Upon the commencement of the Unlawful Organisations Act, passed in 1960, both the ANC and

the Pan-African Congress were declared unlawful for their opposition toward the Apartheid government.⁸ The act was ratified just over a year after the Sharpeville Massacre. The Indemnity Act, passed in 1961, was subsequently enacted to protect the Apartheid government from any legal action for, among others, the Sharpeville Massacre.⁹ This act prevented courts from hearing any civil or criminal case against the state for actions taken from March 1960 to July 1961.¹⁰ Today, the repressions of people's political rights are entrenched in South Africa's constitution, with provisions protecting individuals' rights to political affiliation.¹¹

Positive Law: Shortcomings in Post-1994 South Africa

The following sections analyze positive law's role in contemporary South Africa's legal, political, and social domains, respectively. The first two case studies illustrate the judiciary's role in reconciling with positive law, and are analyzed based on the issues raised within the cases themselves and their relevance in terms of the final outcomes. The final case study focuses on the 2015 #FeesMust-Fall movement, which swept across South Africa, and assesses how positive law is arguably one of the causes that led to students' frustrations, and ultimately launched the movement.

The Role of South Africa's Judges

The Oscar Pistorius Case

Oscar Pistorius made headlines across the world when, on 14 February 2013, he shot and killed his girlfriend, Reeva Steenkamp. After months of deliberation and argument, in September 2014 Judge Thokozile Masipa of the Pretoria High Court found Pistorius not guilty of murder, but guilty of the culpable homicide of Steenkamp.¹²

The Pistorius case brought South Africa's legal culture (an adherence to positive law) under the spotlight with its noticeable lack of justice, through the strict application of South African criminal law legislative provisions. The duration of the High Court trial entertained a great emphasis on whether Pistorius (hereafter the accused) acted intentionally when shooting Steenkamp (hereafter the deceased). In this regard, the question of law posed was whether the accused was criminally liable for his actions when shooting the deceased. The High Court therefore dealt with the determination of the accused's intention when firing four shots through a closed bathroom door, ultimately killing the deceased.

In South African criminal law, a crime is generally precipitated by several key elements, of which intent is one. Intention, a form of fault, is made up of three elements: a di-

rection of the will at a specific act, knowledge of the act in question, and knowledge of the unlawfulness of the act. Further, three forms of intent are recognized: *dolus directus*, *dolus indirectus*, and *dolus eventualis*. In handing down judgement, Judge Masipa found that the accused had *dolus eventualis* when he shot and killed the deceased. However, the problematic point in the High Court trial (and subsequent judgement) was the strict evaluation of *dolus eventualis* and its isolated application to the accused's conduct.¹³ The question posed by the court was whether the accused foresaw the possibility that he may kill the deceased, yet persisted in his "reckless" act.¹⁴ The emphasis was greatly directed only on if the accused foresaw the possibility that he may kill the deceased, without enough warrant on the accused's actions killing another person, regardless of who that person may have been behind the closed bathroom door.

The High Court's judgment was that on the count of murder, read with Section 51(1) of the Criminal Law Amendment Act,¹⁵ the accused was found not guilty of murder, but guilty of culpable homicide. Subsequent to the High Court's judgement, the case was appealed to the Supreme Court. The appeal court, focusing on all relevant issues including legal intention in the form of *dolus eventualis* and all relevant

evidence, found the accused guilty of murder. In addressing *dolus eventualis*, which the court stated was at the heart of the appeal, it found that the trial court had erred in its judgement.¹⁶ The appeal court added, "although a perpetrator's intention to kill must relate to the person killed, this does not mean that the perpetrator must know or appreciate the identity of the victim."¹⁷ Further, the court noted the accused's incorrect appreciation of who was behind the closed door did not mean he had not had criminal intent when shooting his gun.¹⁸ The appeal court held the principle of *dolus eventualis* was incorrectly applied to the facts.¹⁹ The trial court failed to correctly conceive and apply the legal principles pertaining to circumstantial evidence.²⁰ The appeal court thus made an order that the accused's conviction of culpable homicide be set aside and replaced with "[g]uilty of murder with the accused having had criminal intent in the form of *dolus eventualis*."²¹ The matter was subsequently referred back to trial court for appropriate sentencing.

The Supreme Court of Appeal's judgement in the Oscar Pistorius case brings to light not only a more just application of the law, but also the importance of statutory interpretation in the administration of justice. In sticking to positive law it would arguably have shown that a strict interpretation of the law such

as that of the High Court would not have served in the best interest of justice. It is therefore crucial to add that, upon the appeal court's judgment in its interpretation of the law to give effect to justice and in line with a critical interpretative approach, such justice was administered accordingly.²²

The al-Bashir Case

The al-Bashir case was also widely publicized. It illustrated the South African government's failure to detain the President of the Republic of Sudan, Omar Hassan Ahmad al-Bashir (hereafter President al-Bashir), for violating the provisions of the Rome Statute of the International Criminal Court (ICC).²³ In doing so, the South African government failed to comply with a High Court order for President al-Bashir's arrest. South Africa's botch resulted in the Pretoria High Court ruling the government's conduct in disobeying a court order unconstitutional.

President al-Bashir, who is wanted by the ICC on several charges of crimes against humanity, including genocide, arrived in South Africa for an African Union (AU) Summit.²⁴ According to the Rome Statute, as ratified by the South African government, South Africa was compelled to take all reasonable steps to prepare to arrest President al-Bashir. South Africa was prepared to ar-

rest him without a warrant, as read in Section 40(1)(k) of the Criminal Procedure Act.²⁵ They could have detained him until a formal request for his surrender was made from the ICC.²⁶ The respondents to the case²⁷ argued that President al-Bashir was immune to arrest due to the provisions of the Vienna Convention on Diplomatic Relations, 1961, which has the force of law from the Diplomatic Immunities and Privileges Act.²⁸ Respondents also cited the General Convention on the Privileges and Immunities of the Organisation of African Unity (OAU).²⁹ Further, they point to a cabinet resolution to grant President al-Bashir immunity from arrest and a ministerial notice published in the *Government Gazette* on 05 June 2015, which expressed the agreement on the OAU Convention regarding the AU Summit.

Citing several previous cases in South African law, the High Court held that the respondents had an obligation to arrest President al-Bashir.³⁰ The court noted the Rome Statute had been ratified, whereas the OAU Convention had not been domestically enacted.³¹ The court also found the government's non-compliance with a court order dated 14 June 2015, to arrest President al-Bashir was unconstitutional.³²

In essence, the court's consideration was whether a cabinet reso-

lution, coupled with a ministerial notice, was capable of suspending South Africa's obligation under the Rome Statute to arrest President al-Bashir.

Positive law, in its essence, would have such a cabinet resolution and notice binding, as its source at the time of enactment was legitimate, thereby concluding President al-Bashir would have had immunity conferred upon him. A more fair question, however, in line with natural law and a critical perspective, would have been whether a person of another state, (be it a citizen or head of the state) who has five counts of crimes against humanity (including murder, torture, and rape), two counts of war crimes, and three counts of genocide, be allowed by any law, domestic or international, to be granted any kind of immunity whatsoever, notwithstanding its legitimate or illegitimate source.³³ Finally, the al-Bashir case grants yet another opportunity for individuals to scrutinize South Africa's positive law and the reputation it gives to South Africa on the world stage.

The #FeesMustFall Movement

The #FeesMustFall campaign was a student-led protest movement that began in mid-October 2015 and swept across all major South African universities. Initially, the movement stemmed from student frustrations

regarding increases in university tuition fees, but later developed into a movement to tackle issues of transformation, university tuition fees, language policies, and university outsourcing of private contractors. Beginning at the University of the Witwatersrand (Wits) and moving to the University of Cape Town (UCT) and Rhodes University, the protests rapidly escalated to a nationwide student movement and included almost every public tertiary education institution in the country. At its peak, the movement saw an estimated 15,000 students descend upon South Africa's iconic union buildings, demanding the government address student concerns.³⁴

In a broader context, the #FeesMustFall movement showcased government shortfalls and portrayed its failure to uphold constitutional, statutory, and social responsibilities. The South African Constitution, in its Bill of Rights, grants every citizen the right to a basic education.³⁵ However, the constitution does not include the right to tertiary education, or at least not directly in its provisions on the right to education. Instead, the right to education merely states that everyone has the right to receive a basic education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable.³⁶

However, all legislation is subject to be read together. The preamble of South Africa's constitution states that "[w]e, the people of South Africa. . . believe that South Africa belongs to all who live in it. . . therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to. . . improve the quality of life of all citizens and free the potential of each person. . ."³⁷ It is clear that, in a country plagued with injustices of the past and working to develop a nation for all, education, including tertiary education, is a pillar in the constitutional democracy brought about after 1994. A country such as South Africa, where there is a dire need for an increase in a skilled workforce, a tertiary education is of paramount importance in achieving the goals set out in the constitution. Further, the Higher Education Act's preamble states it is desirable to "re-structure and transform programs and institutions to respond better to the human resource, economic and development needs of the Republic."³⁸ A restricted jurisprudential approach, in adherence to positive law, would warrant that because the right to tertiary education is not adopted by the constitution, such a right is not attainable.

In a similar vein, issues of transformation raised by the #FeesMust-Fall movement also brought about questions in tertiary institutions'

language policies. Most public tertiary education institutions in South Africa use either English or Afrikaans as a means of instruction with considerable exclusion of most other official languages.³⁹ Section 6 of the constitution specifically grants equal status to all eleven official languages.⁴⁰ In addition, it also recognizes the historically diminished use and status of indigenous languages and asserts that the state must take practical and positive steps to elevate the status and advance usage of these languages.⁴¹ In public tertiary education systems little has been done to implement this provision. A practical, implementable policy consideration, in particular, is analyzing the geographical location of these universities and considering the predominant languages spoken in those locations. Inadequate language policy considerations are taken into account when drafting and implementing these policies.⁴²

As an example, the University of Pretoria, uses English and Afrikaans as its mediums of instruction. However, demographic data for the province shows that the predominant language spoken is IsiZulu (19.8 percent), with English at 13.3 percent and Afrikaans at 12.4 percent.⁴³ The university has also taken considerable steps in advancing the use of Sesotho (another indigenous language); however, demographic data shows that Sesotho is only spoken by

11.6 percent of the population in the Gauteng province.⁴⁴

This suggests public tertiary education institutions' language policies should include more consideration for the predominant languages spoken in the provinces where they are situated. Regard should also be given to the composition and predominance of language usage among the student and faculty population. A further consideration in addressing the issue is that the national and provincial governments, through legislative and other measures should, together with the Pan South African Language Board, promote and create favorable conditions for the development and use of all official languages.⁴⁵

Policy Considerations: The Principle of *Ubuntu* and Preambles

Here follows a brief discussion of potential implementable policy considerations in addressing legal interpretation as a tool for achieving a just application of the law.

The Importance of the African Principle of Ubuntu in Legal Interpretation

A policy consideration this paper looks at is taking cognizance of the principle of *ubuntu*. It is clear that what is needed in South African law is a greater appreciation of African

moral principles. Here, the principle of *ubuntu* (directly translated to humaneness) is expressly focused upon as an example. *Ubuntu*, in its most fundamental sense, translates to “personhood” and “morality,” and envelops key values of group solidarity, compassion, respect, human dignity, conformity to basic norms, and collective unity.⁴⁶ *Ubuntu*'s principle appreciation of justice is one of balance, and where such balance has been prejudiced, a restoration of equilibrium being necessary.⁴⁷ This principle has even been expressly stated in South Africa's 1993 Constitution: “. . . There is a need for understanding but not for vengeance, a need for reparation but not retaliation, a need for *Ubuntu* but not for victimisation.”⁴⁸

In this understanding of justice, it must be realized that *ubuntu* in its true sense embodies a law ultimately synonymous with justice. If this is to be accepted, then it must too be understood that legal interpretation in light of the concept of *ubuntu* would suggest a law administered more justly and with more fairness.

Although the current South African Constitution does not explicitly make mention of the term *ubuntu*, it can be understood in terms such as “fairness,” “human dignity,” “unity,” and “social justice.” Judges should therefore be encouraged to interpret the law in light of the principle of *ubuntu* and the values in

which it represents, which will arguably allow for the administration of justice in which the law is not seen as a tool for administering justice, but as being justice in itself.

The Importance of Preambles

Another policy consideration, which must be mentioned, is the important role preambles (preludes to legal texts) play in legislation and the constitution. Preambles serve as guidelines showcasing the values and what the provisions of a legal text aim to do, and as such, must be used in legal interpretation.⁴⁹ Several cases in South African law have confirmed and considered the preamble of statutes to be part of the broader context of those statutes.⁵⁰ This also includes the preamble to the constitution.⁵¹

Specifically in statutory interpretation, preambles can serve a dual function—contextual and constructive.⁵² In dealing with the preamble's contextual role, a purposive approach to statutory interpretation is required.⁵³ Preambles serve to unlock the intentions of lawmakers and the mischiefs they intend to redress with their acts (as well as administer a justice in order to redress previous imbalances).⁵⁴

A purposive interpretation of the preambles of the constitution, and that of the Higher Education Act in the #FeesMustFall movement may well serve in arguing that, in accordance with a critical approach,

tertiary education should be a right granted to all citizens of the state and in a language that represents the majority demographic.⁵⁵ Such a policy consideration would drastically affect the views on justice and the administration thereof.

Conclusion

Positive law is not only detrimental to the administration of justice in society but also limits legal development. Positive law falls short of justifying its lack of morality, its disconnection with justice, and its concern with the absence of morality in law is the center of the problem.⁵⁶

A departure from positive law is a desperate attempt at administering just and legitimate laws in South Africa. It allows a true meaning of justice to be realized beyond the mere application of national laws. Its connection with morality and societal values identifies with a law that is inevitably built upon such morals and values, broadening the scope of what it means to administer justice and what justice itself means.

A widening of this scope allows for a radical rethinking of the nature of rights, justice, sovereignty, and judgment.⁵⁷ In departing from positive law, we are urged to reassess the contemporary interpretation of the law in South Africa and to reassess its purpose in a modern and dynamic society.

Endnotes

1. Gardner, John. 2001. "Legal Positivism: 5 ½ Myths," *American Journal of Jurisprudence* 46: 199.
2. Costas, Douzinas, and Adam Gearey. 2005. *A Critical Jurisprudence: The Political Philosophy of Justice*. Oxford: Hart Publishing.
3. Costas, Douzinas. 2014. "A Short History of the British Critical Legal Conference or, the Responsibility of the Critic." *Law and Critique* 25: 189.
4. Suppression of Communism Act 44 of 1950. South Africa. (This act was later renamed the Internal Security Amendment Act 79 of 1976.)
5. Horrell, Muriel. 1978. "Laws Affecting Race Relations in South Africa 1948-1976." *South African Institute of Race Relations*: 469.
6. Truth and Reconciliation Commission, "Human Rights Violations," question and answers submission. 12 May 1997.
7. Horrell, supra note 5.
8. Unlawful Organisations Act 34 of 1960. South Africa.
9. Indemnity Act 61 of 1961. South Africa.
10. *Ibid.*, sec. 1(1).
11. Section 19 of the Constitution of the Republic of South Africa, 1996, grants every citizen of the Republic the freedom to make political choices, including the freedom to form a political party, participate in political activities, recruit members for a political party, and campaign for a political party or cause.
12. I do not find it necessary to discuss the full details of the trial, as much of it has already been widely publicized. Instead I prefer to focus on the overall aim and outcome of the trial, as well as the subsequent appeal trial.
13. In South African criminal law, *dolus eventualis* occurs when the accused, while not intending a particular consequence of his or her conduct, objectively and reasonably foresees the possibility of his or her conduct causing a particular result, and reconciling him or herself with this possibility, nonetheless continues with the same conduct, bringing about the result in question.
14. Director of Public Prosecutions (DPP), *Gauteng v. Pistorius*, ZASCA 204 (03 December 2015), p. 3327-3329.
15. Higher Education Act 105 of 1997. South Africa; DPP v. Pistorius supra note 14, p. 3350-3351.
16. DPP v. Pistorius supra note 14 at para. 19.
17. DPP v. Pistorius supra note 14 at para. 30-31.
18. DPP v. Pistorius supra note 14 at para. 32.
19. DPP v. Pistorius supra note 14 at para. 42(1).
20. DPP v. Pistorius supra note 14 at para. 42(2).
21. DPP v. Pistorius supra note 14 at para. 58.
22. Roux, Ulrich. 2015. "Oscar Pistorius: 5 ways the SCA Judgment Differed from Judge Masipa." *TimesLive.com*. 12 July. Accessed 28 January 2016.
23. al-Bashir was in violation, according to the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002.
24. According to court documents from *The Prosecutor v. Omar Hassan Ahmad al-Bashir*, the Sudanese president is criminally responsible for ten counts on the basis of his individual criminal responsibility under Article 25(3)(a) of the Rome Statute.
25. Criminal Procedure Act 51 of 1977. South Africa.
26. *The Prosecutor v. Omar Hassan Ahmad al-Bashir*, 27740/2015 (2015). *ConstitutionallySpeaking.co*. Accessed 28 January 2016.
27. Twelve respondents were involved in the case, including, among others, the Minister of Justice and Constitutional Development, the Minister of Police, the Commissioner

of Police, the Minister of International Relations and Cooperation, the Director General of International Relations and Cooperation, the Minister of Home Affairs, and the Head of the Directorate of Priority Crimes Investigation.

28. Privileges Act 37 of 2001. South Africa.

29. General Convention on the Privileges and Immunities of the Organization of Africa Unity. 1980. Articles V(1)(a) and (g); VI; and VIII, and sections C and D.

30. *Glenister v. The President of the Republic of South Africa and Others*, (3) SA 347 (2011) at para. 97; *National Commissioner of the South African Police Service v. Southern African Human Rights Litigation Centre and Another*, 12 BCLR 1428 CC (2014) at para. 23.

31. *Glenister* supra note 31 at paras. 28–29.

32. *Glenister* supra note 31 at para. 39.

33. *Glenister* supra note 31 at para. 36

34. Nkosi, Bongani. 2015. “#FeesMustFall Takes Fights to Union Buildings.” Mail & Guardian online, 23 October. Accessed 28 January 2016.

35. The Constitution of the Republic of South Africa. Section 29 states that everyone has the right to basic education and to further education, which the state, through reasonable measures, must make progressively available and accessible.

36. Constitution, supra note 36, Section 29(2).

37. Constitution, supra note 36, preamble. It is noteworthy to mention that, in line with constitutional and statutory interpretation, legislation’s preambles serve as a vision to the provisions contained in it and should always be read holistically in order to encompass the aim of the legislation.

38. Higher Education Act 101 of 1997. South Africa.

39. University of Pretoria. 2010. “Language Policy,” doc. R 16/10; University of Witwatersrand. 2003. “Language Policy,” 14 March; University of Cape Town. 2003.

“Language Policy”; and Stellenbosch University. 2014. “Language Plan of Stellenbosch University,” 22 November.

40. Constitution, supra note 36, Section 6(1).

41. Constitution, supra note 36, Section 6(2).

42. A notable exception is the University of the Witwatersrand’s language policy, which contains extensive debate on the development of Sesotho and IsiZulu.

43. “South Africa.” 2012. *Ethnologue.com*. Accessed 28 January 28, 2016

44. *Ibid.*

45. Constitution, supra note 36, Sections 6(4) and 6(5)(a)(i).

46. *The State v. Makwanyane*, 5 SA.391 CC 501C-E (1995).

47. Ramose, Mogobe B. 2002. “An African Perspective on Justice and Race.” *Forum for Intercultural Philosophizing* 2: 7.

48. The Constitution of South Africa Act 200 of 1993. South Africa.

49. *Ibid.*, Act 118.

50. *Jaga v. Donges*, 4 SA 653 A(1850).

51. *Khala v. The Minister of Safety and Security*, 4 SA 218 W (1994); Weinstein, Joshua I. 2009. “The Market in Plato’s Republic.” *Classical Philology* 104: 440.

52. Ijaiya, Hakeem. 2009. “The Constructive and Contextual Roles of a Preamble in Statutory Interpretation.” *Journal of Public Law Kogi State University, Ayingba* 2: 244–249.

53. Supra note 38.

54. Supra note 38.

55. “South Africa,” supra note 44.

56. Douzinas and Gearey, supra note 1, 4–7.

57. Douzinas and Gearey, supra note 1, 1.

Regulating the Inflationary Cost of Nigeria's Democracy

By Enyinnaya Uchenna-Emezue

ENYINNAYA UCHENNA-EMEZUE is a student at the Nigerian Law School in Bwari, Abuja. He holds a degree in engineering from the Federal University of Technology in Owerri, Nigeria, and a law degree from the University of Buckingham in the United Kingdom. During his time at Buckingham, he was president of the University of Buckingham Law Society, as well as the founding editor-in-chief of the Buckingham Student Law Review. Uchenna-Emezue also holds the Claritas Investment Certification from the Chartered Financial Analyst Institute.

Abstract

The democratic system is undermined when political financing is unregulated and votes can be gained through coercion or corruption. Unregulated political financing can have dire economic consequences and culminate in political crisis. This article will show that coercion and corruption are the norm and not the exception in Nigerian politics, and that the present framework fails to accurately regulate political financing as intended. This article also proposes pragmatic measures that may help curtail the influence of money in Nigerian politics.

Introduction

On 28 March 2015 and 11 April 2015,

general elections for political offices across the federal, state, and local government levels were held in Nigeria. The elections were generally considered a success and victory for democracy in a country that has a history of democratically elected governments being truncated by military coups. The elections were also historical, as it marked the first time an incumbent national government (People's Democratic Party, or PDP) was defeated at the polls by the opposition (All Progressives Congress, or APC). Remarkably, the transition process was largely peaceful, and most of the results were uncontested by candidates who lost. Nigeria's democracy, however, is plagued by the contentious issue of electoral financing, which if left

unchecked, may reverse whatever democratic gains have been made in the last decade.

Government enforcement of election financing has been weak. Election financing is regulated under the Electoral Act of 2006, which was amended in 2010 (now the Electoral Act 2010). Sections 88–93 provide for the regulation of political parties' financing and election expenses. The Independent National Electoral Commission (INEC) also published the *Political Party Financial Reporting Manual* in 2011 to assist political parties with their financial reporting obligations under the act. Enforcement of these regulations by INEC has been minimal at best, despite its authority to monitor and sanction candidates who violate the spending limits.¹

The regulatory shortcomings resulted in the 2015 general elections recording an unprecedented spending splurge by the two prominent political parties. While there is limited information in the public domain on the exact amount spent by both parties, estimates derived from monitoring political advertising indicate that almost N4,000,000,000 (approximately \$20,000,000) was spent on this political activity alone.² Working with this base figure, it may be reasonably projected that the aggregate of other expenditures by the political parties may be well above. Political activity in any democracy is

largely dependent on money, but the inflationary cost of Nigeria's democracy raises pertinent questions about what limitations should be placed on political financing, and what enforcement mechanisms can guarantee reasonable success of regulation.

The Symbiosis Between Democracy and Capitalism

Capitalism has come to represent the preeminent economic philosophy in most parts of the world since the fall of the Berlin Wall. The capitalist ideologies of self-interest and free markets make it congenial to the political philosophy of democracy, whereby people may freely choose their leaders. Capitalism is often mistakenly equated to democracy.³

Considering the capitalist and democratic systems in parallel, there is a convergence of values and behaviors in the economic marketplace that tend to be replicated in the political marketplace. While the economic marketplace is the center for the exchange of goods and services, transactions in the political marketplace undermine the democratic ethos.⁴

The unregulated flow of money in politics can create systemic inequalities whereby candidates and political parties can't compete on equal terms. Political competition under unregulated political financing, according to constitutional professor Keith Ewing, would be like "invit-

ing two people to participate in the race, with one participant turning up with a bicycle, and the other with a sports car.”⁵

Democratic governance is still at a very nascent stage in Africa. Just over twenty-five years ago, almost all African countries were one-party states or military dictatorships.⁶ In this embryonic stage of building democratic institutions, any seismic shocks to African economies may have dire political consequences. For instance, credit institutions reported that increased budget spending ahead of the 2012 elections in Ghana would damage the country’s economy.⁷ It is vitally important that the forces driving the free market (particularly unregulated flow of capital or money in this instance) are reined in from producing unintended political consequences in nascent democracies—Nigeria’s, in this instance.

Defining the Limits of the Political Marketplace

Michael Sandel makes a claim in his book *What Money Can’t Buy: The Moral Limits of Markets*, about the danger of drifting from a market economy to a market society where everything is up for sale. He argues against this extension of market-oriented thinking based on what he calls the “coercion objection” and the “corruption objection.” The coercion objection points to the

injustice that can arise when people buy and sell under conditions of severe inequality, which negates the voluntary nature of market exchanges. The corruption objection argues that certain moral and civic goods and practices are corrupted if bought and sold for money.⁸ In a lecture on Sandel delivered at Oxford University, he argued against the perception of citizens as consumers and politics as economics by other means. If this theory of democracy as a form of economics is right, then there is no reason to prohibit the buying and selling of votes.⁹

These arguments point to the corrupting influence money has when used in an unrestrained and overreaching manner in the economic marketplace. If these concerns are valid in the context of the economic marketplace, they are even more so in the political marketplace. While this issue mostly concerns corporate political spending and freedom of speech in advanced democracies, in Nigerian politics it is centered around open acts of bribery that fundamentally corrupt the electoral process.

Given that 46 percent of the Nigerian population lives below the poverty line, and a significant portion of the voting public is illiterate, it is easy to see why bribes given during the course of an election can have a significant influence on voting patterns.¹⁰ In a survey conducted by the International Foundation for

Electoral Systems (IFES) in 2007, a quarter of Nigerian adults admitted that someone tried to offer them a reward or gift to vote for certain candidates during an election. In addition, a third think it is understandable for political parties to offer money to people in return for their vote.¹¹ In the 2015 election, the two main political parties delivered bags of rice, etched with the faces of candidates, to voters in an attempt to sway the polls in their favors.¹² Instances abound where candidates throw money in the air during campaign rallies and leave the people to scramble for it.¹³ It is evident that the buying and selling of votes is the norm and not the exception in Nigerian political practice. As one political analyst described it: “The use of money [in Nigerian politics] is near bizarre. It is crude and pervasive. Delegates are not swayed by sentiments or superior arguments. They have to be bought wholesale.”¹⁴ The true democratic content in Nigeria’s electoral process appears to be largely compromised as the objections of coercion and corruption distort the freedom and ethics that should characterize the process.

An Analysis of the Present Regulatory Framework

The Electoral Act was amended in 2010 and regulates political party financing and election expenses. The

act sets maximum election spending limits for candidates and political parties but two sections in the act appear to be in conflict. Section 91 provides precise limitations on election expenses for candidates; however, in Section 92 there is no limitation on the party’s election expenses. In addition, the two sections are ambiguous about whether “election expenses” generally refer to expenditures by candidates or by parties. With this ambiguity, further cracks become evident in the regulatory framework.

For example, while Section 91 sanctions candidates who exceed the spending limit the act does not include any provisions to report contributions made to either candidates or parties. Similarly, Section 89 requires political parties to submit an audited annual statement, but includes no penalties for breaching this statutory requirement. It is thus evident the political financing provisions in the Electoral Act serve a self-defeating purpose, as reporting and disclosure are irrelevant in the absence of limitations on party financing, and reporting election expenses is no use if contributions are not recorded and reported properly.

The present reality is that disclosure is not a part of the country’s dominant political culture and INEC has failed to sanction any erring party. This failure of enforcement and compliance creates a constitu-

tional impasse for INEC in regard to performance of its reporting duties, though this has largely been ignored or goes unnoticed every year. Section 226(1) of the Constitution of the Federal Republic of Nigeria (1999) provides that the INEC shall, in every year, prepare and submit to the National Assembly a report on the accounts and a balance sheet of every political party. Since political parties fail to make proper disclosure to the commission, INEC also defaults in its duty to report properly on this matter to the National Assembly.

A Pragmatic Approach to Regulating Political Financing

The evidence of unregulated political financing in the last two general elections (2011 and 2015) makes it imperative that a new strategy based on pragmatism be employed to check the unmitigated flow of cash to politicians and political parties. It is vitally important that regulatory measures are implemented before the next general elections in 2019.

There are three pillars on which a comprehensive system of political financing may be established. First, there must be full disclosure of donations. This entails a system be put in place for accepting donations, recording donations, and reporting donations. It requires systematic reporting, auditing, and public access

to records. The objective of disclosure of political finances is to make politicians' accounts a subject of public knowledge and debate. Second, there must be an independent enforcement agency endowed with the necessary legal powers to supervise, verify, investigate, and if required, institute legal proceedings.¹⁵ Third, there must be access to public funding to provide an alternative to private sources. The absence of reasonable public funding exposes the electoral process to the risk of market forces having an overbearing influence on the outcome of elections. While the three pillars are present in the existing regulatory framework—in varying degrees—the full disclosure of donations is the weakest.

Full Disclosure and Reporting of Donations

The failure to regulate and enforce political financing measures is pervasive throughout Africa. One problem undermining effective scrutiny is the limited penetration of the banking system. Many transactions, whether legitimate or illegitimate, are carried out using cash rather than bank transfers or checks. Therefore there is no paper (or electronic) trail for the enforcing agency to follow.¹⁶ However, in the past five years, the Nigerian government has taken steps to improve the penetration of the banking system. The Central Bank of Nigeria (CBN) began implementing a new

cash policy effective 01 June 2012, to reduce cash payments and encourage electronic payments.¹⁷ In addition, the Money Laundering (Prohibition) Act 2011 stipulates that cash payments exceeding N5,000,000 and N10,000,000 made or accepted by an individual or corporation, respectively, can only be transacted through a financial institution.¹⁸ Financial institutions are obligated to disclose transactions in excess of the above sums to the CBN.¹⁹

Despite the measures to curb cash transfers, large sums of cash by politically exposed persons have not been communicated to INEC, and if such transactions *have* been disclosed, the commission has failed to act upon such information. Implementing an effective disclosure and reporting regime in Nigeria requires cross-cooperation, at the minimum between the Economic and Financial Crimes Commission (EFCC), the CBN, and INEC.

For instance, in December 2014, many Nigerian newspapers reported on a PDP fundraising dinner which raised N21,000,000,000 (about \$105,000,000) for the 2015 election campaign.²⁰ Many of the donations during the dinner were made by governors who owed civil servants in their respective states a backlog of unpaid salaries. Around the same time, the APC had its presidential primary and the chatter in the blogosphere was that many delegates

rejected sums of \$3,000 and \$5,000 offered to them as bribes, and rather voted with their conscience.²¹ These two events arguably contributed to the outcome of the election as it informed voters' opinions about the values each party represented. If non-detailed reporting of political financing by media sources can arouse public interest, an official and more thorough report has the potential to arouse even greater attention.

An Independent Enforcement Agency

The autonomy of INEC has been dubious since the inauguration of the Third Republic in 1999, due to frequent pressure from the executive branch and inadequate funding for the commission in the national budget.²² However, since 2010 INEC has become increasingly independent in its operations. The conduct of the last presidential election, and announcement of results by the commission, in which the incumbent (PDP) lost to the opposition (APC), is evidence that the commission can act without interference from the executive branch. On the basis of this development, the commission should begin to take proactive measures to ensure that it transitions from a body that is independent as a result of a non-interfering executive branch, to one that is a strong independent institution of the state. Consolidating the in-

dependence of INEC should focus on achieving two objectives: first, enforcing internal democracy and corporate governance within political parties; and second, restructuring the commission's organizational hierarchy.

Enforcing Internal Democracy in Political Parties

Transitioning into a strong independent institution requires the commission to have sufficient control over the operations and activities of both political parties and politicians. Among the nine constitutional powers granted to the commission, the first appears to be the one for which the Commission's application is most evident. It gives INEC the power to "organise, undertake and supervise" all elections to major offices in Nigeria.¹⁵

However, the organization and supervision of elections to various offices is essentially a wasteful and futile exercise if the processes are mired in undemocratic and corrupt activities. For this reason, INEC must become more proactive in exercising two of its other constitutional powers, namely monitoring the organization and operation of the political parties—including their finances—and providing rules and regulations that govern the political parties.¹⁶

Since political parties are the only vehicle by which politics may be practiced in Nigeria, it is imperative

that the commission ensures their activities are legal and democratic. Political parties are integral to the performance of INEC's functions, so they must also evolve to become institutions in their own right. In the last sixteen years, political parties have mostly been loose, unprincipled associations. This has been evidenced in fraudulent party primaries in which manipulation and coercion are performed by party executives with impunity, and also in political officers frequently decamping from one party to another, depending on which one serves their immediate political interest. The commission needs to set very specific regulations for party operations and closely supervise their internal processes to ensure that the democratic content is not lost. Such a proactive approach will ensure that internal democracy is established within the parties. With a thriving culture in political parties, the overall national democratic process will be greatly strengthened.

Restructuring the Commission's Organizational Hierarchy

At the apex of the organizational structure of the commission is the chairman who serves as the Chief Electoral Commissioner. The constitution mandates that persons appointed to these positions shall be "nonpartisan and of unquestionable integrity."²³ The implication of these broad powers of appointment

by the president—subject only to confirmation by the Senate, usually comprised of a majority of members from the president’s party—makes the commission in reality seem like an extension of the presidency. The opposition has often questioned INEC’s integrity as a result. The appointment process also places the commission’s principal officers under inordinate pressure from politicians. The fractured structural character of the commission has, over the years, become the focal point during elections.²⁴ The neutrality of electoral commissions is ensured by either appointing members who are nonpartisan or the appointment of members in a proportionate ratio representing different political affiliations.²⁵ Since the determination of what qualities a person who is “nonpartisan and of unquestionable integrity” must possess is not objective, the latter method is a more likely guarantee for impartiality. This is because the balance of political forces within the group will offset the risk of partiality. Also, if political parties know they have fair representation in the commission it could temper suspicions regarding the motive behind policy decisions made by INEC. Leadership should be collegial and comprise of seven national electoral commissioners, as opposed to the twelve who currently sit on the committee. The

party constituting the majority in the National Assembly should be allocated three nominees, the party in second position should be allocated two nominees, the party in third position and any other parties with representation in the National Assembly should be allocated one nominee each. A chairman should be appointed from this group of seven, by the president, all appointments being subject to confirmation by the Senate. Policy decisions by the commission should be taken on a simple majority vote. The result of such restructuring of the leadership of the commission would douse the mistrust that parties in the opposition have towards INEC being open to manipulation by the presidency.

Reasonable Public Funding

Public funding is guaranteed for political parties under Nigeria’s constitution. The constitution stipulates that disbursement by INEC to the political parties should be on a “fair and equitable” basis.²⁶ In concurrence with this constitutional provision, funding for the political parties was provided for under Sections 90 and 91 of the now repealed Electoral Act of 2006. The ratio in which funds were to be disbursed was 10:90, in favor of political parties that have representation in the National Assembly. There is no corresponding provision in the Elec-

toral Act of 2010. It appears that the omission of this provision was a result of the judgment in a case heard by the Abuja Federal High Court in 2006, in which the Citizens Popular Party (CPP) and nineteen other parties challenged this sharing arrangement. Judgment was granted in favor of the parties, thus compelling INEC to share funds among political parties equally. This narrow

noteworthy that under the Electoral Act of 2010, INEC may deregister political parties for failing to win a seat in the National or State Assembly elections.

A reasonable public funding regime would allow for proportionate funding for political activities by INEC and the political parties. A viable mechanism for implementing this may require INEC to provide

This narrow judicial interpretation of what the words “fair and equitable” means is an impediment to ensuring reasonable public funding for political parties. This is because sharing scarce resources equally among an uncertain number of political parties defeats the purpose of providing public funds for political activities.

judicial interpretation of what the words “fair and equitable” means is an impediment to ensuring reasonable public funding for political parties. This is because sharing scarce resources equally among an uncertain number of political parties defeats the purpose of providing public funds for political activities. The most common criterion for the distribution of public funds in a political finance regime is the number of seats and/or votes achieved, and this criterion was the guiding principle underlying the distribution ratio in the Electoral Act of 2006. It is also

about one-third of the funds, while the political parties generate the remaining two-thirds. This ratio will vary, subject to the caps INEC will set for fundraising at the different levels of election.

In order to make the most of any public funding regime, both direct and indirect public funding sources must be employed. The annual budgetary allocation to INEC appears sufficient enough to provide direct funding for political parties if supplemented by other indirect public funding sources. The allocations to INEC in the 2014 and 2015 bud-

gets were N45,000,000,000 (\$225 million) and N62,000,000,000 (\$310 million), respectively. The proposal in the 2016 budget is N45,000,000,000. Thus, the average allocation over the past three years is N50 billion per year (\$250 million), which if calculated per capita for a population of 180 million, will give \$1.3 per citizen. In comparison, South Africa (Africa's second largest economy) had a budget for 2010–2011 of \$17.3 million for a population of 50.6 million, which gives \$0.35 per citizen.

Indirect funding, on the other hand, is the provision of state resources other than money to political parties or candidates. The main form is free or subsidized access to public media. It may also include tax relief for parties, free access to public buildings for rallies or other party activities, and the provision of space for electoral advertising. The Electoral Act of 2010, in Section 100(1), provides that state apparatuses, including the media, shall not be employed to the advantage or disadvantage of any political party or candidate at any election. However, it provides further in Section 100(4) that the equal allotment of media time is subject to the payment of appropriate fees. This provision presumes the equality of financial power of the political parties, which should equate to the use of state apparatuses on an equal basis. The reality, however, is that

only the well-funded parties benefit from the use of the state's media apparatuses. A more prudent approach would entail the grant of specific time blocks to different political parties at a subsidized rate on state radio and television media. The same principle should apply to the use of public halls and stadiums for holding political rallies.

Such a regime would, in effect, accomplish two purposes: first, it would limit the opportunity for corporations and wealthy individuals to exercise undue control over the political process, and secondly, it would allow opposition parties access to public funds in order to remain viable alternatives to the party in power.

The Commodification of Candidacy

One of the basic elements in a democracy is the active participation of the people. Citizens must have the freedom to vote and to be voted for in elections. However, the political space in Nigeria is largely uncontested as a result of money's influence on participation. Money is quickly shrinking the political space, becoming a key variable in determining who participates in electoral politics and how they participate.²⁷ There is very low turnover of candidates in elections as financial barriers prevent average citizens from

standing for election, which creates systemic inequalities. Full political participation is thus limited to the very affluent in society, and to average citizens who have been co-opted by “political godfathers.”²⁸

In the last electoral cycle, the average cost of obtaining a nomination form to contest the presidency was N25,000,000 (\$125,000) and N500,000 (\$2,500) for the State House of Assembly. This was in addition to the N2,500,000 (\$12,500) and N50,000 (\$250) that was required as an “expression of interest” in the respective political offices.²⁹ In contrast, it costs just £500 (\$727) for a person to submit a nomination form to be elected to Parliament in the United Kingdom.³⁰ In other words, it costs three times more to obtain a nomination form for a Nigerian State House of Assembly than it does to obtain one for national parliament in the United Kingdom.²¹ These fees can be extortionary and discriminatory. The overall effect on politics in Nigeria is the emergence of the “commodification of candidacy.” Citizens can only stand for election if they are a party’s candidate for political office, and candidacy is a commodity which may be obtained by the highest bidder. With such inflated fees at the entry level, it is easy to see why money politics continues to dominate the Nigerian political landscape. Political parties conduct the nomination process

more as a fundraising drive than as an exercise geared toward picking credible and electable individuals. Even if the conduct of elections is adjudged to be free and fair, a gaping democratic deficit remains if the processes are tainted by coercion and corruption.

Conclusion

The provisions of the Electoral Act regulating political parties financing and election expenses are incoherent and produce an unregulated political financing regime. The democratic content in the electoral process has been largely compromised, as there is prevalent coercion of the electorate and rampant corruption of democratic values. If allowed to continue unabated, especially in a nascent democracy such as Nigeria’s, this spending may produce unintended political consequences. A new Electoral Act is needed to correct many inconsistencies and gaps in the present one.

In the interim however, INEC should focus on the areas it has the greatest capacity to regulate, such as monitoring the activities of political parties, prescribing rules to govern the parties, and applying sanctions to parties in breach—until there is sufficient capacity and political will to enforce an effective regime of full disclosure and reporting of political contributions and expenses. Cit-

izens can be useful players in this regulatory effort if the political space is expanded to allow for increased participation, which should curtail the trend of co-optation of public office holders by political godfathers. Nigeria cannot afford an election in 2019 that allows for the unregulated flow of cash in the political marketplace. The hard work of regulating the inflationary cost of Nigeria's democracy must begin now.

Endnotes

1. Abdusalam, Kehinde. 2014. "INEC Replies Critics: 'We Have Capacity To Monitor Parties' Campaign Spending." *Business Day Online*, 28 December.
2. Salman, Tunde. 2015. "Issues in Campaign Expenditure: Tracking Political Advertorials for 2015 Presidential Electioneering Campaigns in Nigeria from the Print Media" (conference presentation, n.d.).
3. Stoker, Gerry. 2006. "Capitalist Globalisation Threatens Democracy". *Democracy Series: Democracy and Capitalism*, 17-20.
4. Fiss, Owen. 1992. "Capitalism And Democracy." *Michigan Journal of International Law* 13: 9-11.
5. Walecki, Marcin. 2008. "Political Money and Corruption: Limiting Corruption in Political Finance," *Money and Politics In Nigeria: 1-12*. Edited by Victor A.O. Adetula. Abuja, Nigeria: Petra Digital Press.
6. Elin Falguera et al. 2014. *Funding of Political Parties and Election Campaigns: A Handbook on Political Finance*. Stockholm: International IDEA.
7. Meredith, Martin. 2011. *The State Of Africa*. London: Simon & Schuster.
8. Sandel, Michael J. 2013. *What Money Can't Buy*. London: Penguin.
9. Sandel, Michael J. 1998. "What Money Can't Buy: The Moral Limits of Markets" (lecture, Brasenose College, Oxford, United Kingdom, May 11-12).
10. "Nigeria: World Development Indicators." N.d. WorldBank.org. Accessed 28 September 2015.
11. Adetula, Victor A. O. 2008. *Introduction to Money and Politics in Nigeria*. Edited by Victor A. O. Adetula. Abuja, Nigeria: Petra Digital Press.
12. Moore, Jack. 2015. "Nigeria's Political Parties Bribe Voters with Rice Ahead of Elections." *Newsweek, Europe Edition*, 27 March.
13. Ojo, Emmanuel. 2008. "Vote Buying In Nigeria." *Money and Politics In Nigeria*, Edited by Victor A. O. Adetula. Abuja, Nigeria: Petra Digital Press.
14. "2015: Politicians Sell Properties, Collect Loans For Electioneering." 2014. *ThisDayLive.com*, 17 October.
15. Walecki, Marcin. 2008. "Political Money and Corruption: Limiting Corruption in Political Finance," *Money and Politics In Nigeria: 1-12*. Edited by Victor A.O. Adetula. Abuja, Nigeria: Petra Digital Press.
16. Elin Falguera et al. 2014. *Funding of Political Parties and Election Campaigns: A Handbook on Political Finance*. Stockholm: International IDEA.
17. "Cash-less Nigeria." N.d. Central Bank of Nigeria Online. Accessed 28 September 2015.
18. *Money Laundering (Prohibition) Act of 2011*, sec. 1. 2011. Nigeria.
19. *Ibid.*, sec. 10.
20. "PDP Raises N21 Billion for 2015 Election Campaign." 2014. *ThisDayLive.com*, 21 December.
21. "Dollars Everywhere at The APC Primaries This Moment." 2014. *Nairaland Forum (blog)*, 10 December.
22. 1999 Constitution of the Federal Republic of Nigeria, sec. 15a, pt. 1, sch. 3. 1999.

23. Nigeria Constitution, sec. 14(2a), pt. 1, sch. 3.
24. Omeiza, Moveh David. 2012. "Analysis Of The Structure Of Nigeria's Independent National Election Commission (1999–2011)." *European Scientific Journal* 8 (3): 171.
25. Ibid.
26. Nigeria Constitution, sec. 228(c).
27. Smah, Sam. 2008. "Money Politics and Electoral Violence in Nigeria." *Money and Politics in Nigeria*. Edited by Victor A. O. Adetula. Abuja, Nigeria: Petra Digital Press.
28. "Draft Guidelines for the Nomination of Candidates for Public Office In Nigeria." N.d. All Progressives Congress online. Accessed 28 September 2015.
29. "Guidance For Candidates And Agents: UK Parliamentary General Elections in Great Britain." N.d. ElectoralCommission.org. Accessed 28 September 2015.
30. "Exchange Rate (1GBP–N301.787)." N.d. Oanda.com. Accessed 28 September 2015.

Unlocking Financing for Slum Redevelopment: The Case of Mukuru

Mary Wanza Mutinda and Smith Otieno

MARY WANZA MUTINDA is a lecturer at Strathmore University School of Finance and Applied Economics in Nairobi, Kenya. Mutinda is also the finance team leader in the Improving Access to Justice and Basic Services in the Informal Settlements of Nairobi research project.

SMITH OTIENO is a graduate assistant at Strathmore Law School and legal research assistant in the Improving Access to Justice and Basic Services in the Informal Settlements of Nairobi research project.

Abstract

This study analyzes the financial relationship between land tenure and access to basic services in Mukuru, one of the biggest slums in Nairobi, Kenya. It challenges the premise that slums offer only low quality services at an affordable cost, and instead suggests residents pay a premium. The informal service structure presents a vibrant untaxed economy, which could be channeled toward the overall improvement of services. We recommend using a community approach to build a framework to leverage land tenure changes, as well as accessing the untaxed economy to provide improved collateral and financing for Mukuru residents.

Introduction

Over 60 percent of the 3.5 million people in Nairobi, Kenya, live in slums.¹ These informal settlements are characterized by extensive economic poverty, substandard housing, and limited access to basic services.

The linkage between access to basic services and tenure insecurity has been studied since the mid-1990s, with correlations drawn between level of land ownership, poverty, and access to services. Many slum dwellers face tenure insecurity, meaning they don't legally own the land on which they reside and lack legal rights to protect themselves against eviction. It is widely considered that the formalization of land rights facilitates access to better services at a lower price.²

Tenure insecurity is an archetype of informal urban settlements and the Mukuru slum is no exception. Mukuru is divided into two segments: Mukuru kwa Njenga and Mukuru kwa Reuben. In Section 3 of the Kenya Government Lands Act (GLA), the president issued several grants in the mid-1980s and '90s to private individuals and corporations. The grants issued contained special conditions, among them, that light industries were to be established on the land in question. However, the settlement area mushroomed in the mid-1990s and early 2000s due to a combination of failure to secure possession of already encroached land before issuing grants and political action condoning illegal encroachment.

In Kenya's newly adopted 2010 constitution, there are provisions that could provide innovative interpretations to secure tenure rights for the community in Mukuru slums.³ The constitution states land can be owned by communities in varied forms with "communities of interest" being one of the categories recognized.⁴

Keeping in mind that over sixty percent of Kenya's economic activity originates in Nairobi, this paper advocates for an economic framework to unlock capital generated by the informal basic services sector.

About the Settlement

The Mukuru slum sits on approx-

imately 450 acres of land in an industrial area and is among Nairobi's largest informal settlements. Mukuru developed over time as people traveled to the city to find jobs in the industrial sector.

The population of Mukuru is contested with estimates that range between 250,000 and 690,000 people and between 52,000 and 150,000 households. A railway line demarcates Mukuru kwa Njenga to the northeast and Mukuru kwa Reuben to the southwest. Both areas are further divided into approximately fifteen villages ranging in size from six to 80 acres. About two-thirds of residents today are small-scale entrepreneurs, rather than industrial workers. Households occupy on average a hundred-square-foot room with average monthly rent of KShs. (Kenyan shillings) 2,643, or \$26. Mukuru is more expensive than other large slums in Nairobi. Kibera, for instance, which is approximately fifteen kilometers (nine miles) from the Mukuru slum and considered the largest slum in Africa, has an average rent of KShs. 1,500 (approximately \$15) for the same room size.

Methodology, Data, and the Archetypical Household

This study is part of a larger International Development Research Centre project, backed by the Canadian government, which focuses on the

Mukuru slum in order to generate a better understanding of land tenure and basic service functions in the informal settlements. In doing so, it will suggest practical tools and solutions to improve conditions in the Mukuru slum.

The data present was gathered in November 2013 from an integrated survey on land ownership and tenure, provision, access and control of basic services, asset ownership, financial resources, evictions and demolition of houses, as well as thirty-two key informant interviews with informal small-scale service providers.

Stylized Household Characteristics

The average household in Mukuru has 3.7 people, compared to the Kenyan national average for low-income households of seven.⁵ The low household size for this demographic is partly attributed to the high proportion of single-person households, accounting for 28.6 percent of all Kenyan households. A household head was, on average, thirty-six years old. The research team recreated a typical Mukuru household budget, which indicated an average monthly expenditure of KShs. 7,772.73 (\$77). Food and rent constituted 51 and 34 percent, respectively, of this expenditure. There were minimal variations in the typical costs incurred across households, and no statistically significant concentrations of cheaper zones. However, there were

significant variations in income levels, which ranged from KShs. 4,000 (\$40) to KShs. 10,000 (\$100) and above. Households with earnings below the average KShs. 6,606.82 food and rent cost threshold adopted various coping mechanisms such as skipping a meal, owning the structure they lived in (usually through inheritance), and receiving donations from neighbors

The Premium Charge for Basic Services

Based on our analysis, Mukuru has low access levels to basic services, which are supplied by unlicensed and usually illegal small-scale service providers (SSSPs). SSSPs are difficult to hold accountable for quality and safety of the service they provide.

Rent for a 100-square-foot room in Mukuru is on average KShs. 2,643 (\$26), translating to a charge of KShs. 26.43 per square foot. This works out to a premium per square foot of about twenty-five percent when compared to the adjacent middle-income estate of Imara Daima where average rental of KShs. 35,000 (\$350) for a 1,660-square-foot living space translates to KShs. 21.01 per square foot.

Likewise, whereas a resident of Mukuru pays a minimum of KShs. 3/- for a 20-liter jerican of water (KShs. 150/- per cubic meter), a Nairobi resident connected to the formal water services will pay about

KShs. 55/- per cubic meter. Water, then, works out to be nearly three times more expensive for a Mukuru resident.

A similar picture is revealed for electricity. A Mukuru household is billed between KShs. 300 and 500 (\$3 to \$5) by an illegal small-scale provider for a live wire that connects one electricity bulb for lighting in a 100-square-foot room. This averages out to a consumption of 43 kilowatt-hours for which the Kenya Power and Lighting Company (KPLC), the legal formal service provider, would bill KShs. 206. This translates to a premium of at least forty-five percent for a resident of Mukuru.

Working with the lower estimate of household population in the Mukuru slum at 52,000, with over ninety percent tenancy rate, the revenues generated by the SSSPs provision of housing, water, and electricity work out to about KShs. 125 million, 5 million, and 15 million, respectively. These extensive revenues are largely untaxed.

These findings demonstrate the ability of a Mukuru resident to participate in the formal service system if a nexus can be found between divisibility of the formal service to fit the Mukuru wallet, while also creating a sustainable micro-revenue collection system.

Though the numbers indicate that a Mukuru household can afford the

formal service at a micro level, it is important to note that the consumption per household still falls below the expected global level. For instance, the findings suggest an archetypical household of three persons in Mukuru will consume, at most, two 20-liter jericans of water in a day. This translates to 1.2 cubic meters per month, falling far below the global estimates of between two and 10 cubic meters per month.⁶

Dynamics of the Informal Services Value Chain

Studies indicate a minimum of KShs. 145 million (\$1.45 million) generated by the informal Mukuru economy every month. These revenues are largely untaxed and controlled by an estimated 5,000 to 10,000 SSSPs.⁷

In order to build a claim for harnessing such revenues for formal purposes, it is necessary to understand the dynamics of the SSSPs' operations in terms of business setup, revenue model, institutionalization, and gendered issues. To do this we conducted thirty-two key informant interviews with various SSSPs providing housing, water, and electricity to Mukuru.

The growth of the Mukuru area in the 1990s and early 2000s correlates with the claimed "ownership" of structures in the area.⁸ Data analysis indicated a strong correlation with

demographic characteristics of age and gender and structure ownership. This was corroborated by key informants who provided documentary evidence of “officially driven” division and distribution of land led by the government-appointed chief and village elders between 2002 and 2005.⁹ Those residing in Mukuru paid KShs. 2,000/- for a 10-by-10 meter space to be used for construction of their personal accommodation. With time and increasing demand, the space owners partitioned structures to approximately 100-square-feet, occupying some and renting out the rest for extra income.

There are an estimated 20,000 structures in Mukuru, each with about ten to twenty partitioned rooms and an estimated 5,000 to 6,000 structure owners. A typical structure is built using iron sheets retailing between KShs. 150 to 200 a sheet and wood retailing between KShs. 80 to 100 a plank. The cost to build of each room is KShs. 20,000 to 30,000. With an average rental of KShs. 2,643, a structure owner is able to recover the capital outlay in eighteen months.

Water is a two-tier business model with few initial—and usually illegal—connections. These connections are from the formal Nairobi Water Services underground water chamber and an estimated 3,000 to 5,000 water vendors with either an

over-ground tap from illegal piping or a water kiosk that has a raised 5,000- or 10,000-liter plastic water tank with one to three water taps from the tank. Only a few vendors go the extra mile to treat the water—most arguing that the water is from a “safe” Nairobi water source and therefore adequately treated.¹⁰ However with common leaks in the piping and water sitting in untreated tanks there are common outbreaks of waterborne diseases.

The majority of water vendors we interviewed claim to recover their capital outlay of about KShs. 100,000 within four months.

Electricity, on the other hand, presents an interesting test case. Virtually all residents of Mukuru have access to electricity for lighting. Usually, a structure owner will formally apply for a legal connection. The KPLC charges a fee between KShs. 32,000 and 75,000 for a single-phase meter, depending on when the application was made. Thereafter, a second-level category of electricity vendors will seek “rights” to tap electricity from the original applicants in return for an agreed commission.¹¹ This second tier serves about twenty to eighty customers who are limited by the geographical distance of the spaghetti wires they would normally use to connect from the initial vendor. With a resident paying between KShs. 300 and 500, the first level

supplier is able to recover such capital investment within two years in the worst cases.

Most SSSPs finance their businesses from personal savings, family, or informal savings and credit groups. The relatively short period to fully recover capital allows such funding sources to be viable.

The informal service providers in Mukuru create various barriers blocking access to their economic activities. For example, the more lucrative services like electricity and water are organized into cartels with economic barriers to entry (higher capital outlay), as well as social barriers preventing individual residents from reaching out to the formal system (such as through threats or malicious damage of service lines).

Though no evidence surfaced to suggest an association or network of SSSPs, we did find commonality of social networks like tribe dominance of certain services. For instance, medical services are more common in the Kisii community, whereas housing and electricity are predominantly from the Kikuyu tribe.

The results clearly demonstrate the merits of such SSSPs in filling an unmet demand by formal providers and having the ability to overcome the operational cost barriers faced by formal providers in scaling down to a micro consumer. However, with a large number of seemingly

autonomous players, harnessing the revenues generated becomes even more challenging.

Evaluating Dynamics of Savings and Credit

To fully capture a snapshot of a household's income it is important to evaluate the level and frequency of savings—the balance of income after meeting monthly expenses.

Initial data indicated only about one-third of households had some savings, with a majority doing so through organized merry-go-round (chama) groups. Contributions to the chama are between KShs. 20 and 200 on a daily or weekly basis. Such savings translate to about ten percent of a household's monthly income.

The research team conducted interviews with thirty-one selected chamas to understand their dynamics. The team was especially interested in group characteristics and embedded social ties that enable the proper functioning of the credit system. A survey indicated over two-thirds of chamas having lived in Mukuru for less than five years.

In all cases, though the savings group operated under the classic Grameen model, there was repeated evidence of downsizing groups to an optimal membership of twelve to fifteen members within close geographical residency. Members indicated in interviews that a group in

size between the months in a year (twelve) and days in a month (thirty-one) is easier to manage, and does not take long for all the members receive their money. There was also evidence of a higher velocity of money in the system, with contributions collected and distributed daily to reduce the risk of default. Additionally, the typical savings group operates as a Rotating Savings and Credit Association (ROSCA) where the regular contributions are pooled and given as a lump sum to a member, as opposed to being invested in a banking institution. Members indicated that such lump sums were then used to pay for required stocks in business or settle school fees or hospital bills—essentially functioning as a delayed budget expense rather than savings for investment.

These findings present a near zero level of savings that, when available, can be used toward improving livelihoods. It, however, also reveals a functional social network that can be leveraged when negotiating for loans in the absence of traditional collateral forms.

Improving Housing and Basic Services in Informal Settlements

The analysis of the Mukuru household and dynamics of service provision have brought forth three key aspects that can be considered to

improve livelihoods, which are as follows:

1. With appropriate divisibility in cost and units of the basic resource, a household in Mukuru is able to participate in the formalized system.
2. There exists a risk group living below the estimated cost of housing and food level that needs special consideration to avoid gentrification.
3. A successful fund pooling and borrowing scheme should consider a system of social collateral with embedded control and reward systems that provide for weaker social ties.

How Much Basic Housing and Services Can a Mukuru Household Afford?

Assuming that the housing unit is the vehicle used to provide access to basic services such as water, electricity, and sanitation, and using a proxy for house affordability as three times the annual household income (a widely used measure of housing affordability recognized internationally in UN frameworks and World Bank briefs), we generated the affordability range between KShs. 174,194 and KShs. 522,581. We iterated different scenarios to estimate the optimal term and interest rate for

a loan whose repayment should reasonably fall within the current rental repayments of KShs. 1,000 and 5,000. In this case, we set the term to 15 years, the maximum term typically offered in Kenya home loans.

The optimal mortgage terms translate to

1. A term of fifteen years;
2. A monthly repayment of KShs.s 1,934 to 5,801.72; and
3. An implied affordable interest rate of six to eight percent.

The implied mortgage rate falls below the current market rates in Kenya, indicating a need for policy intervention to aid in affordability and ease of repayment.¹² The suggested interplay of actors and policy in creating an enabling framework is illustrated in Figure 1, and elaborated further in the section below.

Addressing the Affordability Gap

Given that a resident of Mukuru with virtually no savings can afford just under half the cost of mortgage (converting their rental payments to mortgage payments), they can only finance half the cost of the house, creating about a fifty percent gap in affordability.

There are several aspects at play in Mukuru (and the wider Kenyan housing market), which could be considered at a policy level to bridge such a gap.

Land Policy Intervention

In estimates of improvements, the cost of land is ignored. Mukuru land presents a complex case of government land transferred to private title with underlying illegality of grant-holders not exercising provisions within the grant. To avoid the costs of purchasing the land it could be designated as a community, suggesting a legal route embedded in the Kenyan constitution.¹³

Cross-subsidization

The Mukuru slum sits at the heart of the Industrial area and in close proximity to the central business district in Nairobi, the capital city of Kenya. Land values in industrial areas have more than tripled over the last ten years in Kenya, attributed mainly to infrastructure improvements, with estimates of about KShs. 60 million (\$6 million) per acre.¹⁴ A cross-subsidization to allow mixed use of the land for upmarket and industrial development, while simultaneously protecting gentrification of current residents, could be factored in to reducing the cost of improvements for a Mukuru resident.

Interest Rate Subsidization

Affordability of credit in Kenya is difficult to achieve. With interest rates in the double digits, the Kenyan mortgage market stands at just under 20,000 loans.¹⁵ Government

can play a role in reducing the affordability gap for Mukuru residents through policy and a well-designed capital guarantee and subsidy plan that addresses the inefficiencies in the housing market.¹⁶

Local Authorities Revenue Bonds

Evidently, the informal service provision generates revenues that in aggregate create a business case for the formal service providers to scale activities to Mukuru. Social Impact Bonds (SIBs) have been suggested as innovative funding methods for social outcomes, such as improving informal settlements for the health and wellbeing of society. In this case, a public agency seeks funds from private investors to provide a positive social outcome for a defined household. Ideally, the social outcome can be reliably measured financially (reduced health costs for Mukuru residents, for example). An important element for successful implementation is a one-on-one measurement of financial benefit from the social outcome. For Mukuru (as is with wider Kenya), it may be difficult to reliably measure the financial benefits through savings on a social issue. It may be easier to measure the financial benefit for a formal service provider by examining the potential increase in its revenue base or reducing systemic losses of billable service. This is the case for a revenue bond.

Unlike a general bond that would be guaranteed by a state or agency's issuing, the revenue bond is secured by a specific income-generating project (water services to a Mukuru zone, for instance). It is important to note that application to electricity may be surpassed by the continuing KPLC–World Bank slum electrification program. The program embeds a subsidized cost to the slums with the purpose of providing access to electricity, as opposed to a revenue stream for the KPLC.¹⁷

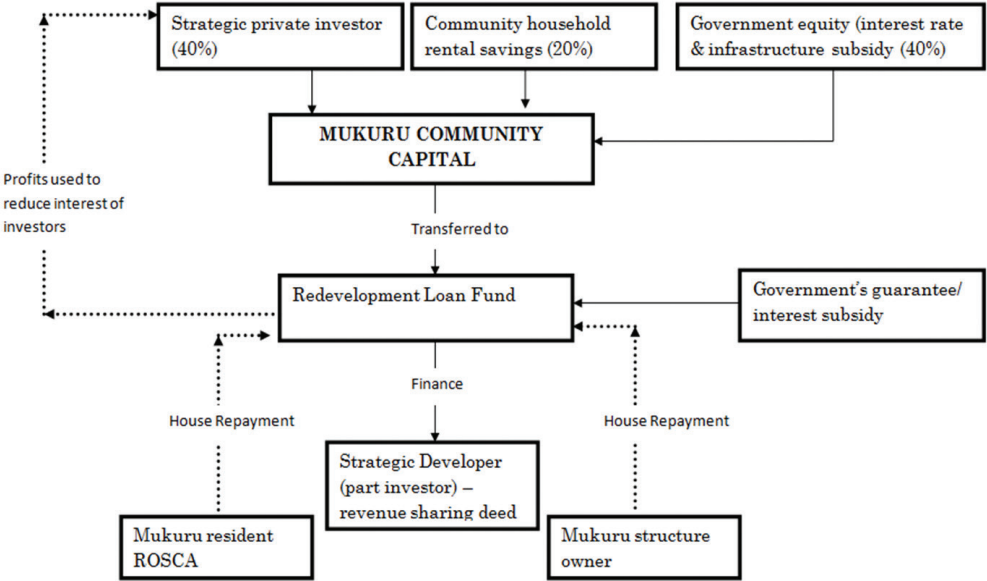
Reducing the Credit Risk Score

Though there exists evidence of vibrant ROSCA systems in Mukuru, they are largely informal and lack records that can be used as evidence of repayment. A formal credit provider would therefore shy away or demand a premium to lend monies to this demographic. With the social benefit the Mukuru community could offer, though, the government can provide a guarantee on all capital and interest raised by the community for improvements of livelihood. The government would be guaranteeing a strategic investor return of capital and interest, lowering the risk for the investor.

It is important to note that such policy interventions, guarantees, and subsidies should not represent a free service that would then distort the market, but rather an incentive to

various players in the housing market to lower opportunity costs for residents of Mukuru.¹⁸ In line with a market model, the value of such incentives needs to be measured and identified as equity due to the governmental role in the proposed Mukuru housing fund. Conditions can then be attached for recovery of such subsidies in the event of a resident's departure from the scheme.

Figure 1: Mukuru Settlement Housing Financing Model



Endnotes

1. Syagga, P., W. Mitullah, and S. Karirah-Gitau. 2001. *Nairobi Situation Analysis Consultative Report*. Nairobi: Government of Kenya and United Nations Center for Human Settlement.

2. Durand-Lasserve, Alain, and Harris Selod. 2007. *The Formalisation of Urban Land Tenure in Developing Countries*. Washington, DC: World Bank Urban Research

Symposium.

3. Kameri-Mbote, Patricia, and Collins Odote. 2015. "Innovating Tenure Rights for Communities in Informal Settlements: Lessons from Mukuru" (lecture, Annual World Bank Conference, Washington, DC, May 7).

4. Constitution of Kenya, art. 63(1) and 63(2)(b). 2010.

5. "Kenya Poverty and Inequality Assessment, Vol. 1: Synthesis Report." 2008. *WorldBank.org*. June.
6. The "Global Water and Sanitation Assessment of 2000" report defined "reasonable access" as 20 liters per person per day. With a household size of three, the reasonable consumption should be at least 1.8 cubic meters per month.
7. Due to the embedded illegality in the provision of services, the SSSPs prefer anonymity. Their number is thus hard to establish. Through understanding the dynamics of control of a region or service we estimated a geographical and demographic influence per SSSP and applied this to the area of Mukuru.
8. Mukuru Kwa Njenga (key informant), in discussion with the authors, 16 May 2014.
9. Ibid.
10. Mukuru Kwa Njenga (key informant), in discussion with the authors, 02 May 2014.
11. Ibid; Mukuru Kwa Ruben (key informant), in discussion with the authors, 16 May 2014.
12. Currently, mortgage rates in Kenya are between twelve and twenty-five percent.
13. Kameri-Mbote, Patricia, and Collins Odote. 2015. "Innovating Tenure Rights for Communities in Informal Settlements: Lessons from Mukuru" (lecture, Annual World Bank Conference on Land and Poverty, Washington, DC, May 7).
14. "2nd Half 2014 Kenya Market Update." N.d. *KnightFrank.com*.
15. "Developing Kenya's Mortgage Market." 2011. *WorldBank.org*. May.
16. Hoek-Smit, Marja C. 2009. "Housing Finance Subsidies." *Housing Finance Policy in Emerging Markets*: 417-461.
17. Mwangi, H. 2012. "Electrification Strategies for Slum Customers." Irena.org. 02 September. Accessed 05 January 2015. Whereas electricity is provided at a national level with only one entity KPLC has mandated to distribute power, water is a devolved function at county and city level. So a water program would involve 47 counties and several water boards with revenue accounted at the devolved level.
18. Hoek-Smit, *supra* note 12.



**Pyrethrum farmer on the foothills
of the Virunga Mountains, Rwanda**

Photo by Andy Agaba

Redressing HIV/AIDS Discrimination in Nigeria: The Implications of the Anti-Discrimination Act of 2015

Ngozi Okidegbe

NGOZI OKIDEGBE is a former law clerk to Justice Madlanga of the Constitutional Court of South Africa. She holds a BCL/LLB from the McGill Faculty of Law. Her areas of research are human rights and African constitutionalism. Okidegbe's work has been presented at several conferences, including the 2014 International AIDS Conference in Melbourne, Australia. She would like to thank Justice Cameron of the Constitutional Court of South Africa for his insight and feedback on a previous draft.

Introduction

Systemic discrimination continues to be the most pressing issue affecting people living with HIV/AIDS (PLWHAs) in Nigeria. In 2015, the Nigerian government decided to address this problem by enacting the HIV and AIDS (Anti-Discrimination) Act.¹ This act seeks to combat prejudice against PLWHAs by introducing important constitutional, civil, and criminal mechanisms to redress HIV-related discrimination. This article analyzes the potential impact the Anti-Discrimination Act will have on the lives of PLWHAs from both a human rights and public health perspective. It argues that while the act has the potential to be-

come a viable framework for reducing the prevalence of HIV-related discrimination in Nigeria, certain flaws threaten to limit its efficacy if left unaddressed. It calls on the Nigerian government to amend the act so as to correct these issues and give PLWHAs full enjoyment of their constitutional right to equality.

A Brief History

Nigeria holds the second-largest population of PLWHAs in the world.² Today, PLWHAs are a heavily stigmatized group in the country. According to the 2013 Nigeria Demographic and Health Survey conducted by the National Population Commission of the Federal Republic of Nigeria, the majority of Nige-

rians hold discriminatory attitudes towards PLWHAs.³ Such views are strengthened by the perceived association of HIV/AIDS with socially unacceptable behavior such as sex outside of marriage.⁴

The effect of this stigma is twofold. First, it dampens the effectiveness of public health policies aimed at controlling the epidemic by creating an atmosphere of fear that discourages those affected from getting tested or seeking treatment.⁵ Second, it affects the daily realities of PLWHAs, who, as a result, face bigotry.

Discrimination is particularly prevalent in employment and health care settings. Companies routinely require candidates to undergo HIV testing as a precondition for employment.⁶ Those who become HIV-positive during the course of employment may lose their jobs.⁷ In health care settings, medical professionals routinely conduct HIV tests on patients without obtaining informed consent or dispensing HIV-related counseling, as required by Nigerian law.⁸ These test results are often disclosed to third parties without the patient's consent.⁹ In some cases, PLWHAs have been denied treatment and access to medical facilities due to their HIV status.¹⁰ In addition, PLWHAs may also face discrimination in housing, their communities, and their families.¹¹

Despite the widespread prevalence of HIV discrimination, few cases

have made it to court. This may be because victims are afraid of the stigma attached to publicly coming forward as a person with HIV. The result is that HIV-related discrimination thrives, since those engaging in such discriminatory practices face few, if any, legal repercussions.

Prior to the Enactment of the Anti-Discrimination Act

The right to nondiscrimination on the basis of HIV status is longstanding. It is rooted in both the Nigerian Constitution and the African Charter on Human and Peoples' Rights.¹² Section 42 of the Nigerian Constitution guarantees the right to equality, which also prohibits discrimination on the basis of community, ethnic group, place of origin, sex, or religion.¹³ The grounds of discrimination listed in Section 42 are not exhaustive and therefore also include HIV status.¹⁴

The African Charter also provides a comprehensive framework that protects the right to nondiscrimination for all people, including PLWHAs. Article 2 of the African Charter prohibits discrimination on the basis of sex, race, religion, or other status. The phrase "any status" was included to widen the application to statuses not explicitly referred to in the African Charter—statuses such as HIV.¹⁵ Article 2 is reinforced by

Article 18(3), which imposes a duty on the state to eliminate forms of discrimination against women that are prohibited by international declarations and conventions. Article 28 offers further support by bestowing a private law duty on all persons to tolerate others. When read together, these provisions work in tandem to protect rights of PLWHAs against HIV-related discrimination.

Despite being guaranteed by both its national constitution and the African Charter, Nigerian courts have consistently failed to legally support the right to nondiscrimination. One example is *Festus Odafe v. Attorney General of the Federation*.¹⁶ This case concerns four HIV-positive prisoners, who were denied access to HIV treatment while suffering from opportunistic infections. The prisoners brought an action to the High Court of Port Harcourt, alleging the prison's denial violated their fundamental rights, in particular their right to equality under the Nigerian Constitution and their right to health under the African Charter. The High Court made two important findings with its decision. In respect to the discrimination claim, the court held that the plaintiffs' constitutional right to equality was not violated as Section 42 does not protect against HIV-related discrimination. As Judge Nwodo wrote:

[T]he right to freedom from discrimination as enshrined in

Section 42(1) of the constitution did not cover discrimination by reason of illness, virus or disease. . . . Therefore from the above category specified, applicants cannot invoke section 42(1) on the contention that they have a right to exercise under that section.¹⁷

Regarding the right to health claim, Nwodo ruled the denial of medical treatment violated the African Charter. This was, in part, due to the fact the Nigerian government is obligated to provide medical treatment to prisoners in Sections 3 and 8 of the Federal Prison Act.¹⁸ Nwodo noted that "statutes have to be complied with and the state has a responsibility to all the inmates in prison, regardless of the offence involved."¹⁹ As a result, the court upheld the prisoners' claim in part, finding only their right to health had been violated.

The *Festus Odafe* decision had two implications. First, its holding that Section 42 does not protect against HIV-related discrimination forecloses on the ability of PLWHAs to contest unfair treatment on the basis of HIV status. The decision also introduced uncertainty about the enforceability of the right to health guaranteed in the African Charter in Nigeria. As a result, the case prompted two divergent views. One view is that *Festus Odafe* stands for the proposition that the right to health guarantee in the African Charter is

enforceable in Nigeria.²⁰ The other view is that *Festus Odafe's* holding is enforceable only where existing statutes demonstrate Nigeria has taken steps to protect this right. The uncertainty leaves PLWHAs without a concrete mechanism to combat HIV-related discrimination resulting from their denial of essential health care services.²¹

Another important case to examine is *Georgina Ahamefule v. Imperial Medical Centre and Dr. Molokwu*.²² This case concerns Ahamefule, who sued her former employer Dr. Molokwu, chief medical director at Imperial Medical Centre, for HIV-related discrimination. Molokwu tested Ahamefule for HIV without her consent and failed to provide requisite counseling. Ahamefule was fired on the basis of her HIV-positive status and subsequently refused access to medical treatment. In 2002, Ahamefule brought an action to the High Court of Lagos against both Molokwu and Imperial Medical Centre claiming: (1) that the termination of her employment due to her HIV-positive status was illegal, in bad faith, and in violation of her right to nondiscrimination under Articles 2, 18(3), and 28 of the African Charter; (2) that being denied medical treatment based on her HIV-positive status violated her right to health pursuant to Article 16 of the African Charter and Article 12 of the International

Covenant on Economic, Social and Cultural Rights (ICESCR); (3) that the initial HIV test conducted by Molokwu was not consensual and therefore constituted unlawful battery on her person; and (4) that Molokwu's failure to provide her with both pre- and post-HIV-test counseling constituted unlawful negligence on his part.²³ For these claims, she sought five million naira for wrongful termination, three million naira for unlawful and negligent HIV testing, and two million naira in punitive damages. The defendants admitted to the alleged conduct. The defense also argued Ahamefule had to be fired because the hospital had an "obligation to protect the public at large from being infected by HIV or similar diseases."²⁴ The Imperial Medical Centre further contended they had "no regrets for terminating the Claimant's appointment upon it being confirmed of her danger to the entire community."²⁵

In reaching its decision, the court chose not to rule on the merits of Ahamefule's discrimination claim. Instead, it found her termination due to her HIV-positive status to be unlawful, since the defendants had failed to prove her employment would have posed a direct threat to the health and safety of hospital staff and patients. Judge Idowu noted there was insufficient evidence demonstrating Ahamefule's position as an auxiliary nurse who

never handled “blood and sharp objects such as needles, knives, and others serve[d] as a risk to the staff and patients of the hospital.”²⁶ Second, the court held that denying Ahamefule medical care amounted to a flagrant violation of her right to health guaranteed under Article 16 of the African Charter and Article 12 of the ICESCR. Third, the court held that carrying out an HIV test without first obtaining Ahamefule’s informed consent constituted unlawful battery on her person. Finally, Idowu held that Molokwu was negligent by breaching his professional duty to afford Ahamefule HIV-related counseling services before and after the HIV test. Idowu found the hospital and Molokwu were jointly liable and ordered them to pay seven million naira in monetary compensation to Ahamefule.

The *Georgina* decision has important implications on the rights of PLWHAs. By holding the plaintiffs’ right to health had been violated it endorses the proposition that the right to health guarantee in the African Charter is enforceable in Nigeria.²⁷ In this respect, the decision removed the prior uncertainty created by *Festus Odafe* and enabled PLWHAs to rely on the African Charter to contest unfair treatment in health care settings. Second, the decision states that dismissing an employee solely due to HIV status is illegal, which provides a strong

basis for HIV-positive employees to contest their exclusion in the workplace. The decision also recognizes the right to informed consent for HIV testing. By ruling that carrying out an HIV test without consent constituted unlawful battery, the court provides PLWHAs with an important tool to redress a common HIV-related discriminatory practice in hospitals. Fourth, the decision has important implications on medical professionals, citing their duty to both obtain informed consent prior to carrying out an HIV test and provide HIV-related counseling services. Breaching this duty amounts to medical negligence. The ruling warrants a level of medical care in the context of HIV testing that conforms to international human rights guarantees.²⁸ It further affirms the ability of a plaintiff to successfully bring an action in negligence where this level of medical care has not been provided.

Despite the positives of the decision, *Georgina* also had an important shortcoming in the failure of the court to consider the merits of Ahamefule’s discrimination claim. As a result, the decision does not give effect to PLWHAs’ right to nondiscrimination. This means PLWHAs have continued to lack an equality framework in which they can contest and challenge the totality of discrimination they face daily. This omission means PLWHAs can only

rely on *Georgina* decision's to redress a specific set of discriminatory practices occurring in employment and health care settings. This severely limits its ability to fully address the problem of HIV-related discrimination in Nigeria.

It is important to note this judicial failure is inconsistent with judicial trends in other African countries. One example is the South African Constitutional Court's decision in *Hoffmann v. South African Airways*.²⁹ This case concerns a plaintiff who had been refused employment as a cabin attendant by South African Airways (SAA) because he was HIV-positive. The Court held that SAA's refusal to employ Hoffmann had violated his constitutional rights to equality and dignity.

At the time of the decision, the South African Constitutional Court was grappling with the same challenges and pressures before Nigerian courts. South Africa had a significant population of PLWHAs who were being subjected to systematic and widespread discrimination. In rendering its decision, the Court was empathetic to this fact. It considered the implications of the then rampant HIV-related discrimination in employment in South Africa, noting "the impact of discrimination on HIV positive people is devastating . . . It denies them the right to earn a living."³⁰ The Court's recognition of the social context is the

primary reason it was able to rule the refusal of employment of the plaintiff as discriminatory and therefore prohibited under the South African Constitution. Had Nigerian courts considered the social context of HIV discrimination with the same attention and depth as the *Hoffmann* court they might have been better prepared to address the discrimination claims brought forth by the plaintiffs in *Festus Odafe* and *Georgina*.

The Importance of the Anti-Discrimination Act

The strength of the Anti-Discrimination Act resides in three important features of its framework: the protection it affords PLWHAs against discrimination, the duty it imposes on individuals to eliminate HIV discrimination, and the mechanisms provided to redress HIV discrimination.

Protection Against HIV Discrimination

The act provides a comprehensive framework to protect against HIV discrimination. Section 3 states that PLWHAs have a right to be free from discrimination in employment, health care, education, public places, government, or any other establishment. This protection is reinforced by Section 6, which makes it an offense to discriminate on the basis of HIV status. The section also outlaws

the following practices in respect to PLWHAs:

- (a) Denial of medical treatment;³¹
- (b) Denial of credit, loans, insurance benefits;³²
- (c) Denial of the right to marry;³³
- (d) Refusal of access to religious, residential, communal places, or other places of human endeavor;³⁴
- (e) Removal from medical facilities;³⁵
- (f) Deprivation of the right to vote;³⁶
- (g) Denial of admission to a private or public function; and³⁷
- (h) Refusal to reasonably accommodate PLWHAs.³⁸

By prohibiting these practices, Section 6 affords PLWHAs significant protection against the most common forms of HIV-related discrimination. This should, in turn, enable the act to have a meaningful impact on the daily lives of PLWHAs.

It is important to highlight that the act allows PLWHAs specific protections in the workplace and in health care settings. Employers can no longer hire or fire employees due to HIV status.³⁹ Employers are even prohibited from requiring HIV tests as a precondition to employment.⁴⁰ Where an employer does provide HIV testing, it must be in compliance with the National HIV Counselling and Testing Guidelines,

which require informed consent and pre- and post-HIV test counseling services.⁴¹ The information obtained through such tests must be kept confidential.⁴² Disclosure also requires the written consent of the individual to whom the information pertains.⁴³ Not following these procedures renders an employer liable to criminal sanctions.⁴⁴ These provisions will prevent employers from carrying out HIV tests in contravention of the National HIV Counselling and Testing Guidelines. Other important workplace protections include the requirement that employers must: (1) reasonably accommodate PLWHAs, (2) set a workplace policy on HIV in accordance with the National HIV and AIDS workplace policy, and (3) incorporate remedies for HIV-related discrimination into workplace grievance procedures.⁴⁵ These protections should ease the barriers excluding PLWHAs from the workplace.

In addition to the workplace, the Act also provides PLWHAs with key protections in health care settings. The most significant protection concerns HIV testing. Where testing is conducted, medical professionals have an obligation to conduct the test with informed consent and in accordance with the national guidelines on confidentiality and counseling.⁴⁶ Information related to HIV testing and HIV status is private.⁴⁷

Test results cannot be disclosed without written consent.⁴⁸ Medical professionals who breach this requirement are liable to face criminal sanctions.⁴⁹ Furthermore, medical professionals can no longer use a patient's HIV status as a basis to refuse or deny treatment.⁵⁰ In this respect, the Act guarantees a stronger level of protection than that afforded by the *Georgina* decision.

Imposition of a Duty on the State and Individuals to Eliminate HIV Discrimination

The Act imposes a generalized duty on individuals to prevent discrimination. Section 4 states that every individual and institution has a duty to eliminate HIV-related discrimination in all settings. This duty gives meaning to the existing obligation under Article 28 of the African Charter for individuals to eliminate discrimination.⁵¹ The section also reflects the understanding that all individuals have a role to play in combating HIV-related discrimination. This may mean the Nigerian government has finally recognized the link between HIV-related discrimination and the HIV epidemic—namely that policies addressing HIV discrimination also decrease HIV transmission by encouraging those at risk to get tested, and those who are infected to seek treatment.⁵² Perhaps this is what the Nigerian gov-

ernment hopes to achieve through these provisions.

Mechanisms to Redress HIV Discrimination

The final and most promising feature of the Act is its enforcement mechanisms. The first concerns the constitution. The act gives PLWHAs a constitutional right to redress HIV discrimination under Section 42 of the Nigerian Constitution.⁵³ By affording this right, the Act rejects the *Festus Odafe* ruling, and instead affirms PLWHAs' constitutional right to nondiscrimination.

The second mechanism is civil remedies. The Act affirms that any individual or group directly affected by HIV-related discrimination may commence a civil action to redress noncompliance with the Act.⁵⁴ Actions can be taken against both natural and legal persons.⁵⁵ In order to exercise this right, the concerned individual or group must first notify the Minister of Justice.⁵⁶ Where a court finds the concerned party has been unfairly discriminated against it has the discretion to make any appropriate order that is just and equitable in the circumstances. This discretion enables a court to order compensation, damages, specific performance, deregistration of a corporate body, or withdrawal of an individual's professional license.⁵⁷ Providing these legal remedies and

sanctions should have both a practical and deterrent effect on perpetrators of HIV discrimination.

The third mechanism deals with the Minister of Justice. The minister is granted wide-ranging powers to monitor and to enforce the provisions of the Act. First, the Minister of Justice has the power to conduct an inquiry into any alleged contravention of the Act. Section 24(2) affords any individual the right to petition the Minister of Justice concerning a contravention of the Act.⁵⁸ Where an inquiry has been conducted, the minister can make recommendations about how to redress the infringement on the individual or institution concerned. The minister may recommend the person adversely affected be hired, admitted, reinstated, or paid compensation for damages.⁵⁹ The minister can also specify the timeframe in which the contravention must be rectified, as well as potential sanctions for non-compliance with the recommendation.⁶⁰ The minister further has the right to bring criminal proceedings against anyone in a court of competent jurisdiction for noncompliance. Sanctions range from a fine to imprisonment.⁶¹ The state also retains the right to criminally prosecute any individual or institution that discriminates against or threatens a person for exercising a right under the Act.⁶²

Flaws and Potential Solutions

The Anti-Discrimination Act has several shortcomings that threaten to limit its ability to fully tackle the problem of HIV-related discrimination in Nigeria. First, there are concerns as to the limits of its applicability. Second, certain persons do have a right to discriminate against PLWHAs in specific instances. Finally, the Act allows for a spouse or cohabiting partner to obtain information relating to the HIV status of a person without that person's consent.

Limitations on the Act's Applicability

A major problem with the Act is that its applicability is severely limited. As Section 2 states,

1. This Act applies to all persons living with and affected by HIV/AIDS in Nigeria.
2. This Act applies to all employers of labor and employees in the public and private sectors including the Nigerian Armed Forces, Nigeria Police State Security Services, other Para-Military Organizations, Schools, Hospitals, and places of worship.

The effect of Section 2 is that the act is not applicable to all persons in Nigeria. For instance, a private

property owner selling his house on the market would not be subject as he or she would constitute neither an employer nor an employee, and could freely discriminate against HIV-positive individuals interested in the home. A significant class of persons remain able to continue to discriminate against PLWHAs without facing any of the repercussions specified in the Act.

A Right to Discriminate

Where the act does apply, it contains a provision, Section 6, enabling individuals to continue to perpetrate HIV-related discrimination. Section 6 allows discrimination on the basis of HIV status in cases where the status of the individual concerned is of such a nature that it “may expose other persons to the danger of con-

Section 6 allows discrimination on the basis of HIV status in cases where the status of the individual concerned is of such a nature that it “may expose other persons to the danger of contracting the virus.” This exemption is important, as it does not require the risk of exposure to be probable.

To address this problem, the Nigerian government must amend Section 2 of the Act to state that it applies to all persons in Nigeria. This change would bring coherency, since many of its provisions were clearly meant to apply to all. For instance, Section 4 states all individuals shall take steps to protect the human rights of PLWHAs, which includes those not in an employer–employee relationship. Furthermore, it would increase the effectiveness of the Act by enabling PLWHAs and the Minister of Justice to bring actions against any person who discriminates on the basis of HIV status.

tracting the virus.” This exemption is important, as it does not require the risk of exposure to be probable. This means that individuals will be able to discriminate in cases where HIV exposure is possible—even if it is not probable. The effect of this exemption cannot be overstated. It raises the question of whether a defendant such as in the *Georgina* decision would have been able to rely on this exemption to escape liability. In other words, does the inclusion of this exemption dilute the rights that *Georgina* affords for PLWHAs? Furthermore, this exemption renders the key protections afforded by the Act meaningless, since each of them

can be displaced by a defendant who provides proof that HIV exposure was a possibility. The Act is inefficient at protecting the very rights that it creates.

To redress this problem, the exemption in Section 6 should be repealed or, at the very least, amended to include a further qualification on the right to discriminate. This qualification would have to specify the individual relying on this exemption must demonstrate that there exists a logical and well-founded chance of HIV exposure. This would foreclose the possibility of employers and medical professionals utilizing this exemption to perpetrate HIV-related stigma, and would also balance the rights of PLWHAs with the greater public.

Disclosure to a Spouse or Cohabiting Partner

The third shortcoming of the Act is its provisions on disclosure. The Act affords a person the right to know the HIV status of his or her spouse or cohabiting partner in situations where that person considers himself or herself at risk of being infected. This has two implications. First, an individual does not have a right to keep his or her HIV status from a spouse or cohabiting partner. Employers and medical professionals are also allowed to give spouses and cohabiting partners such information without consent. Spouses and co-

habiting partners may even be able to request this information outright.

This shortcoming is further entrenched by Section 6(j), which allows the state to deny a marriage license where one of the partners has not been informed of the HIV status of the other. With these provisions, the Act significantly limits the confidentiality and privacy that PLWHAs will be afforded in regard to their HIV status. In addition, the provisions are unconstitutional, as they interfere with PLWHAs' rights to privacy, confidentiality, and equality.⁶³ It is likely that this will have a chilling effect on HIV testing, as those who are married or in cohabiting relationships may not want to undergo testing and risk the results being disclosed to their significant others. These two problems will significantly reduce the effectiveness of the Act to combat HIV-related discrimination.

The only solution to these shortcomings is for the Nigerian government to repeal Sections 8(2) and 6(j). In addition to being unconstitutional, these provisions also have the potential to undermine one of the key purposes of the Act, which is to create a supportive environment for PLWHAs. These sections also risk counteracting the Act's stated objective to give effect to the human rights guaranteed in Chapter 4 of the Nigerian Constitution. By repealing these sections, the act will be better

able to ensure PLWHAs' constitutional guarantees.

Conclusion

We must wait to see what effect the Anti-Discrimination Act will have on HIV-related discrimination in Nigeria, but it holds significant promise. The fact that it outlaws many of the common HIV-related discriminatory practices means it will likely have a positive and meaningful impact on PLWHAs. The strong protections should provide PLWHAs and the Minister of Justice with crucial tools to contest and redress discrimination when in violation. Nonetheless, significant revisions must be made to the Act so as to strengthen its effectiveness. The Nigerian government must pass proposed amendments to the Act, as this is the only way to bring PLWHAs within the full protection of their right to nondiscrimination. Until the Nigerian Government does so, PLWHAs will continue to be discriminated against, and the Act will be too weak to prevent it.

Endnotes

1. "HIV and AIDS (Anti-Discrimination) Act." 2014. Federal Republic of Nigeria Official Gazette 101, vol. 125 (28 November).
2. United Nations Program on HIV/AIDS. 2012. "UNAIDS World AIDS Day Report."
3. Nigeria National Population Commission and ICF International. 2014. "Nigeria

Demographic and Health Survey."

4. Laura Nyblade et al. 2009. "Combating HIV Stigma in Health Care Settings: What Works?" *Journal of the International AIDS Society* 12: 2.
5. Ogunniyi, Olayemi Jacob, and Dosunmu Akinola George. 2014. "Historical and Cultural Implications of Human Immunodeficiency Virus (HIV) and Women's Rights in Nigeria: A Contextual Clarification." *European Scientific Journal* special edition: 321-326.
6. Centre for the Right to Health Project. "HIV/AIDS and Human Rights in Nigeria Background Paper for HIV/AIDS Policy Review in Nigeria Policy" (working paper no. 5907-413-CRH-01, Nigeria, September 2003).
7. Network of People Living with HIV and AIDS in Nigeria, 2011. "The People Living with HIV Stigma Index."
8. Chen Reis et al. 2005. "Discriminatory Attitudes and Practices by Health Workers Toward Patients with HIV/AIDS in Nigeria." *PLoS Medicine* 2 (8): 743-752..
9. Ibid.
10. Centre for the Right to Health Project. "HIV/AIDS and Human Rights in Nigeria Background Paper for HIV/AIDS Policy Review in Nigeria Policy" (working paper no. 5907-413-CRH-01, Nigeria, September 2003).
11. Ibid.
12. 1999 Constitution of Federal Republic of Nigeria, decree no. 24; African (Banjul) Charter on Human and Peoples Rights Act 1990, cap. 10. Nigeria.
13. Article 42 reads as follows:
 - (a) A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person:
 - (b) be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government, to disabilities

or restrictions to which citizens of Nigeria or other communities, ethnic groups, places of origin, sex, religions or political opinions are not made subject; or

(c) be accorded either expressly by, or in the practical application of, any law in force in Nigeria or any such executive or administrative action, any privilege or advantage that is not accorded to citizens of Nigeria or other communities, ethnic groups, places of origin, sex, religions or political opinions.

(d) No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth.

(e) Nothing in subsection (1) of this section shall invalidate any law by reason only that the law imposes restrictions with respect to the appointment of any person to any office under the State or as a member of the armed forces of the Federation or member of the Nigeria Police Forces or to an office in the service of a body, corporate established directly by any law in force in Nigeria.

14. One case that illustrates how the grounds of discrimination listed in Section 42 are not exhaustive is *Mrs Folarin Oreka Maiya v. The Incorporated Trustees of Clinton Health Access Initiative Nigeria* in 2011. The ruling held that pregnancy was a protected status under Section 42. Prior to the Anti-Discrimination Act, several scholars contended that Section 42 prohibited discrimination on the basis of HIV status. See also: Durojaye, Ebenezer 2010. "Litigating the Right to Health in Nigeria: Challenges and Prospects." *Law and Domestic Human Rights Litigation in Africa*. Edited by Mangus Killander. Cape Town: University of Pretoria. This is now affirmed in Section 28 of the Anti-Discrimination Act, which holds:

Nothing in this Act shall preclude a person living with HIV or affected by AIDS from seeking redress against any person or institution for any breach of his or her constitutional rights in accordance with the provisions of Section 42 of the 1999 Con-

stitution of the Federal Republic of Nigeria as amended.

15. The African Charter's prohibition of HIV discrimination was also expressed by the South African Constitutional Court in *Hoffmann v. South African Airways* in 2001. This case concerned the constitutionality of South African Airways' refusal to hire the plaintiff on the basis of his HIV status. In reaching its decision, the court noted its obligation to redress the HIV-related discrimination committed against the plaintiff arose in part from the equality guarantee in the African Charter.

16. *Festus Odafe v. Attorney-General of the Federation*, 205.FHC 608 (2004). Federal High Court of Nigeria.

17. *Ibid.*, paras. 30-31

18. *Ibid.*, paras. 36-37.

19. *Ibid.*, para. 38

20. This is the view taken by Durojaye, *supra* note 14.

21. The second view was supported by the fact that the court heavily based its decision on Nigeria being statutorily obligated to treat prisoners as a result of Sections 3 and 8 of the Federal Prison Act.

22. *Georgina Ahamefule v. Imperial Medical Centre and Dr. Alex K. Molokwu*, ID.1627.2000 (2012). High Court of Lagos State.

23. The International Covenant on Economic, Social and Cultural Rights. 16 December 1966, Nigeria.

24. Georgina, *supra* note 22 at 5.

25. *Ibid.*

26. Georgina, *supra* note 22 at 21.

27. The court held that the plaintiff's right to health was violated, however the court failed to provide its reasoning for this holding.

28. For example, the International Guidelines on HIV/AIDS and Human Rights, promulgated by the Office of the United Nations High Commissioner for Human

Rights (OHCHR) and the Joint United Nations Programme on HIV and AIDS (UNAIDS); ILO Code of Practice on HIV/AIDS and the World of Work; and ILO Recommendation Concerning HIV and AIDS and the World of Work. See also: Office of the High Commissioner for Human Rights. 1998. "OHCHR/UNAIDS: HIV/AIDS and Human Rights: International Guidelines." New York and Geneva.

29. Hoffmann, supra note 15.

30. Hoffmann, supra note 15 at para. 28.

31. "HIV and AIDS (Anti-Discrimination) Act," supra note 1 at Section 6(a).

32. "HIV and AIDS (Anti-Discrimination) Act," supra note 1 and Section 6(h). It is important to note that a person can be denied credit, loans, and insurance benefits if that person has failed to disclose their HIV status.

33. "HIV and AIDS (Anti-Discrimination) Act," supra note 1 at Section 6(j). It is important to note that a person cannot be denied the right to marry if that person's soon-to-be spouse is unaware of the person's HIV-status.

34. "HIV and AIDS (Anti-Discrimination) Act," supra note 1 at Sections 6(d), (e), (f), and (i).

35. "HIV and AIDS (Anti-Discrimination) Act," supra note 1 at Section 6(i).

36. "HIV and AIDS (Anti-Discrimination) Act," supra note 1 at Section 6(g).

37. Ibid.

38. "HIV and AIDS (Anti-Discrimination) Act," supra note 1 at Section 6(c).

39. "HIV and AIDS (Anti-Discrimination) Act," supra note 1 at Section 2.

40. "HIV and AIDS (Anti-Discrimination) Act," supra note 1 at Section 9. This protection is not absolute, as Section 9 states an employer can require an HIV test in accordance with the circumstances set out in other Nigerian laws..

41. "HIV and AIDS (Anti-Discrimination)

Act," supra note 1 at Section 10.

42. "HIV and AIDS (Anti-Discrimination) Act," supra note 1 at Section 13.

43. "HIV and AIDS (Anti-Discrimination) Act," supra note 1 at Section 11.

44. "HIV and AIDS (Anti-Discrimination) Act," supra note 1 at Section 10(3); Section 12.

45. "HIV and AIDS (Anti-Discrimination) Act," supra note 1 at Section 7; Section 21; Section 20..

46. "HIV and AIDS (Anti-Discrimination) Act," supra note 1 at Section 9(4).

47. "HIV and AIDS (Anti-Discrimination) Act," supra note 1 at Section 13.

48. Ibid.

49. Ibid.

50. "HIV and AIDS (Anti-Discrimination) Act," supra note 1 at Section 6.

51. "HIV and AIDS (Anti-Discrimination) Act," supra note 1 at Article 28.

52. See also: UNAIDS Joint United Nations Programme on HIV/AIDS. 2006. International Guidelines on HIV/AIDS and Human Rights consolidated version. Geneva: UNAIDS.

53. "HIV and AIDS (Anti-Discrimination) Act," supra note 1 at Section 28.

54. "HIV and AIDS (Anti-Discrimination) Act," supra note 1 at Section 26.

55. "HIV and AIDS (Anti-Discrimination) Act," supra note 1 at Section 29.

56. "HIV and AIDS (Anti-Discrimination) Act," supra note 1 at Section 26(2).. This notification is required in order to avoid duplication of efforts, as the Minister of Justice has the power to investigate and redress any act of HIV-related discrimination that comes to his or her attention under Sections 24 and 25.

57. "HIV and AIDS (Anti-Discrimination) Act," supra note 1 at Section 27.

58. It is important to note that the procedure for this inquiry is to be specified in future regulation. See also: "HIV and AIDS

(Anti-Discrimination) Act,” supra note 1 at Section 24(4).

59. “HIV and AIDS (Anti-Discrimination) Act,” supra note 1 at Section 25.

60. Ibid.

61. “HIV and AIDS (Anti-Discrimination) Act,” supra note 1 at Section 23.

62. “HIV and AIDS (Anti-Discrimination) Act,” supra note 1 at Section 22. The term “the state” is intended to refer to a law officer. Under the Criminal Code Act, criminal proceedings are brought forth by law officers, which include “the Attorney-General and the Solicitor-General of the Federation, and includes the Director of Public Prosecutions and such other qualified officers, by whatever names designated, to whom any of the powers of a law officer are delegated by law or necessary intendment.” Section 22 does not mention whether the bringing criminal charges under this section would be within the purview of the Minister of Justice or a law officer. As the Minister of Justice is not explicitly referenced in section 22, it is reasonable to assume that the law officer would be the party to bring the criminal sanction.

63. “HIV and AIDS (Anti-Discrimination) Act,” supra note 1 at Section 37; Section 42. The reason why Sections 8(2) and 6(j) may violate the right to equality is because this caveat does not apply to other chronic infections or illnesses. It is important to note that these provisions are *prima facie* in contravention of Section 37, since Section 45 of the Nigerian constitution states nothing in Section 37 shall invalidate any law that is reasonably justifiable in a democratic society as it is in the interest of defense, public safety, public order, public morality, or public health. While these provisions cannot be justified on any of these grounds, the government may argue so and thus its constitutionality will be up to a court to determine.

Enhancing the Protective Space for Refugees in Kenya and Uganda

Michael Addaney

MICHAEL ADDANEY holds a master of philosophy in human rights and democratization in Africa from the University of Pretoria in South Africa and is also working as a senior research assistant at the University of Energy and Natural Resources in Ghana. He holds a postgraduate diploma in education from the University of Cape Coast, and a bachelor of science in development planning from the Kwame Nkrumah University of Science and Technology, both in Ghana. Addaney has also worked as a consultant with the African Committee of Experts on the Rights and Welfare of the Child and the International Organization of Migration (IOM).

Abstract

Kenya and Uganda are widely known for hosting a large population of refugees with the latter recognized for its self-settling refugee policy. In Kenya, refugees face hostilities and victimization due to sporadic Al-Shabaab attacks. Conversely, urban refugees in Kampala forgo their right to protection and humanitarian assistance. Studies indicate that most of these refugees struggle to make a living in Nairobi and Kampala and have difficulty enjoying their socioeconomic rights. The prevailing conditions make Europe the target destination for forced migrants fleeing various forms of persecution, particularly from the Horn of Af-

rica. There is an urgent need for the governments of Kenya and Uganda to prioritize their refugee policies in order to allow refugees successful integration into the socioeconomic fibre by protecting the fundamental rights they are guaranteed under international law.

Refugee Protection in East Africa

The number of refugees in the world has surged over the past decade. The United Nations High Commissioner for Refugees (UNHCR) estimated around 14.4 million refugees worldwide in 2014.¹ Figures in East Africa are continuously rising with host countries unable to handle the swelling influx of large-scale refu-

gees. Countries such as Uganda and Kenya together host more than 1.2 million refugees. This translates to around seven percent of the world's total refugees in a region that accounts for nearly 10 percent of the world's population and is the least capable of caring for them.² Arguably, there are more refugees located in East Africa than anywhere else in sub-Saharan Africa. In addition, there are about 12 million internally displaced persons (IDPs), making the protection challenges faced by both source and host countries in the region daunting.

With the Horn of Africa acknowledged as a major refugee-producing region coupled with the civil war in South Sudan, terrorist activities in Somalia, and the protracted conflict in the Democratic Republic of Congo, the resulting displacement of populations persists. Uganda and Kenya are grappling with how best to manage the large-scale influx of refugees in the face of long-term displacement.

This article analyzes the refugee protection frameworks of Kenya and Uganda as a means to identify opportunities where international standards can be applied to protect the rights of refugees. In order to find a durable solution to the Mediterranean crises caused by forced migrants from Africa, efforts should be channeled into addressing the poor application, supervision, and en-

forcement of refugee laws and policies of host countries in East Africa, particularly Kenya and Uganda.

Unfriendly Refugee Policy in Kenya

Kenya is currently hosting about 551,352 refugees and 34,011 asylum seekers.³ Per its national policy, refugees are held in traditional refugee camp settings with temporary, makeshift structures created to provide shelter for forced migrants. However, since 2005, the camps have undergone a dramatic shift, becoming a permanent housing feature for refugees in Kenya and other parts of East Africa. UNHCR's Dadaab refugee camp presents the clearest illustration and is where the government of Kenya houses the large influx of Somali refugees. Since 1995, the camp has hosted thousands of refugees fleeing famine, armed conflicts, and recently, the increased threat by Al-Shabaab insurgency in Somalia. Dadaab comprises of three major camps: Dagahaley, Hagadera, and Ifo. The camp now houses more than 300,000 refugees with an annual increase of 11.7 percent since 1992.⁴

Studies have revealed that refugee camps in Kenya, including Dadaab, are urbanizing, which has come with associated challenges like poor access to healthcare, education, and housing.⁵ As a result, refugees in these camps face unrest and extreme pov-

erty with restricted access to basic social services.⁶ Moreover, the protracted instability in Somalia means that Somali refugees, who constitute more than half of the total refugee population in Kenya, are uncertain about when they will be able to return home. The uncertainty Somali refugees face in Kenya implies a semi-permanent situation. These refugees should be economically integrated into the mainstream socioeconomic life of Kenya so they may be enabled to live decent and dignified lives.

Meanwhile, the policies pursued by Eastern African governments show little intention to seriously consider alternatives to the dominant encampment policy. The encampment policy provides that refugees reside in camps—including planned or self-settled camps and settlements—or other facilities, such as collective centres where, in most cases, host governments and humanitarian actors provide assistance and services in a centralized manner.⁷ Encampment often limits the rights and freedoms of refugees, and deters their ability to make meaningful choices about their lives. The government of Kenya's insistence on encampment, for example, is a mixed response to international obligations and unwillingness to face the erosion of local support caused by refugee integration. As a result, refugees in Kenya are now in worse economic

and social conditions because of the restriction on their movement and their inability to engage in meaningful economic activities.

Though integration is the best alternative to encampment, political realities such as sporadic attacks by Al-Shabaab continue to limit viable options, thereby keeping containment as the only choice. Local integration is specifically relevant when refugees cannot return to their country of origin in a foreseeable future, or develop strong ties with the host communities through either business or marriage.⁸ The concept of local integration is based on the assumption that refugees will remain in the host country permanently, and thereby attempt to acquire citizenship. It is a mechanism that allows refugees to rebuild their lives, become self-reliant, and generate new livelihoods as contributing members of their host societies.⁹ Refugees fleeing from famine and protracted armed conflicts in the Horn of Africa would rather risk everything, including their lives, to migrate to Europe than be kept in a prison-like camp.

Challenges of Protecting Refugees in Uganda

Uganda is home to about 450,000 refugees from neighboring states that are engaged in protracted armed conflicts and security crises. Some of

these states include the Democratic Republic of Congo, South Sudan, Somalia, and Burundi.¹⁰ The 2006 Refugees Act of Uganda permits refugees to self-settle, and many are scattered across the slums in Kampala. Somalis are concentrated mainly in the central neighborhood of Kisenyi, with the Congolese in Katwe, Makindye, and Masajja. Despite the greater security refugees have found in Uganda, they encounter numerous challenges residing in unfamiliar urban terrain.¹¹

A provision in the Ugandan Refugees Act stating that self-settling refugees do not qualify for any form of protection or assistance from the government or UNHCR deepens the issues refugees face. Many urban refugees do not even register with the government or the UNHCR and remain anonymous. This creates difficulty in gathering information about refugees' locations, populations, and the forms of protection they need. As a result, most Ugandan state departments do not factor in urban refugees when formulating and designing development plans and institutional policies. Additionally, skilled refugees are unable to access both public and private sector employment because employers are afraid to illegally employ them. Refugees are underutilized in their knowledge and skills to the detriment of their welfare.

Protecting the rights of Ugandan

refugees is approached from a political and economic perspective, rather than a human rights one. Therefore, refugee rights become of secondary importance as a way of promoting the socioeconomic welfare of the locals. Although some refugees go into farming or engage in small businesses, the majority are unemployed and often have to rely on donations from family, friends, and religious associations to make a living.¹²

Critical Protection Capacities in Both Countries

Self-settling refugees reside in impoverished, overcrowded, and often squalid, living conditions in the poorest neighborhoods. Most refugees are forced by the prevailing conditions to sleep on the streets, making them more susceptible to violent attacks and illness. Due to the lack of relief agencies, food is scarce and it is difficult to access healthcare. Both Ugandan and Kenyan refugees face serious challenges to their social and economic needs, as well as great risk to violence. Human Rights Watch argues there are serious shortcomings in both countries with regard to the refugee determination procedures.¹³

In Kenya, the refugee determination process is dysfunctional because it subjects asylum seekers to lengthy delays where they are vulnerable to systematic abuses.¹⁴ The outcome

of the determination process is a letter simply recognizing a particular person as a refugee. This letter is routinely ignored and sometimes destroyed by the police during daily roundups of foreigners.

The case is not much different in Uganda. The government's role in the conflicts in Somalia and South Sudan makes asylum seekers from those countries fearful of the refugee protection system. Unlike the delays faced while processing refugee applications in Nairobi, asylum seekers in Kampala only experience such delays when the government is suspicious of an applicant.¹⁵ These suspicious cases often require the most urgent attention. It is reported that many refugees and asylum seekers are frequently subjected to extortion, physical harassment, arbitrary arrest, and detention, all at the hands of security officers.¹⁶

It is alleged that many refugees and asylum seekers in Kenya and Uganda are also trailed, threatened, or sometimes assaulted by agents from their home countries. Most who face this treatment are left with no option but to seek urgent resettlement in a third country, particularly in Europe, Canada, or Australia. They also experience bureaucratic delays and are forced to risk crossing the Mediterranean Sea.

Refugee protection is inherently an international issue that requires responsibility sharing, harmoniza-

tion of practice, collaboration, and engagement in high-level advocacy. At present, East African states are not actively engaged in collaboration or dialogue about refugee protection, leaving the responsibility for protection to UNHCR, other international organizations, and civil society actors. There is a need for cooperation and coordination between East African governments, the UNHCR, and other stakeholders to expand the protection space for refugees, especially in helping refugees realize their socioeconomic rights.¹⁷

The Legal Framework for Refugee Protection in Kenya and Uganda

The UNHCR's legislation at the 1951 Convention "Relating to the Status of Refugees." is the bedrock of the contemporary refugee protection regime. However, international protection of the rights of refugees can be traced to the Universal Declaration of Human Rights. The 1967 protocol to UNHCR's 1951 legislation and the Organization of African Unity (OAU) 1969 Convention legislation "Governing the Specific Aspects of Refugee Problems in Africa" are also key instruments in the protection of African refugee rights.¹⁸ These instruments guarantee the rights of all refugees including, the rights to housing, work, and education; access to the courts;

freedom of movement within the territory; and the right to be issued identity and travel documents.¹⁹ In short, protecting the human rights of refugees is the basic obligation of the state.²⁰

Article 2(1) of the 1969 OAU Convention legislation obliges “member states to use their best endeavours consistent with their respective legislations to receive refugees and to secure the settlement of those refugees who, for well-founded reasons, are unable or unwilling to return to their country of origin or nationality.”²¹ Despite this legislation’s provision to protect the rights of urban refugees in Africa, oppressive states can exploit the excesses by adopting repressive laws to the contrary. Article 2(1) further states that “granting asylum to refugees is a peaceful and humanitarian act which shall not be treated as an unfriendly act by any member state.”²² Researcher Joe Oloka Onyango posits that Article 2(1) is one of the most significant contributions to refugee jurisprudence in general.²³ Anne-Marie Slaughter and William Burke-White also argue international law influences domestic outcomes through the strengthening of domestic institutions, supporting domestic governance, and driving domestic action—hence domestic mechanisms become more effective.²⁴

The International Covenant on Economic, Social, and Cultural

Rights (ICESCR) contains pertinent rights such as the right to an adequate standard of living (which includes food, housing, and intellectual property). The ICESCR has also considered applying the principle of non-discrimination to specific Covenant rights, including housing, food, education, health, water, work, and social security.²⁵ The International Covenant on Civil and Political Rights (ICCPR) also provides that “everyone lawfully within the territory of a State shall within that territory have the right to liberty of movement and freedom to choose his residence.”²⁶ In addition, the Human Rights Committee (HRC) explains that Article 2 of the ICCPR applies to asylum seekers and refugees: “The enjoyment of Covenant rights is not limited to citizens of States Parties but also available to all individuals, regardless of nationality or statelessness, such as asylum seekers and urban refugees, who may find themselves in their territory or subject to their jurisdiction.”²⁷ It is argued that asylum seekers whose claims are still pending can invoke the Covenant’s protection provided in the legislation from the 1951 UNHCR Convention.²⁸

Both Kenya and Uganda are subject to these pieces of legislation. In 2006, both countries adopted national refugee legislations to domesticate and implement the provisions laid out during the 1951 UNHCR

Convention and 1969 OAU Convention.

The Way Forward

Despite the national legislations in Kenya and Uganda, the laws often do not translate into actual protection and assistance. A lack of compliance with international standards and norms arises in both countries, resulting in the marginalization of many refugees. Those who need the most protection remain in the sub-region, often in protracted situations. Kenya and Uganda should pursue more progressive refugee laws to reduce the political corrosion surrounding the enforcement of current laws. Under international human rights law, the onus is on the state to protect the rights of refugees no matter their location within the country.

In contrast to Uganda, the Refugee Act of Kenya does not expressly outline the specific refugee rights that it guarantees. It also fails to reference the rights of refugees contained in the legislations from the 1951 UNHCR Convention and the 1969 OAU Convention, or any other international human rights convention. The Ugandan Refugees Act specifically protects the rights of refugees. Therefore, in order to make the Kenyan legal and policy framework more coherent, similar refugee rights, like those outlined in

Uganda's Refugees Act, should be included. This can provide certainty regarding the precise rights refugees are entitled to under the Act. The inclusion of human rights in national legislation makes them more easily justiciable and enforceable.

The effectiveness of the legal and policy frameworks largely depends on the competence and capacity of the agencies and officers implementing them. The governments of Kenya and Uganda should educate all agencies involved in protecting the rights of refugees in refugee law and human rights education and sensitisation to ensure they understand the human rights implications of the process. Civil society organizations in both countries should also be more proactive in ensuring its governments adhere to international human rights standards when processing refugee applications. One method is by granting applications for integration and voluntary repatriation. This can be achieved through sufficient legal support for urban refugees that allows them to claim and defend their rights, and through the establishment of aid units across the country to offer legal assistance. Refugees should also access courts of law and legal aid, and other relevant rights-based organizations when necessary in order to effectively exercise their rights.

Additionally, the international community must give further con-

sideration to the national application, supervision, and enforcement of refugee rights. At the global and regional levels, there should be treaty-monitoring bodies to enforce the states' compliance with the 1951 UNHCR Convention and 1969 OAU Convention legislations. This can be carried out through a protocol to augment the mandate of the UNHCR as a means to provide robust protection for the rights of refugees against repressive domestic laws. This will enable the utilization of monitoring mechanisms to strengthen legal remedies and ensure that states respect, promote, protect, and fulfill the rights of refugees.

The global refugee problem is unlikely to be resolved in the near future because the problem is more apparent than at any time before. The issues involved require states to provide a conducive legal and policy environment for the protection of refugees in accordance with international standards. The refugee laws in Kenya and Uganda are efforts to help provide the legal and policy framework, and are therefore statutory mechanisms incorporating international normative standards on the protection of refugees. Overall, the international standards must be adapted to properly incorporate the 1951 UNHCR Convention and the 1969 OAU Convention practices into national law in Kenya and Uganda.

Endnotes

1. UNHCR. 2013. "Global Trends." UNCHR.org., Accessed 14 November 2015.
2. UNHCR. 2015. "2015 UNHCR Sub-regional Operations Profile: East and Horn of Africa." UNCHR.org. Accessed 07 September 2015.
3. UNHCR. 2015. "2015 UNHCR Country Operations Profile: Kenya." UNCHR.org. Accessed 06 September 2015.
4. Danish Refugee Council. 2013. "The Dadaab Dilemma: A Study on Livelihood Activities and Opportunities for Dadaab Refugees." DRC.dk. Accessed 09 February 2016.
5. "Kenya's Dadaab Camp: Aid Agencies Make Appeal." 2012. BBC online, 12 July 12. Accessed 05 November 2015.
6. Ibid.
7. UNHCR. 2009. "Policy on Alternatives to Camps." UNCHR.org. Accessed 09 February 2016.
8. UNHCR. 2010. "The Benefits of Belonging: Local Integration Options and Opportunities for Host Countries, Communities and Refugees." UNCHR.org. Accessed 09 February 2016.
9. Ibid.
10. UNHCR. 2015. "2015 UNHCR Country Operations Profile: Uganda Overview." UNCHR.org. Accessed 16 August 2015.
11. Women's Refugee Commission. 2011. "The Living Ain't Easy Urban Refugees in Kampala." 04 March.
12. Norris, KJ. "Livelihood Security Among Refugees in Uganda: Opportunities, Obstacles, and Physical Security Implications" (1686 Independent Study Project (ISP) collection paper, 2013). Accessed 18 August 2015.
13. Human Rights Watch. 2015. "World Report 2015: Kenya." Accessed 13 No-

vember 2015.

14. Ibid.

15. Pavanello, Sara Samir Elhawary, and Sara Pantuliano. "Hidden and Exposed: Urban Refugees in Nairobi, Kenya" (working paper 17, 2010); Women's Refugee Commission. 2011. "The Living Ain't Easy Urban Refugees in Kampala." Accessed 14 November 2015.

16. Norris, *supra* note 12.

17. UNHCR. 2009. "Urban Refugee Policy." Accessed, 14 November 2015.

18. C d'Orsi. 2012. "Strengths and Weaknesses in the Protection of the Internally Displaced Persons in Sub-Saharan Africa." PeacePlaceLibrary.com., Accessed 14 November 2015.

19. UN Convention, Articles 17–28, "Relating to the Status of Refugees." 28 July 1951. UN.org. Accessed 25 January 2016; ZA Lomo 2000. "The Struggle for Protection of the Rights of Refugees and IDPs in Africa: Making the Existing International Legal Regime Work." *Berkeley Journal of International Law* 18(2): 6.

20. Jastram, K., and M. Achiron 2001. "Refugee Protection: A Guide to International Refugee Law." IPU.org.(2001) Accessed 02 September 2015.

21. Organisation of Africa Unity, Article 2(1), "1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, Addis Ababa." 10 September 1969. ACHPR.org. Accessed 25 January 2016.

22. Ibid., art. 2(2).

23. Onyango, Joe Oloka. 1986. "Plugging the Holes: Refugees, OAU Policy and the Practices of Member States." USC Issue Brief, Washington, DC.

24. Slaughter, Anne-Marie, and William Burke-White. 2006. "The Future of International Law is Domestic (or, the European Way of Law)." *Harvard International Law Journal* 47: 327.

25. UN Committee on Economic, Social

and Cultural Rights, "General Comment No. 4 on the Right to Adequate Housing," 1991; "General Comment No. 7 on the Right to Adequate Housing: Forced Evictions," art. 11, para. 1. 1997; "General Comment No. 12 on the Right to Adequate Food." 1999; "General Comment No. 13 on the Right to Education," art. 13. 1999; "General Comment No. 14 on the Right to the Highest Attainable Standard of Health," art. 12. 2000; "General Comment No. 15 on the Right to Water," arts. 11 and 12. 2002; "General Comment No. 18 on the Right to Work," art. 6. 2005; and "General Comment No. 19 on the Right to Social Security." 2008.

26. UN, Article, 12(1), "International Covenant on Civil and Political Rights." 16 December 1966. UN.org. Accessed 25 January 2016.

27. The Human Rights Committee's "General Comment No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant" states that "the Covenant rights apply to all persons who may be within their territory and to all persons subject to their jurisdiction."

28. Asylum Access and the Refugee Work Rights Coalition, "Submission to the Committee on Economic, Social and Cultural Rights on Draft General Comment to Article 7: The Right to Just and Favourable Conditions of Work." 2015. OHCHR.org. Accessed, 18 September 2015.



**Friday market in Tamale, a city in
northern Ghana**

Photo by Junius Williams

Hakeem Belo-Osagie: Be Bold, Be Courageous

Businessman and entrepreneur HAKEEM BELO-OSAGIE has been a key player in Nigeria's energy, finance, and telecommunications sectors. After graduating from Harvard Business School in 1980 he returned to Nigeria as a special adviser to the presidential adviser on petroleum and energy. Belo-Osagie has been chairman of the United Bank for Africa and is currently chair of the United Arab Emirates-headquartered telecom company Etisalat Nigeria. He is one of the largest donors to the African Leadership Academy, a nonprofit that focuses on training Africa's future leaders.

Hakeem Belo-Osagie spoke with the *Africa Policy Journal* (APJ) and shared advice for young Africans seeking to make a change across the continent. Below is an edited version of the conversation.

APJ: What advice do you have for students contemplating a return to Africa?

BELO-OSAGIE: In my time it wasn't really a decision as to whether you go back home or don't go back home. It was the thing to go back home. Let's not forget that was 1979 [or] 1980. The Nigerian economy was buoyant. We just had the second major oil price increase. Nigeria looked like a country of great opportunity. There was no reason to stay in the U.S. You can say that I went home without thinking, as such. The people who had the big decision to make were

the doctors. At that time the conditions of service, the salaries of doctors in Nigeria, were already rather low compared to what they could earn in the United States. They had the choice to make. For young MBAs, for lawyers, for engineers, it was not the thing to think about.

As the oil price started to fall and the exchange rate depreciated and inflation increased it then became an issue. Do I go back or don't go back? It's still my view that the decision to go back is not a moral question. It's an individual question, because I think you can serve abroad and you can serve at home. When you look at the contribution Africans in the diaspora make to their own economies, I think the figures show they make more contribution to their economies than the whole of foreign investment and maybe foreign aid put together.

I have children—three girls and a boy—who are all college and grad-school age. What I tell them is that you should not be against coming home, but you should organize yourself such that you are comfortable in two continents.

APJ: As young people start to plan for their futures what advice do you have for them?

BELO-OSAGIE: You don't have to be an investment banker or a consultant. That's the prevailing ethos on many campuses. You should not follow that ethos if you don't want to. People should march to the beat of the music that they're hearing in their own minds. People should not just think of the short term. They should think of the long term and there are many different routes to that long-term success.

APJ: As a continent, what does Africa need to grow further?

BELO-OSAGIE: Africa definitely does need more robust infrastructure. We need the spread of IT and technology throughout the continent. We need to have very well-trained manpower and womanpower that can feel at home in several different African countries and the creation of pan-African companies. I think that it's going to be having young people who have an entrepreneurial bent.

It's this generation that will be

spearheading the generation of pan-African companies. These companies will change the narrative. An African will have a very different view of risk. An Aliko Dangote invests in cement plants in Ethiopia, Senegal, Tanzania, whereas a European or an American investor would get very worried if there was a change of government or a president who is fired. An Aliko Dangote who grew up in that environment will take it in his stride. Africans would downplay political risk, be more collaborative with the government and other partners in achieving their success.

APJ: There is a lot of discussion about entrepreneurialism. How important will it be to development?

BELO-OSAGIE: Entrepreneurialism will be a key driver. Sometimes I worry a lot that entrepreneurialism is becoming a new religion. We've swung from no entrepreneurialism to entrepreneurialism over and over again. I do think there is a role for large companies and while encouraging entrepreneurialism I don't want people to feel that if they don't set up their own business that it's not a sign of manhood. I would hate for that to be the case.

APJ: What will our generation bring to Africa's development?

BELO-OSAGIE: I'm most excited about the work I'm doing involving work for young people's education, especially education across ethnic groups. Hopefully it will train or produce a group of pan-African managers and leaders who are home in any part of Africa, but at the same time, have an unafraid relationship with the Europeans because they do not have the scars of colonial conflict. I think it is that group of people with a critical mass of MBAs who I really see taking us to the next level.

There is a need for us to be bold, to be courageous, and to make leaps into an uncertain future. We have another generation that as usual is bolder than its older generation and I would encourage young people to stick with that.

The previous generation, they were responsible for the political independence of Africa and proving that Africans can run an administration and maybe can run companies. Our generation—my generation—our responsibility is to run the large companies in our country and to create the large companies in our countries. The next generation of Africans will create the giant companies that cut across Africa and which will lead to the integration of Africa amongst the north, east, west, and the south.

View from Dangote Group: Strategy and Policy for Doing Business in Africa

Harvard University's Center for African Studies, in conjunction with Harvard Business School's Africa Business Club, hosted a talk in October 2015 with Dangote Group Chief Executive and President ALIKO DANGOTE. Dangote Group, based in Lagos, Nigeria, is one of Africa's largest and most successful industrial conglomerates with diversified activities in flour, sugar, cement, and steel.

The *Africa Policy Journal* (APJ) sat down with key members of Dangote Group's team during their visit to Boston to talk about doing business in Africa and the policy changes necessary to spur growth. We spoke with Chief of Strategy Abdu Mukhtar, Group Chief Internal Auditor Tope Adedara, and Executive Director Halima Dangote. The following is an edited version of the interview.

APJ: What are the biggest challenges to business in Africa?

MUKHTAR: The major thing is that many countries are living in silos. One of the most important things that can happen is regional integration. Intra-Africa trade is the lowest anywhere in the world. Many African countries trade more with non-African countries.

Even the visa regimes are an issue.

African leaders, they're shooting themselves in the foot. We want people to invest in Africa, but to travel from one African country to another is hectic. My boss, Aliko Dangote, needs a visa to go to about 85 percent of countries. An American tourist needs fewer visas. Right now it's changing slightly—about 18 African countries issue visa on arrival. But more countries need to do that. Capital will go where it's easier to move.

APJ: What is the future for African business?

MUKHTAR: African businesses are getting smarter. African companies are beginning to understand and realize their advantage over some of the outside companies. Understanding of local culture and relationships are key. African companies have this advantage.

One of the things that constrained African companies from growing was capital. There is a lot of capital going in now. There are FDI [foreign direct investment] and private equity funds that invest solely in African companies. We will grow and move because capital is no longer a constraint. Many companies are finding themselves in this place and are realizing the opportunity of moving in Africa is providing in terms of market size.

But I think that what these companies need to do to make it sustainable is also to think world class. They should not think because this is Africa we can cut corners, that African consumers aren't sophisticated, that would be a huge mistake. They need to focus on quality; it needs to be world standard.

APJ: How do you formalize your strategy when you enter a new country?

MUKHTAR: We look at Africa as multiple countries. We do a country strategy for each country. There are some things that are common across countries, but most things are different. There is a lot of policy inconsistency. When you have new leaders they come with different policies. Institutions in general are weak so you aren't able to carry on with the same policy. When a new guy comes in the policy changes.

We know that power will be an

issue and that transportation will be an issue. We know the level of corporate governance is not as it should be. There are issues around bribery and corruption. We know these are things we need to watch out for. We don't go into a country thinking these guys are corrupt.

Often what determines if we go into a country or not is if we have availability for the raw materials we need like limestone and coal for the cement production process.

APJ: Why is boosting intra-Africa trade important?

ADEDARA: I am going to steal the quote from Dangote: "Africa will only develop when Africans begin to invest in Africa." As we speak, within Africa intra-trade is roughly 16 percent. It's difficult for Africa as a continent to begin to develop if I don't trade with my neighbors. A unified trading block is still a few decades away, but I think it's the right way to go. Africans understand Africa. We can take risks on ourselves. A typical FDI before it gets into a country looks at all kinds of issues, and those issues are there. If you wait until the risk is fully mitigated you will never invest. It will take an African person to go in and invest.

A few steps need to be taken such as visa restrictions. A Nigerian needs a visa to go into 36 countries. I hold an American passport. I do

get visa on arrival in most countries. Aliko Dangote doesn't. If an American that will never bring in so much money gets a visa on arrival you need to ease up entrance to different countries. You don't need to do away with visas but at least allow it to be given on arrival. I think Africa-to-Africa trade would go up. With 16 percent intra-Africa trade, that is why Africa as a continent isn't growing as much as it should. When we grow trade, then we can build something together and that's when others outside of Africa will be interested in coming to Africa as well.

APJ: What will it take to get visa restrictions to be more accessible?

ADEDARA: We're going to have to do away with protectionism. In Africa there is still a little of "let's protect what we have." We still have very close ties with colonial countries. A typical francophone country still has a strong alliance with France. Even from one country to another is a fear of wars. You can see Brazzaville from Kinshasa but the two countries don't trade with each other. These are two of the closest country capitals and yet there is no trade between these countries. The fear now is if I open up my border I don't know what is coming in. When there is peace on the continent then I think it will start happening.

APJ: Why is the Dangote Foundation important?

DANGOTE: Africa is the youngest and fastest-growing continent. I see all this growth on a shaky foundation of poverty. The Dangote Foundation is trying to bridge that gap. We have been given \$1.25 billion to do that.

The foundation wants to focus on your basic rights. These are challenges we will still face in a couple of years. Access to very basic things are not there. We must acknowledge we need to put more effort there. The private sector must face the challenges like poverty and illiteracy, and sorting out acute malnutrition. These basic things will strengthen the foundation.

APJ: How is the view towards philanthropy changing in Nigeria?

DANGOTE: What's happening in Nigeria with most of the PLCs [private limited companies] is that shareholders won't ask you about the dividend as much as what do you give back to the community. People understand the social responsibility in our economy. Your business cannot be sustainable unless you give back. I am happy shareholders are putting everyone on their toes.

There's a lot of difference. Six to seven years back people were

skeptical to give back. Nigerians are beginning to talk as philanthropists, of giving back and thinking how do we take Nigeria out of this poverty. It's not like before. Is there room for improvement? Huge amount. We cannot afford to calm down on the things that we are doing or to give up on how we encourage our colleagues in business. It has to take a lot of people from the private sector when it comes to the foundation. Leave the government to their work to provide power and electricity. It's our responsibility to provide the rest.

Call for Submissions

Deadline: 15 November 2016

The *Africa Policy Journal* (APJ) at the John F. Kennedy School of Government at Harvard University (HKS) invites established and emerging scholars, including researchers, journalists, artists, and/or policy practitioners, to submit their work to APJ's twelfth edition publication. APJ will accept research articles, book reviews, commentaries, and artwork for print publication consideration through 16 November 2016. APJ also accepts op-ed/blogs and artwork for web publication consideration on a rolling basis. All submissions must be the author's original work and previously unpublished.

Articles and op-eds should explore the relationship between policy-making and economic, social, or political change affecting African countries today. Book and film reviews should critically assess a recent work of importance to culture, politics, and society in Africa. Artwork should reflect a celebration or critique of African cultures and/or the development of African communities.

Submission Guidelines

- All submissions must adhere to the Chicago Manual of Style, 16th edition, formatting guidelines.
- Academic articles: 2,500–7,000 words, and must include an abstract of no more than 100 words. Op-eds/commentaries: 750–2,000 words, and must include references where appropriate. Book/film reviews: 500–1,000 words, and must include the full citation, including publisher/director and year of publication/original release date. Artwork: Submit high-resolution files (300+ dpi, JPEG format). Each submission must include artwork title, artist name, medium, and year of creation. Blogs: 300–800 words.

How to Submit

- Format all articles/op-ed/book/film reviews as Microsoft Word documents.
- Format all images as JPEG files.
- For all citations, use endnotes with a web link for fact checking.
- All submissions must include a cover letter with: (1) author's name; (2) mailing address; (3) e-mail address; (4) phone number; (5) a biography of no more than 300 words; and (6) a headshot.
- All submissions received by 15 November 2016 will be considered for print publication. *APJ's* editorial board will notify all applicants by 15 January 2017. Selected authors may be asked to perform additional fact checking or editing before publication. Compliance with these procedures is required for publication.

Review Process

The *Africa Policy Journal* strives to maintain the quality and integrity of our publication through a submission review process that is fair and transparent. To this end, all works will be reviewed and scored along a common rubric by at least two editorial staff members. Submissions are first processed to remove author's information and are assigned a numerical code. Editorial staff members then read submissions and score according to the evaluative criteria of relevance, clarity of argument, use of evidence, organization, contribution, and style. The editorial staff members discuss top-ranked submissions and final decisions are made collaboratively.

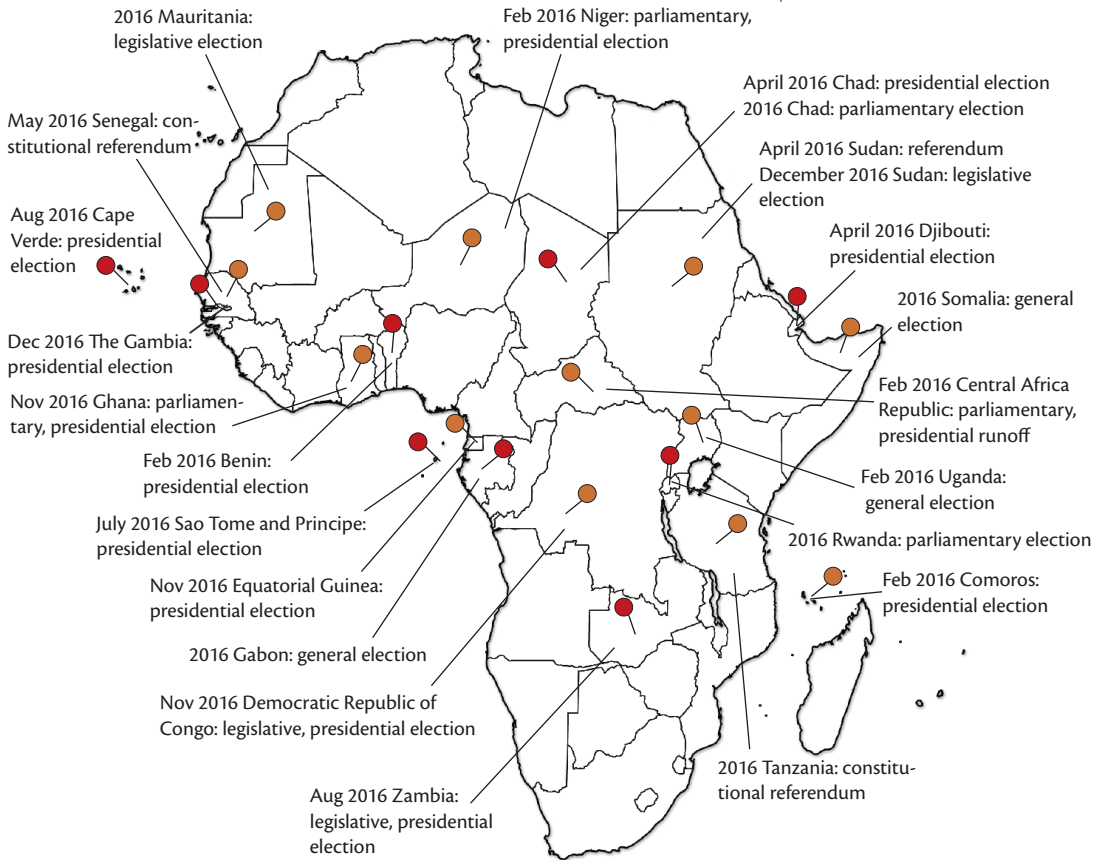
About

The *Africa Policy Journal* is the only student-run scholarly journal in the United States dedicated to African policy. Our mission is to promote a rigorous, informed, and influential policy dialogue that is relevant to current and future issues of governance, economics, politics, and society on the African continent. We publish thought-provoking content that provides fresh insights into the most significant opportunities and challenges facing African nations.

Questions?

Contact us via e-mail at africa_journal@hks.harvard.edu.

This Year in Elections



MALCOLM WIENER CENTER FOR SOCIAL POLICY

The Malcolm Wiener Center is a vibrant intellectual community of faculty, masters and PhD students, researchers, and administrative staff striving to improve public policy and practice in the areas of health care, human services, criminal justice, inequality, education, and labor.

The work of the center draws on the worlds of scholarship, policy, and practice to address pressing questions by:

- carrying out research on important policy issues affecting the lives of those most vulnerable and needy
- providing professional education for those in the world of practice
- educating the next generation of academics and policy scholars
- ensuring that research and education are closely tied to and draw from politics and practice in the field
- developing working partnerships with the broader policy community

For more than two decades the Malcolm Wiener Center has been an influential voice in domestic policy through faculty work on community policing, welfare reform, youth violence, education, urban poverty, youth and the low-wage labor market, American Indian economic and social development, and medical error rates.

Our research portfolio is both broad and deep, spanning many academic disciplines, encompassing traditional research as well as executive sessions, case-based research and action research, and employing a variety of research methodologies. It is inspired by our focus on bettering the lives of our fellow citizens, particularly those who are most vulnerable and needy.

WEB SITE: www.hks.harvard.edu/centers/wiener



HARVARD Kennedy School

MALCOLM WIENER CENTER
for Social Policy

Advancing knowledge and
policy analysis concerning
society's most challenging
problems at the interface of
the public and private sectors

VISIT US AT WWW.MRCBG.ORG



@HKS_bizgov



M-RCBG

Electricity Policy | Energy Policy |
Environmental Economics | Sustainability
Science | Corporate Social Responsibility
| Business and Human Rights |
Collaborative Governance | Regulatory
Policy | Education Policy | Financial
Sector | Trade and Negotiations |
Kansai Keizei Doyukai



HARVARD Kennedy School

MOSSAVAR-RAHMANI CENTER
for Business and Government