

# FOUNDATIONS OF HUMAN RIGHTS AND DEVELOPMENT: A CRITIQUE OF AFRICAN HUMAN RIGHTS INSTRUMENTS

*Joseph M. Isanga*<sup>†</sup>

## INTRODUCTION

Rule of law is essential to peaceful and sustainable economic development, but only if law itself is deduced from the principles of human dignity and the common good.<sup>1</sup> Some theory animates every form of social action.<sup>2</sup> This Article argues that, of the contemporary human rights theories, sustainable African development necessitates grounding human rights in complete alignment with the broader perspective of natural law theory, as opposed to narrower perspectives such as utilitarian, positivist, and kindred theories.<sup>3</sup> Part I presents pertinent philosophical theories and modes of analysis in conjunction with general international legal jurisprudence. Part II

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<sup>†</sup> Associate Professor of Law at Ave Maria School of Law, Naples, Florida, U.S.A.; LL.B., Makerere University, Kampala, Uganda, *First Class Honors* and *First-in-Class*; LL.M., University of Notre Dame, *Summa Cum Laude*; J.S.D., University of Notre Dame, *Summa Cum Laude*. I thank my research assistants, Lorenzo Thompson (R.I.P.) and Preston L. Talanda-Fisher, for their invaluable assistance.

1. The European experience exemplifies that peace and unity can be brought to a region with a history of violence, and in the process create the most decent and democratic societies in human history, fully committed to protecting human rights. See Paul Krugman, *Can Europe Be Saved?*, N.Y. TIMES (Jan. 12, 2011), <http://www.nytimes.com/2011/01/16/magazine/16-Europe-t.html>. See also Sheryl Gay Stolberg & Mark Landler, *Obama and Hu Cite Mutual Aims Amid Trade Deals*, N.Y. TIMES (Jan. 19, 2011), <http://thecaucus.blogs.nytimes.com/2011/01/19/obama-hu-cite-mutual-aims-as-summit-starts/> (President Obama states “[h]istory shows that societies are more harmonious, nations are more successful and the world is more just when the rights and responsibilities of all nations and all people are upheld, including the universal rights of every human being.”).

2. Pope Paul VI, *Populorum Progressio* [*Encyclical Letter on the Development of Peoples*] ¶ 39 (1967) [hereinafter *Populorum Progressio*].

3. Yet it remains important to “be modest and prudent when invoking . . . precepts of the natural law. . . [i]n a pluralistic society.” Int’l Theological Comm’n, *The Search for Universal Ethics: A New Look at the Natural Law*, PATHS OF LOVE, ¶ 52, <http://www.paths-of-love.com/universal-ethics-natural-law.html> (last updated Mar. 25, 2010) (unofficial translation by Joseph Bolin; the official translation has not yet been published in English).

then uses this philosophical analysis to examine specific African human rights instruments and jurisprudence. Part III considers African traditional human rights conceptions. Part IV recommends a natural law foundation for African development.

## I. CONTEMPORARY PHILOSOPHICAL FOUNDATIONS OF HUMAN RIGHTS LAW

### *A. Natural Law*

Although framers of international human rights instruments agree that humans have rights because of their particular dignity, they differ as to *why* humans have inherent dignity.<sup>4</sup> The African Charter on Human and People's Rights (African Charter) embraces the language of "inherent" human rights.<sup>5</sup> But it is important to delineate what human dignity is in order to discover legitimate candidates for human rights and justify their legal protection.<sup>6</sup> A contrasting example, utilitarianism, which proceeds from the general welfare of society, denies this analysis.<sup>7</sup> International law in general and international human rights law in particular, in their present state, are derived from natural law, legal positivism, legal realism, and third world and feminist theories, *inter alia*.<sup>8</sup> International law theorists—especially Francisco de Vitoria, Francisco Suarez, Hugo Grotius, and Samuel Pufendorf—relied heavily, albeit in very different ways, on natural law theory to defend the law of nations.<sup>9</sup> Hugo Grotius

4. JACQUES MARITAIN, *Introduction to HUMAN RIGHTS: COMMENTS AND INTERPRETATION*, UNESCO/PHS/3(rev.), at I-IX (July 25, 1948).

5. See African Charter on Human and Peoples' Rights pmb., June 27, 1981, 21 I.L.M. 58 (entered into force Oct. 21, 1986) [hereinafter African Charter].

6. This finds expression in terms of *consequentialism* and *proportionalism*. "The former claims to draw the criteria of the rightness of a given way of acting solely from a calculation of foreseeable consequences deriving from a given choice. The latter, by weighing the various values and goods being sought, focuses rather on the proportion acknowledged between the good and bad effects of that choice, with a view to the 'greater good' or 'lesser evil' actually possible in a particular situation." Pope John Paul II, *Veritatis Splendor* [*Encyclical Letter on the Splendor of Truth*] ¶ 75 (1993).

7. James W. Nickel & David A. Reidy, *Philosophy*, in INTERNATIONAL HUMAN RIGHTS LAW 39, 45 (Daniel Moeckli et al. ed., 2010).

8. SEAN D. MURPHY, PRINCIPLES OF INTERNATIONAL LAW 10-18 (2006).

9. *Id.* at 10. Cicero prioritizes natural law in these terms: "[I]n establishing the nature of justice, let us begin from that highest law, which was born aeons before any law was written or indeed before any state was established." CICERO, *On the Laws*, in ON THE COMMONWEALTH AND ON THE LAWS 105, 112 (James E. G. Zetzel ed., 2002). Medieval canonists of the twelfth

contends that there are rights natural to man and demanded by his nature.<sup>10</sup> Emmerich de Vattel postulates that “the law of Nations is originally no other than the law of Nature applied to Nations.”<sup>11</sup> A great achievement of the eighteenth century was the articulation of the rights of man as being universally guaranteed by natural law.<sup>12</sup> In Immanuel Kant’s view, our duty to recognize and respect the humanity, or moral personality, of others is expressed in the notion of human rights.<sup>13</sup>

Because natural law expresses the totality of the dignity of the human person it justifies all fundamental human rights. The very proposition of the universality of human dignity<sup>14</sup> affirms that human rights are justified *outside of themselves*, which presupposes, as Jacques Maritain put it, that the “philosophical foundation of the Rights of man is Natural Law.”<sup>15</sup> Contemporary human rights discourse is “a modern version of the natural law theory.”<sup>16</sup> Joseph

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century and onward, working from the Roman legal tradition, used the term rights (*iura*) and thought them to derive from natural law (*lex naturale*). JOHN WITTE JR., *GOD’S JOUST, GOD’S JUSTICE: LAW AND RELIGION IN THE WESTERN TRADITION* 35–36 (2006). The most elementary precept of natural law is that “Good is to be done and evil avoided.” ST. THOMAS AQUINAS, *SUMMA THEOLOGIAE*, Pt. I-II, Q. 94, Art. 4 (R. J. Henle, S.J. ed., trans., 1993) [hereinafter *SUMMA THEOLOGIAE*]. According to Aquinas, “[E]very human positive law has the nature of law to the extent that it is derived from the Natural Law. If, however, in some point it conflicts with the law of nature it will no longer be law but rather a perversion of law.” *Id.* Pt. I-II, Q. 95, Art. 2. To know what is right, one must exercise his reason.

10. Hugo Grotius, *The Right of War and Peace*, in *FROM IRENAEUS TO GROTIUS: A SOURCEBOOK IN CHRISTIAN POLITICAL THOUGHT* 792, 795 (Oliver O’Donovan & Joan Lockwood O’Donovan eds., 1999) [hereinafter *FROM IRENAEUS TO GROTIUS*].

11. Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 *VAND. L. REV.* 819, 822 (1989) (emphasis omitted).

12. JACQUES MARITAIN, *MAN AND THE STATE* 94 (1951).

13. Nickel & Reidy, *supra* note 7, at 48.

14. John L. Allen, Jr., *The Word from Rome*, *NAT’L CATHOLIC REP.* (May 5, 2006), <http://nationalcatholicreporter.org/word/word050506.htm>.

15. MARITAIN, *supra* note 12, at 80.

16. LESZEK KOLAKOWSKI, *MODERNITY ON ENDLESS TRIAL* 214 (1990). According to St. Bonaventure, humans have inherent rights, i.e., real claims against the community notwithstanding contrary human laws. St. Bonaventure, *A Defence of the Mendicants*, in *FROM IRENAEUS TO GROTIUS: A SOURCEBOOK IN CHRISTIAN POLITICAL THOUGHT*, *supra* note 10, at 312, 317. Magna Carta is an example of a long list of specific rights for free men, towns, etc. which was becoming the norm for memorializing and ensuring rights. St. Thomas, in questioning whether rights can be both natural and positive, or posited, expressly provides that no derogation is permitted from a natural right: “if something is repugnant in itself to natural right, the human will cannot by any means make it just: for example, by decreeing that it is lawful to steal . . .” *SUMMA THEOLOGIAE*, *supra* note 9, Pt. II-II, Q. 57, Art. 2. He also argues that what is natural must be universal, permitting the inference that a natural or “human” right is

Raz contemporaneously argues that “[h]uman rights are *moral* rights held by individuals”<sup>17</sup> and “[i]nternational law is at fault when it recognises as a human right something which, morally speaking, is not a right or not one whose violation might justify international action against a state, as well as when it fails to recognise the legitimacy of sovereignty-limiting measures when the violation of rights morally justifies them.”<sup>18</sup> For a natural law theorist, international law consists primarily of principles of right and wrong.<sup>19</sup> Pope Benedict XVI reiterates that human rights are “based on the natural law inscribed on human hearts . . . . Removing human rights from this context would mean restricting their range and yielding to a relativistic conception.”<sup>20</sup> There are other philosophical traditions that accept a natural law foundation of human rights.<sup>21</sup> Because some

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universally owed to all persons. *Id.* Pt. II-II, Q. 60, Art. 5. Francisco de Vitoria argues at length that uncivilized natives, the vicious (mortal sinners), children before the age of reason, and even the incurably insane have the natural right of “*dominium*” or ownership of property. FRANCISCO DE VITORIA, O.P., *DE INDIS, reprinted in* VITORIA: POLITICAL WRITINGS 239–51 (Anthony Pagden & Jeremy Lawrance eds., 1991). This proposition evidences a broader claim that certain rights are naturally inherent in human beings, and are not granted nor capable of derogation by civil or religious authority. John Locke contends that all people have “natural rights” which their parents, and authority in general, are obligated to respect. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 101–03 (Whitmore et al. eds., London, 1821) (1690), available at <http://ia700400.us.archive.org/21/items/twotreatisesofg00lockuoft/twotreatisesofg00lockuoft.pdf>. John Locke additionally maintains that men have fundamental rights others are obligated to respect by the law of nature, which exists independent of civil law. *Id.* at 191–99. The American Declaration of Independence provides: “We hold these Truths to be *self-evident*, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights.” THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (emphasis added). Antonio Rosmini maintains that in a just society natural rights are inviolate and superior to the human law, for natural law “does not *emanate* at all, but simply *exists*,” and to it all positive law must conform. ANTONIO ROSMINI, *THE CONSTITUTION UNDER SOCIAL JUSTICE* 27–29 (Alberto Mingardi trans., 2007) (emphasis added).

17. Joseph Raz, *Human Rights Without Foundations*, in *THE PHILOSOPHY OF INTERNATIONAL LAW* 18 (Oxford Legal Studies Research Series, Paper, No. 14, 2007), available at <http://ssrn.com/abstract=999874>.

18. *Id.* at 10.

19. See MURPHY, *supra* note 8, at 10.

20. Pope Benedict XVI, Address to the U.N. General Assembly (Apr. 18, 2008), [http://www.vatican.va/holy\\_father/benedict\\_xvi/speeches/2008/april/documents/hf\\_ben-xvi\\_spe\\_20080418\\_un-visit\\_en.html](http://www.vatican.va/holy_father/benedict_xvi/speeches/2008/april/documents/hf_ben-xvi_spe_20080418_un-visit_en.html).

21. The philosopher Xun Zi argues that “[i]n order to relieve anxiety and eradicate strife, nothing is as effective as the institution of corporate life based on a clear recognition of individual rights.” PAUL GORDON LAUREN, *THE EVOLUTION OF INTERNATIONAL HUMAN RIGHTS* 11 (2d ed. 2003). Ancient Babylonian, Egyptian, and Indian (Sanskrit) laws vaguely enumerate fundamental rights, especially the right to life, and proscribe their violation or discrimination in their protection for reasons of wealth and similar characteristics. *Id.* at 11–12.

theorists trace human rights theories to the Stoic philosophers and Judaic and Christian sources,<sup>22</sup> the modern human rights debate is part of the perennial debate on natural law and its consequences for human law. Natural law is central to that debate.

Natural law explicitly underpins a number of international law instruments.<sup>23</sup> Human rights are essentially moral rights.<sup>24</sup> The Vienna Convention on the Law of Treaties (VCLT) provides peremptory norms known as *jus cogens*<sup>25</sup> and establishes the integrity of international treaties on the principle of *pacta sunt servanda* (“an agreement must be kept in good faith”).<sup>26</sup> This necessarily presupposes that there is an *a priori* authority superior to the treaty itself that binds states to these principles.<sup>27</sup>

International cases also occasionally have express recourse to natural law reasoning. In *The Venus*, Justice Story of the United States Supreme Court stated “[t]he law of nations is a law founded on the great and immutable principles of equity and natural justice.”<sup>28</sup> In *The Amistad*, Justice Story maintains that a “treaty with Spain never could have intended to take away the equal rights of all foreigners . . . .”<sup>29</sup> Admittedly, in some of these cases legal positivism prevails as in *The Antelope*, in which Justice Marshall, while admitting that slave trade was “contrary to the law of nature,” nevertheless upheld its legality on the premise that the state of the law is unalterable because it is rooted in the consent and practice of nations.<sup>30</sup>

In response to the defendants’ argument against the application of *ex post facto* international laws holding them accountable for war crimes, the Tribunal in the *Nurnberg Trial* stated that even in the circumstance of an inferior obeying orders, the aggressor must know that he is doing wrong and it is unjust to fail to punish his wrong.<sup>31</sup> In

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22. Michael J. Perry, *Morality and Normativity*, 13 *LEGAL THEORY* 211, 214 n.9 (2007) (quoting LESZEK KOLAKOWSKI, *MODERNITY ON ENDLESS TRIAL* 214 (1990)).

23. MURPHY, *supra* note 8, at 10–11.

24. Nickel & Reidy, *supra* note 7, at 41.

25. Vienna Convention on the Law of Treaties art. 53, Jan. 27, 1980, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]. Art. 53 provides that “[a] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.” *Id.*

26. *Id.* art. 26 (author’s translation).

27. MURPHY, *supra* note 8, at 11.

28. *Venus*, 12 U.S. 253, 297 (1814) (Story, J., concurring).

29. *Amistad*, 40 U.S. 518, 596 (1841).

30. *Antelope*, 23 U.S. 66, 120–21 (1825).

31. *Nurnberg Trial*, 6 F.R.D. 69, 147 (1947).

*North Sea Continental Shelf*, a natural law argument was tendered suggesting that the equidistance principle, concerning the delimitation of the continental shelf, had an *a priori* character.<sup>32</sup> In *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, the International Court of Justice (I.C.J.) referred to “the moral and humanitarian principles which are its basis.”<sup>33</sup> In the *Genocide Case*, the I.C.J. maintained that genocide is “contrary to moral law . . . ‘the principles underlying the Convention . . . recognized by civilized nations as binding on States, even without any conventional obligation’.”<sup>34</sup>

Domestic judicial decisions sometimes make express natural law arguments, including some in the United States. The United States Supreme Court postulates that federal common law is “strongly supported by reason and justice”<sup>35</sup> and that “[t]he common law, [is] founded in reason and nature.”<sup>36</sup> Justice Story, in *Swift v. Tyson*, approvingly cites to Cicero’s proclamation that “[n]on erit alia lex Romæ, alia Athenis, alia nunc, alia posthac, sed et apud omnes gentes, et omni tempore, una eademque lex obtinebit.”<sup>37</sup> In *Calder v. Bull*, Justice Samuel Chase declares that if a state legislature enacted an *ex post facto* law it would be invalid even if the United States Constitution did not prohibit it.<sup>38</sup> The Supreme Court recognizes that some rights not specifically guaranteed in written law are “so rooted in the traditions and conscience of our people as to be ranked as fundamental.”<sup>39</sup>

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32. *North Sea Continental Shelf* (Ger. v. Den.; Ger. v. Neth.), 1969 I.C.J. 3, ¶¶ 37, 55 (Feb. 20).

33. *Reservations to Convention on Prevention and Punishment of Crime of Genocide*, Advisory Opinion, 1951 I.C.J. 15, 24 (May 28).

34. *Application of Convention on Prevention and Punishment of Crime of Genocide* (Bosn. & Herz. v. Serb. & Montenegro), 1996 I.C.J. 595, ¶ 31 (July 11) (emphasis omitted).

35. *Venus*, 12 U.S. 253, 282 (1814).

36. *M’Ilvaine v. Coxe’s Lessee*, 6 U.S. 280, 309 (1805).

37. *Swift v. Tyson*, 41 U.S. 1, 19 (1842). “There will not be one law at Rome and another at Athens, one now and another later; but all nations at all times will be bound by this one eternal and unchangeable law.” *Id.* (author’s translation).

38. *Calder v. Bull*, 3 U.S. 386, 387–89 (1798).

39. *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

### *B. International Legal Positivism*

Legal positivism maintains that the legitimacy of law depends on social circumstances notwithstanding the morality of the law.<sup>40</sup> It emphasizes consent by locating all authority in the collective will. This is particularly evident in the priority placed on written treaties and instruments.<sup>41</sup> The word “consent” appears sixty-two times in the Vienna Convention on the Law of Treaties.<sup>42</sup> In *S.S. Lotus*, the Permanent Court of International Justice contended that “[i]nternational law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will . . . .”<sup>43</sup> Despite the attractiveness of its appeal to personal liberty and upholding promises, even the most ardent protagonists of legal positivism recognize its inherent limitations, especially regarding its failure to provide norms for the resolution of human rights problems.

### *C. International Legal Realism*

International legal realism emphasizes the autonomy of the judge as decision-maker. Realists do not understand judges as mechanically applying rules free of their own biases and policy preferences. For the realist, applying pre-existing rules “out there” to facts is misguided.<sup>44</sup> The realist stresses the *context* in which law is made, operates, and has effects.<sup>45</sup> To illustrate the theory, at the time of issuing its advisory opinion on the *Legality of the Threat or Use of Nuclear*

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40. The English jurist John Austin (1790–1859) articulates the essence of legal positivism as follows: “The existence of a law is one thing; its merits and demerits are another thing. Whether a law be, is one inquiry; whether it ought to be, or whether it agree with a given or assumed test, is another and a distinct inquiry.” JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 157 (1995). H.L.A. Hart argues that, “nothing which legislators do makes law unless they comply with fundamental accepted rules specifying the essential lawmaking procedures,” which “lie at the root of a legal system.” H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 *HARV. L. REV.* 593, 603 (1958).

41. See Statute of the I.C.J. art. 38, June 26, 1945, 59 Stat. 1031, 33 U.N.T.S. 993.

42. Vienna Convention, *supra* note 25.

43. *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7).

44. MURPHY, *supra* note 8, at 13.

45. Gregory C. Shaffer, *A Call for a New Legal Realism in International Law: The Need for Method* 11 (Univ. of Minn. Law Sch., Legal Studies Research Paper Series, Paper No. 09-02, 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1323912](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1323912).

*Weapons*,<sup>46</sup> most states did not possess nuclear weapons, but the I.C.J. did not unambiguously declare nuclear weapons to be unlawful, plausibly because nuclear weapons were unlikely to be abandoned by the most powerful states. While realism recognizes *realpolitik*, it ignores human rights if expedient.

#### *D. International Third World and Feminist Legal Theories*

The theoretical debate includes feminist and "Third World" theories.<sup>47</sup> Feminist theorists argue that the international legal system, as dominated by men, perpetuates the inequality of women and therefore participation needs to be equalized between the sexes. Third World theorists speculate that international law only serves the interests of the powerful developed world and therefore needs to be redirected toward distributive justice, ending poverty, and development. These theories are politically motivated and, consequently, lack merit as enduring foundations for human rights.

## II. THEORETICAL PREMISES AND AFRICAN HUMAN RIGHTS INSTRUMENTS

Universal international human rights instruments are premised on the equal inherent dignity of every person,<sup>48</sup> but this reasoning has not been consistently applied. As John Witte notes:

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46. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8).

47. MURPHY, *supra* note 8, at 16.

48. The U.N. Charter affirms "faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women." U.N. Charter pmb. Almost every human rights instrument refers to human dignity. The Universal Declaration of Human Rights maintains that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world . . ." Universal Declaration of Human Rights, G.A. Res. 217 (III) A, pmb, U.N. Doc A/RES/217(III) (Dec. 10, 1948); *see also id.* art. 1 (providing "[a]ll human beings are born free and equal in dignity and rights."). The International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment recognize that these "rights derive from the inherent dignity of the human person." G.A. Res. 2200 (XXI) A, pmb, U.N. Doc. A/6316 (Dec. 16, 1966); G.A. Res. 2200 (XXI) A, pmb, U.N. Doc. A/6316 (Dec. 16, 1966); G.A. Res. 39/46, pmb, U.N. Doc. A/39/51 (Dec. 10, 1984). In addition, the International Convention on the Elimination of All Forms of Racial Discrimination "affirms the necessity of speedily eliminating racial discrimination throughout the world in all its forms and manifestations and of securing understanding of and respect for the dignity of the human person." G.A. Res. 2106 (XX), pmb, U.N. Doc. A/6014 (Dec. 26, 1966). The Convention on the

[T]he very proliferation of new human rights threatens their long-term effectiveness . . . . Human dignity needs to be assigned some limits if it is to remain a sturdy foundation for the edifice of human rights. Human rights need to be founded firmly on human dignity and other moral principles lest they devolve into a gaggle of wishes and wants. Fairness commands as broad a definition of human dignity as possible, so that no legitimate human good is excluded and no legitimate human rights claim is foreclosed. But prudence counsels a narrower definition of human dignity, so that not every good becomes part of human dignity, and not every aspiration becomes subject to human rights vindication.<sup>49</sup>

African human rights instruments should be interpreted accordingly. Normatively, African human rights instruments are partly influenced by the policy preferences of African states. In this regard, legal realism and Third World theory informs a number of African human rights instruments. The Constitutive Act of the African Union (Constitutive Act) provides that the “Organization of African Unity has played a determining and invaluable role in the *liberation* of the continent.”<sup>50</sup> The African Charter is expressly predicated on a “pledge . . . to eradicate all forms of colonialism from Africa” and seeks to “achieve the total liberation of Africa, . . . genuine independence, and . . . eliminate colonialism, neo-colonialism, apartheid, zionism and to dismantle aggressive foreign military bases and all forms of discrimination.”<sup>51</sup> It further provides that “[c]olonized or oppressed peoples shall have the right to free themselves from the bonds of domination,” and that “[a]ll peoples shall have the right to the assistance of the States parties to the present Charter in their liberation struggle against foreign domination.”<sup>52</sup> The African Charter therefore promotes the right to self-

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Elimination of All Forms of Discrimination against Women provides that “discrimination against women violates the principles . . . equality of rights and respect for human dignity . . . .” G.A. Res. 34/180, pmbl, U.N. Doc. A/34/46 (Sept. 3, 1981). Finally, the Convention on the Rights of Persons with Disabilities recognizes that “discrimination against any person on the basis of disability is a violation of the inherent dignity and worth of the human person.” G.A. Res. 61/106, pmbl, U.N. Doc. A/RES/61/106 (Jan. 24, 2007).

49. WITTE JR., *supra* note 9, at 48.

50. Constitutive Act of the African Union pmbl, OAU Doc. CAB/LEG/23.15 (July 11, 2000) (emphasis added), *available at* [http://www.africa-union.org/root/au/AboutAU/Constitutive\\_Act\\_en.htm](http://www.africa-union.org/root/au/AboutAU/Constitutive_Act_en.htm).

51. African Charter, *supra* note 5, pmbl.

52. *Id.* art. 20(2), (3).

determination<sup>53</sup> and, relatedly, the right of peoples to “freely dispose of their wealth and natural resources,”<sup>54</sup> to ensure “national and international peace and security,”<sup>55</sup> and to protect “a general satisfactory environment favorable to their development.”<sup>56</sup> Additionally, it provides that “States parties . . . shall undertake to eliminate all forms of foreign economic exploitation particularly that practiced by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources.”<sup>57</sup>

The allocation of decision-making power within African human rights instruments reflects political, and even realist, preferences. The African Commission cannot publish its findings until its report has received comment from, and been adopted by, the heads of member states and further given permission to publish it.<sup>58</sup> Some findings never see the light of day if they offend prevailing politics, or they are published too late to have practical impact.<sup>59</sup> In *Media Rights Agenda v. Nigeria*, for example, the African Commission determined that the

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53. *Id.* art. 20(1) (“All peoples . . . shall have the unquestionable and inalienable right to self-determination.”); *see also id.* art. 22(1) (“All peoples shall have the right to their economic, social and cultural development.”).

54. *Id.* art. 21(1).

55. *Id.* art. 23(1).

56. *Id.* art. 24.

57. *Id.* art. 21(5). The African Commission has also endorsed these views on colonial economic exploitation. *Soc. and Econ. Rights Action Ctr v. Nigeria*, Comm. No. 159/96 (Afr. Comm’n on Hum. & Peoples’ Rts. 2001), *available at* [http://www.achpr.org/files/sessions/30th/communications/155.96/achpr30\\_155\\_96\\_eng.pdf](http://www.achpr.org/files/sessions/30th/communications/155.96/achpr30_155_96_eng.pdf).

58. African Charter, *supra* note 5, arts. 52–53.

All measures taken within the provisions of the present Chapter shall remain confidential until such a time as the Assembly of Heads of State and Government shall otherwise decide. . . . The report on the activities of the Commission shall be published by its Chairman after it has been considered by the Assembly of Heads of State and Government.

*Id.* art. 59(1), (3).

59. *See, e.g.,* *Constitutional Rights Project v. Nigeria*, Comm. No. 102/93 (Afr. Comm’n on Hum. & Peoples’ Rts. 1998), *available at* [http://www.achpr.org/files/sessions/24th/communications/102.93/achpr24\\_102\\_93\\_eng.pdf](http://www.achpr.org/files/sessions/24th/communications/102.93/achpr24_102_93_eng.pdf). In this case, presidential elections were held on June 12, 1993 in Nigeria. *Id.* According to both foreign and local election monitors elections were free and fair. *Id.* Not satisfied with the electoral results, however, the Nigerian Federal Military government annulled the results. *Id.* The African Commission received this communication in July 1993, however it was not until October 1998 that it ruled that the Nigerian State had violated the right to political participation, long after the Abacha military government had left office. *Id.*

Abacha government had violated freedom of expression guarantees, but this decision was not published until the Abacha regime had been removed from power.<sup>60</sup>

Moreover, legal positivism dominates African human rights jurisprudence. Most rights in the African Charter are subject to clawback clauses.<sup>61</sup> Effectively, those rights are protected only to the extent that they do not conflict with national laws,<sup>62</sup> thereby locating supreme authority in the will of the state. In his concurring opinion, Justice Fatsah Ouguergouz states in *Yogogombaye v. Republic of Senegal* that the African Court on Human and Peoples' Rights can only justify its jurisdiction by state consent, a positivist position.<sup>63</sup>

The cross-boundary migration of norms is a discernible trend in several African human rights instruments. Globalization forces have

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60. *Media Rights Agenda v. Nigeria*, Comm. Nos. 105/93, 128/94, 130/94, 152/96 (Afr. Comm'n on Hum. & Peoples' Rts. 1998), available at [http://www.achpr.org/files/sessions/24th/communications/105.93-128.94-130.94-52.96/achpr24\\_105.93\\_128.94\\_130.94\\_152.96\\_eng.pdf](http://www.achpr.org/files/sessions/24th/communications/105.93-128.94-130.94-52.96/achpr24_105.93_128.94_130.94_152.96_eng.pdf).

61. The African Charter provides the "right to liberty and to the security of his person," but this right is subject to the overbroad limitation clause which indicates that the right is unavailable in situations of "reasons and conditions previously laid down by law." African Charter, *supra* note 5, art. 6. Similarly, the Charter provides for the "[f]reedom of conscience, the profession and free practice of religion," but this is subject to limitations dictated by "law and order." *Id.* art. 8. This pattern is repeated in Article 9 (right to express and disseminate opinions), Article 10 (right to free association), Article 11 (right to assemble), Article 12 (right to free movement), Article 13 (right to participate in government), and Article 14 (right to property). *Id.* arts. 9–14. The African Commission has sought to limit the impact of clawback clauses by noting that the "only legitimate reasons for limitations of the rights and freedoms of the African Charter are found in Article [27(2)]." *Constitutional Rights Project v. Nigeria*, Comm. Nos. 140/94, 141/94, 145/95, ¶ 41 (Afr. Comm'n on Hum. & Peoples' Rts. 1999), available at [http://www.achpr.org/files/sessions/26th/comunications/140.94-141.94-145.95/achpr26\\_140.94\\_141.94\\_145.95\\_eng.pdf](http://www.achpr.org/files/sessions/26th/comunications/140.94-141.94-145.95/achpr26_140.94_141.94_145.95_eng.pdf). See African Charter, *supra* note 5, art. 27(2) ("The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.").

62. Christof Heyns, *The African Rights Regional Human Rights System: The African Charter*, 108 PENN ST. L. REV. 679, 688 (2003–2004). Remedial clauses in the African Charter provide that the African Commission on Human and Peoples' Rights is to draw inspiration from international human rights law in interpreting the provisions of the Charter. See African Charter, *supra* note 5, arts. 60–61. The African Commission has used those provisions to conform the Charter to international practices, and this has helped to limit the chilling effect of the clawback clauses. See, e.g., *Media Rights Agenda*, Comm. Nos. 105/93, 128/93, 130/94, 152/96, ¶ 66 ("To allow national law to have precedent over the international law of the Charter would defeat the purpose of the rights and freedoms enshrined in this Charter. International human rights standards must always prevail over contradictory national law.").

63. *Yogogombaye v. Republic of Senegal*, App. No. 001/2008, ¶ 21 (Afr. Ct. Hum. & Peoples' Rts. 2009) (Ouguergouz, J., concurring), available at [http://www.african-court.org/en/images/documents/Press\\_Docs/SEPARATE%20OPINION%20OF%20JUDGE%20FATSAH%20OUGUERGOUZ.EN.pdf](http://www.african-court.org/en/images/documents/Press_Docs/SEPARATE%20OPINION%20OF%20JUDGE%20FATSAH%20OUGUERGOUZ.EN.pdf).

accelerated this borrowing process, which is sometimes uncritical, expedient, or imposed by external pressures.<sup>64</sup> Women's rights and political participation rights, among others, most vividly exemplify this process. The Constitutive Act declares that one of its objectives is the "promotion of gender equality."<sup>65</sup> While laudable, it is important to examine the *means* by which this objective is achieved to ensure that the dignity of women is maintained. The African Charter addresses gender in its Preamble as well as in Articles 2, 3, and 18(3).<sup>66</sup> Article 18(3) enjoins states to "ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child."<sup>67</sup> The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol)<sup>68</sup> complements the African Charter. It seeks to empower women by increasing their social, political, and economic liberties. The Maputo Protocol is an improvement to the African

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64. Pope Paul VI urged developing nations to

choose wisely from among the things that are offered to them. They must test and reject false values that would tarnish a truly human way of life, while accepting noble and useful values in order to develop them in their own distinctive way, along with their own indigenous heritage.

*Populorum Progressio*, *supra* note 2, ¶ 41. He spoke of the need for "authentic development" stating, "[t]he development We speak of here cannot be restricted to economic growth alone. To be authentic, it must be well rounded; it must foster the development of each man and of the whole man." *Id.* ¶ 14. Pope Benedict XVI further warned:

[T]he increased commercialization of cultural exchange today leads to a twofold danger. First, one may observe a *cultural eclecticism* that is often assumed uncritically: cultures are simply placed alongside one another and viewed as substantially equivalent and interchangeable. This easily yields to a relativism that does not serve true intercultural dialogue; on the social plane, cultural relativism has the effect that cultural groups coexist side by side, but remain separate, with no authentic dialogue and therefore with no true integration. Secondly, the opposite danger exists, that of *cultural leveling* and indiscriminate acceptance of types of conduct and lifestyles. In this way one loses sight of the profound significance of the culture of different nations, of the traditions of the various peoples, by which the individual defines himself in relation to life's fundamental questions.

Pope Benedict XVI, *Caritas in Veritate* [*Encyclical Letter on Integral Human Development in Charity and Truth*] ¶ 26 (June 29, 2009) [hereinafter *Caritas in Veritate*].

65. Constitutive Act of the African Union, *supra* note 50, art. 4(1).

66. African Charter, *supra* note 5, pmbl, arts. 2, 3, 18(3).

67. *Id.* art. 18(3).

68. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Sept. 13, 2000, OAU Doc. CAB/LEG/66.6 [hereinafter Maputo Protocol].

Charter, which only protects women's domestic rights.<sup>69</sup> It seeks to advance the welfare of African women by promoting equal work opportunities for them, as well as banning rape in war.<sup>70</sup> It requires the elimination of discrimination and atrocious practices like female genital mutilation,<sup>71</sup> early marriage,<sup>72</sup> widows' lack of inheritance rights,<sup>73</sup> and domestic violence.<sup>74</sup> It also guarantees rights to food, security,<sup>75</sup> adequate housing,<sup>76</sup> positive cultural context,<sup>77</sup> "sustainable development,"<sup>78</sup> and a healthy and sustainable environment.<sup>79</sup> It could accomplish more by declaring that polygamy is an affront to female dignity.<sup>80</sup>

The new African society envisioned in the Maputo Protocol is based on versions of feminist legal theory prevalent in more developed parts of the world and which do not adequately uphold the dignity of women.<sup>81</sup> Such a new society would be ineffective in

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69. *Id.*; African Charter, *supra* note 5, art.18(3) ("The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions."). It is argued that the lumping of women and children in an article that deals primarily with the family reinforces outdated stereotypes about the proper place and role of women in society, and that this is partially the reason for the adoption of the Protocol. See Heyns, *supra* note 62, at 687–88.

70. Maputo Protocol, *supra* note 68, arts. 13(h), 11(3). See also Kay Boulware-Miller, *Female Circumcision: Challenges to the Practice as a Human Rights Violation*, 8 HARV. WOMEN'S L.J. 155 (1985); Isabelle R. Gunning, *Arrogant Perception, World Travelling and Multicultural Feminism: The Case of Female Genital Surgeries*, 23 COLUM. HUM. RTS. L. REV. 189 (1991–1992); Hope Lewis, *Between Irua and "Female Genital Mutilation": Feminist Human Rights Discourse and the Cultural Divide*, 8 HARV. HUM. RTS. J. 1 (1995).

71. Maputo Protocol, *supra* note 68, art. 5(b).

72. *Id.* art. 6(b).

73. *Id.* art. 21.

74. *Id.* art. 4(2).

75. *Id.* art. 15.

76. *Id.* art. 16.

77. *Id.* art. 17.

78. *Id.* art. 19.

79. *Id.* art. 18. See also, Rachel Murray, *International Human Rights: Neglect of Perspectives From African Institutions*, 55 INT'L & COMP. L.Q. 193, 203 (2006).

80. See Maputo Protocol, *supra* note 68, art. 6(c) ("[M]onogamy is encouraged as the preferred form of marriage and that the rights of women in marriage and family, including in polygamous marital relationships are promoted and protected.").

81. Pope Benedict XVI cautions against abortion policies and legislation, noting that "policies of those who, claiming to improve the 'social edifice[,] threaten its very foundations. How bitter the irony of those who promote abortion as a form of 'maternal' healthcare! How disconcerting the claim that the termination of life is a matter of reproductive health (cf. *Maputo Protocol*, art. 14)!" Pope Benedict XVI, Address to Cameroon and Angola Political and Civil Authorities and the Diplomatic Corps (Mar. 20, 2009), [http://www.vatican.va/holy\\_father/](http://www.vatican.va/holy_father/)

promoting “sustainable development.” While gender equality is laudable, the Maputo Protocol’s attempt to *redefine* gender itself undermines its very purpose to protect the dignity of women. In another part, it states that “States Parties shall commit themselves to modify . . . harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on *stereotyped roles for women and men.*”<sup>82</sup> Additionally, a “married woman shall have the right to retain her maiden name”<sup>83</sup> and each State is obligated to “take the necessary measures to recognise the economic value of the work of women in the home.”<sup>84</sup> These provisions are politically motivated and sharply contrast with most women’s views of their femininity and fundamental rights.

Further, the Maputo Protocol subscribes to the view that women’s development depends on limiting their reproductive potential. Article 14(1) provides that State Parties shall ensure that the “right to health of women, including sexual and reproductive health is

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[benedict\\_xvi/speeches/2009/march/documents/hf\\_ben-xvi\\_spe\\_20090320\\_autorita-civili\\_en.html](http://www.vatican.va/holy_father/benedict_xvi/speeches/2009/march/documents/hf_ben-xvi_spe_20090320_autorita-civili_en.html) [hereinafter Address to Cameroon and Angola]. He previously stated:

How can we not be alarmed, moreover, by the continuous attacks on life, from conception to natural death? Such attacks do not even spare regions with a traditional culture of respecting life, such as Africa, where there is an attempt to trivialize abortion surreptitiously, both through the Maputo Protocol and through the Plan of Action adopted by the Health Ministers of the African Union—shortly to be submitted to the Summit of Heads of State and Heads of Government.

Pope Benedict XVI, Address to the Holy See Diplomatic Corps (Jan. 8, 2007), [http://www.vatican.va/holy\\_father/benedict\\_xvi/speeches/2007/january/documents/hf\\_ben-xvi\\_spe\\_20070108\\_diplomatic-corps\\_en.html](http://www.vatican.va/holy_father/benedict_xvi/speeches/2007/january/documents/hf_ben-xvi_spe_20070108_diplomatic-corps_en.html). Pope Benedict XVI also notes:

One of the most striking aspects of development in the present day is the important question of *respect for life*, which cannot in any way be detached from questions concerning the development of peoples. It is an aspect which has acquired increasing prominence in recent times, obliging us to broaden our concept of poverty and underdevelopment to include questions connected with the acceptance of life, especially in cases where it is impeded in a variety of ways.

Not only does the situation of poverty still provoke high rates of infant mortality in many regions, but some parts of the world still experience practices of demographic control, on the part of governments that often promote contraception and even go so far as to impose abortion.

*Caritas in Veritate*, *supra* note 64, at ¶ 28.

82. Maputo Protocol, *supra* note 68, art. 2(2) (emphasis added).

83. *Id.* art. 6(f).

84. *Id.* art. 13(h).

respected and promoted,” and that this includes “the right to control their fertility” and “the right to decide whether to have children, the number of children and the spacing of children.”<sup>85</sup> To ensure the realization of these rights, Article 14(2)(c) enjoins states to “protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus.”<sup>86</sup> Commenting on this provision, the Center for Reproductive Rights notes that this “treaty affirms reproductive choice and autonomy as a key human right and contains a number of global firsts. For example, it . . . explicitly articulate[s] a

85. *Id.* art. 14(1).

86. *Id.* art. 14(2)(c). Some international human rights instruments go further than this. For example, the American Convention on Human Rights provides that “[e]very person has the right to have his life respected. This *right shall be protected by law and, in general, from the moment of conception.* No one shall be arbitrarily deprived of his life.” Organization of American States, American Convention on Human Rights art. 4(1), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (emphasis added). The Inter-American Commission on Human Rights (IACHR) had the opportunity to construe the implications of this provision in the *Baby Boy* case. *Baby Boy v. United States*, Case 2141, Inter-Am. C.H.R., Res. No. 23/81, OEA/Ser.L/V/II.54, doc. 9 rev. 1 (1981), available at <http://www.cidh.org/annualrep/80.81eng/USA2141.htm>. The IACHR noted:

To accommodate the views that insisted on the concept “from the moment of conception, “ with the objection raised, since the Bogota Conference, based on the legislation of American States that permitted abortion, *inter alia*, to save the mother’s life, and in case of rape, the IACHR, redrafting article 2 (Right to life), decided, by majority vote, to introduce the words “in general. “ This compromise was the origin of the new text of article 2.

*Id.* ¶ 25. The European Court of Human Rights, however, reduces the questions of personhood and human dignity to positivist consensus, arguing that Contracting States themselves and that there was no European consensus on the scientific and legal definition of the beginning of life. *Vo v. France*, No. 53924/00, 2004-VIII Eur. Ct. H.R. ¶ 40. The United States Supreme Court too subscribes to a relativist and positivist logic stating that “[a]t the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.” *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992). Legal positivist approaches can even lead to the making of artificial distinctions. The Supreme Court of Canada, for example, held that any right or interest the fetus may have remains inchoate and incomplete until the birth of the child. *Winnipeg Child & Family Servs. (Nw. Area) v. G. (D.F.)* (1997), 3 S.C.R. 925 ¶ 15 (Can.). The dissenting justices, however, pointed out the incoherence of this approach. Justices Major and Sopinka maintained that the “born alive” rule, requiring the child to be born alive before any rights can accrue or remedies can be sought, is a legal anachronism based on rudimentary medical knowledge and should no longer be followed for the purposes of this case in the light of advances in medical technology. *Id.* ¶ 92 (Major, J., dissenting).

woman's right to abortion."<sup>87</sup> It is the only international treaty to do so, and has only regional, as opposed to global, signatories.

It mandates that "States Parties shall ensure the implementation of this Protocol at national level."<sup>88</sup> Several, but not all, signatories have complied.<sup>89</sup> Kenya's new Constitution, for example, guarantees the "right" to abortion when "in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law," even as it recognizes that "[t]he life of a person begins at conception."<sup>90</sup> The African Commission has urged implementation in Mozambique,<sup>91</sup> Uganda, and Botswana,<sup>92</sup> among others.

The Center for Reproductive Rights argues that "[w]hen a woman is denied her reproductive rights—when she is denied . . . birth control . . . or safe abortion . . . —she is denied the means . . . to exercise her human rights."<sup>93</sup> But this could result in situations where the cure is worse than the disease in terms of impact on public resources, with unjustifiable legitimization costs.<sup>94</sup> Even if these means

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87. *The Protocol on the Rights of Women in Africa*, CENTER FOR REPROD. RTS., [http://reproductiverights.org/sites/crr.civicactions.net/files/documents/pub\\_bp\\_africa.pdf](http://reproductiverights.org/sites/crr.civicactions.net/files/documents/pub_bp_africa.pdf) (last visited Aug. 15, 2012).

88. Maputo Protocol, *supra* note 68, art. 26(1).

89. Specifically, fifty-three countries, forty-six signatures, twenty-eight ratifications, and twenty-eight deposits. *Member States*, AFRICAN UNION COMMISSION, [http://www.au.int/en/member\\_states/countryprofiles](http://www.au.int/en/member_states/countryprofiles) (last visited Oct. 23, 2012).

90. CONSTITUTION OF KENYA, art. 26 (2010).

91. AFRICAN COMM'N ON HUM. & PEOPLES' RTS., INTERCESSION ACTIVITY REPORT OF COMM'R MELO, *available at* <http://www.achpr.org/english/Commissioner's%20Activity/43rd%20OS/Commissioners/Com.%20Melo.pdf>.

92. People in Sub-Saharan Africa do not need more laws, but better conditions of life. Laws alone do not change lives in themselves. The Committee on the Elimination of Discrimination against Women (CEDAW) rightly observed with respect to Lebanon, for example, that "Lebanese law is one of the most severe laws regarding abortion. However, it has not put an end to abortion," and then asked, "[w]hat measures have been taken . . . to avert unwanted pregnancies and women's recourse to illegal abortion?" *See* Committee on the Elimination of Discrimination Against Women ¶ 25, U.N. Doc. CEDAW/PSWG/2005/II/CRP.1/Add.8 (Feb. 9, 2005).

93. *Repro Rights Are Human Rights*, CENTER FOR REPRODUCTIVE RIGHTS, <http://reproductiverights.org/en/feature/repro-rights-are-human-rights> (last visited Aug. 16, 2012).

94. Pope Benedict XVI said that "the family is the foundation on which the social edifice is built" and that of grave concern, however, are "policies of those who, claiming to improve the 'social edifice[,] threaten its very foundations. How bitter the irony of those who promote abortion as a form of 'maternal' healthcare! How disconcerting the claim that the termination of life is a matter of reproductive health (*cf.* Maputo Protocol, art. 14)!" Address to Cameroon and Angola, *supra* note 81.

achieved health and development objectives, it is important to examine whether they are narrowly tailored or necessary. Development strategies premised on population control have been attempted previously.<sup>95</sup> But the International Conference on Population and Development insisted that “[g]overnments should take appropriate steps to help women avoid abortion, which in no case should be promoted as a method of family planning.”<sup>96</sup> The impact of demography on development should not be overstated.<sup>97</sup> Achieving a purely utilitarian<sup>98</sup> objective is not a sufficient justification for adding a new human right: the articulation of new rights<sup>99</sup> should be consistent with human dignity, and thus comport with human nature, including its proclivity to reproduce and nurture new life. But the trend has been to reinterpret human rights by separating them from their *objective* foundation in furtherance of

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95. The Committee on the Elimination of Discrimination Against Women (CEDAW) maintains that abortion should not be used as a means of birth control. *See, e.g.,* Consideration of Reports Submitted by States Parties under Article 18 of the Convention on the Elimination of All Forms of Discrimination Against Women, Comm. on the Elimination of Discrimination against Women, Aug. 5–23, 2002, U.N. Doc. CEDAW/C/GRC/4-5 (2002) (urging Greece to take all appropriate steps to eliminate the use of abortion as a means of birth control.). *See also Women’s Access to Health Services Boosts Gender Equality, Says UNDP Chief*, UN NEWS CENTRE (Sept. 2, 2009), <http://www.un.org/apps/news/story.asp?NewsID=31925&Cr=reproductive&Cr1=>.

96. Report Of The International Conference On Population And Development, UN Population Division, Dep’t of Econ. & Soc. Affairs, Sept. 5–13, 1994, U.N. Doc. A/CONF.171/13 (Oct. 18, 1994), *available at* <http://www.un.org/popin/icpd/conference/offeng/poa.html>. In April, 2009, Secretary of State Hillary Clinton told a United States House subcommittee, “[w]e . . . happen to think that family planning is an important part of women’s health and reproductive health includes access to abortion that I believe should be safe, legal and rare.” Samantha Singson, *Obama Administration Calls for Universal Access to Abortion at UN Meeting*, CATH. FAM. & HUM. RTS. INST. (July 02, 2009), <http://www.c-fam.org/fridayfax/volume-12/obama-administration-calls-for-universal-access-to-abortion-at-un-meeting.html>.

97. Pope Paul VI recognizes the obstacles posed by demography to development, but he also offers some timeless counsel. *Populorum Progressio*, *supra* note 2. He states:

There is no denying that the accelerated rate of population growth brings many added difficulties to the problems of development where the size of the population grows more rapidly than the quantity of available resources to such a degree that things seem to have reached an impasse. In such circumstances people are inclined to apply drastic remedies to reduce the birth rate.

*Id.* ¶ 37.

98. Pope Benedict XVI bemoans the attempts “made to deprive rights of their true function in the name of a narrowly utilitarian perspective.” Pope Benedict XVI, *supra* note 20.

99. The evolution of new rights is not wrong in itself. “As history proceeds, new situations arise, and the attempt is made to link them to new rights.” *Id.*

mere *utilitarian* purposes.<sup>100</sup> For example, it has been suggested that the indices of a human right heretofore unrecognized include the degree of consensus<sup>101</sup> on its social value, the degree to which the content of that social value is specific enough to become operational as law, and the existence of practical means of continuous enforcement.<sup>102</sup> In sum, a human right justified by utilitarian motive alone disappears when the motive is satisfied, demonstrating that, in fact, the supposed right was merely a legal fiction devoid of universal and perennial force.

While it may be appropriate for women to refrain from reproduction,<sup>103</sup> overpopulation does not necessarily cause poverty.

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100. Int'l Theological Comm'n, *supra* note 3. Pope Benedict XVI urges that "efforts need to be redoubled in the face of pressure to reinterpret the foundations of the [Universal] Declaration [of Human Rights] and to compromise its inner unity so as to facilitate a move away from the protection of human dignity towards the satisfaction of simple interests, often particular interests." Pope Benedict XVI, *supra* note 20 (emphasis omitted). Additionally, he warns:

Experience shows that legality often prevails over justice when the insistence upon rights makes them appear as the exclusive result of legislative enactments or normative decisions taken by the various agencies of those in power. When presented purely in terms of legality, rights risk becoming weak propositions divorced from the ethical and rational dimension which is their foundation and their goal.

*Id.*

101. Human rights should not be the product of positivist consensus, yet consensus retains a strong appeal.

Americans [are] now split roughly 50-50 between those who back legal access to abortion and those who oppose it . . . . [O]nly 47 percent of Americans now feel abortion should be legal in all or most cases, a drop from 54 percent a year ago . . . . Given the survey's margin of error, the two camps are statistically tied. . . . "There was a drop seen in many, many demographics: men and women, people with a college degree and those with less education, people with various religious backgrounds."

Richard Allen Greene, *Abortion Support Falls Sharply, New Research Finds*, CNNPOLITICS (Oct. 1, 2009, 6:48 PM), <http://www.cnn.com/2009/POLITICS/10/01/abortion.poll/index.html?iref=newssearch>.

102. Julia Swanson, *The Emergence of New Rights in the African Charter*, 12 N.Y.L. SCH. J. INT'L & COMP. L. 307, 316 (1991) (citing Georges Abi-Saab, *The Legal Formulation of a Right to Development*, in LE DROIT AU DEVELOPPEMENT AU PLAN INTERNATIONAL [THE RIGHT TO DEVELOPMENT AT THE INTERNATIONAL LEVEL] 159, 160 (R. Dupuy ed., 1980)).

103. Economic considerations feature prominently in such decisions. See, e.g., *Dobson v. Dobson*, [1999] 2 S.C.R. 753 (Can.) (arguing, *inter alia*, that the mother may be the carrier of the fetus but she is still an individual and that liability would severely compromise her lifestyle choices including the ability to earn a living). The economic recession in developed countries has demonstrated once again that economics always lurks in the background. For many Americans, for example, the recession affected their decisions about sex and family planning. Doctors and clinics reported that many women were choosing abortions and men vasectomies because they could not afford a child. See, e.g., David Crary & Melanie S. Welte, *Doctors See*

China and several East Asian countries, with phenomenally large populations, have witnessed galloping economic growth. Faced with an aging population, Japan established a cash-for-kids program.<sup>104</sup> Some commentators believe that the precedent of *Roe v. Wade*<sup>105</sup> may be responsible for an increasingly graying population and a major threat to economic sustainability in the United States.<sup>106</sup> Africa should head the experience of the developing nations whose reproductive policies it largely imitates.

Regarding rights of political participation, many African states proscribe that the formation of political opposition parties depend on an almost absolute notion of sovereignty and principle of non-intervention, and to secure internal political power even when human rights are flagrantly violated by autocracies.<sup>107</sup> While the African Charter guarantees the right of political participation,<sup>108</sup> it does not provide a specific right to vote. African political elites could argue

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*Economic Impact on Abortion, Birth Control*, USA TODAY (Mar. 24, 2009, 5:11 PM), [http://www.usatoday.com/news/health/2009-03-24-family-planning\\_N.htm](http://www.usatoday.com/news/health/2009-03-24-family-planning_N.htm) (reporting that a pregnant woman showed up at a medical center in flip-flops crying, after walking there to save bus fare, and during the counseling session told the doctor "I just walked here for an hour. I'm sure of my decision.").

104. Japan plans to pay \$3,400 per child per family until the child reaches high school. Kyung Lah, *Plan Would Pay Japanese Families to Have Kids*, CNN, <http://www.cnn.com/2009/WORLD/asiapcf/09/04/japan.children/index.html?iref=newssearch> (last updated Sept. 4, 2009). This is an effort to boost Japan's birth rate, which is one of the lowest in the world, and the presumed cause of economic decline. *Id.*

105. *Roe v. Wade*, 410 U.S. 113 (1973).

106. John Leland, *A Graying Population, A Graying Work Force*, N.Y. TIMES, Apr. 25, 2010, at A14, available at <http://www.nytimes.com/2010/04/25/us/25care.html?hpw> ("In an aging population, the elderly are increasingly being taken care of by the elderly.").

107. The Constitutive Act of the African Union permits intervention in cases of gross violation of human rights, but to date no country has been subjected to such intervention. See Constitutive Act of the African Union, *supra* note 50, art. 4(h). Instead, the African Union has consistently opposed any intervention, and the only serious step has been the suspension of membership in the African Union. Article 4(g) of the Constitutive Act provides that one of the principles of the Union is "non-interference by any Member State in the internal affairs of another." *Id.* art. 4(g). Article 4(h) of the Constitutive Act provides for the "right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity." *Id.* art. 4(h). Based on the potential conflicts between these provisions, it must be recognized that neither of them is absolute. The only feasible situation triggering an intervention under Article 4(h) is a gross violation of human rights.

108. Article 13(1) of the African Charter provides "[e]very citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law," but this does not explicitly provide for the right to vote or to form political parties. See African Charter, *supra* note 5, art. 13(1).

that, in the interest of conventional methods of consensual decision-making<sup>109</sup> and modes of leadership, governments may ban opposition political parties.<sup>110</sup> The preferred alternatives include variants of ruling committee, or oligarchy.<sup>111</sup> To remedy this real possibility, the African Commission should liberally interpret the African Charter's political rights protections.<sup>112</sup> However, the rule of law demands predictability and the practice of the African Commission to liberally interpret the African Charter pursuant to the precedents of international tribunals is not sufficient to protect political rights,<sup>113</sup> necessitating new, clear language in the African Charter guaranteeing fundamental rights not presently included that bulwark human dignity.

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109. Rose M. D'Sa, *Human and Peoples' Rights: Distinctive Features of the African Charter*, 29 J. AFR. L. 72, 74 (1985).

110. See, e.g., *Sir Dawda K Jawara v. Gambia*, Comm. No. 147/95, 149/96 (Afr. Comm'n on Hum. & Peoples' Rts. 2000), available at [http://www.achpr.org/files/sessions/27th/comunications/147.95-149.96/achpr27\\_147.95\\_149.96\\_eng.pdf](http://www.achpr.org/files/sessions/27th/comunications/147.95-149.96/achpr27_147.95_149.96_eng.pdf). In this decision, the former head of state of Gambia's claim of "blatant abuse of power by . . . the military junta" which took power from his government in a coup in 1994. *Id.* He alleged that the government conducted a "reign of terror, intimidation and arbitrary detention," abolished the Bill of Rights, banned political parties, *inter alia*. *Id.* The banning of political parties, the Commission told the military leaders, violated Article 10(1) of the Charter, but military coups had been the order of the day until the 1990s. *Id.*

111. Uganda's National Resistance Movement, which was in power for a long time until political parties were restored, as well as Libya's political system, are examples of what can happen.

112. The right to vote is not explicitly stated in the African Charter. However, the Commission creatively ruled that the right to vote is implied in Article 13 of the Charter. See, e.g., *Constitutional Rights Project v. Nigeria*, Comm. No. 102/93 (Afr. Comm'n on Hum. & Peoples' Rts. 1998). In 1993, Nigeria held a presidential election. *Id.* ¶ 1. As the National Electoral Commission began to announce the election results, the Abuja High Court restrained it from announcing the results. *Id.* ¶ 2. Eleven days later, the Military Government announced the annulment of the election results. *Id.* ¶ 2. The communication alleged that the reason for this was that the government was not happy that Abiola, the Social Democratic candidate appeared to have won the election. *Id.* ¶ 3. The issue was whether the right to vote was an integral part of the right of everyone to participate in the public life of his country. The Commission first underlined the import of Article 13. In this respect, it stated that "[t]o participate freely in government entails, among other things, the right to vote for the representative of one's choice," and then went on to observe that it follows that "the results of free expression of the will of the voters must be respected; otherwise, the right to vote freely is meaningless. In light of this, the annulment of the election results, which reflected the free choice of the voters, is in violation of Article [13(1)]." *Id.* ¶ 50.

113. Christof Heyns, *The African Regional Human Rights System: In Need of Reform?*, 1 AFR. HUM. RTS. L.J. 155, 158 (2001).

## III. AFRICAN TRADITIONS AS FOUNDATIONS FOR HUMAN RIGHTS

The proposition that African human rights instruments should do more to protect human dignity finds support in African traditions, which these instruments reference. The mandate of African Charter framers was to prepare a document that “reflects the *African* conception of human rights” and to “take as a pattern the *African* philosophy of law and *meet the needs of Africa.*”<sup>114</sup> Article 61 of the African Charter provides that the African Commission shall take into consideration as “subsidiary measures to determine the principles of law” the “customs generally accepted as law, [and] general principles of law recognized by African states.”<sup>115</sup> Pertinently, recognizing “dignity . . . [is] essential . . . for the achievement of the legitimate aspirations of the African peoples,”<sup>116</sup> “the values of African civilization . . . should inspire . . . the concept of human and peoples’ rights,”<sup>117</sup> the “fundamental human rights stem from the attributes of human beings,”<sup>118</sup> and “[t]he promotion and protection of *morals* and *traditional values* recognized by the community shall be the *duty* of the State.”<sup>119</sup> It is remarkable that although in most of its provisions the African Charter uses phrases like “every individual”<sup>120</sup> when it turns to the right to life it refers to a “human being.” The Constitutive Act is also grounded on “respect for the *sanctity* of human life.”<sup>121</sup> The African Charter embodies a broader view of a human being inasmuch as it is premised on the “values of African civilization which should inspire and characterize their reflection on the concept of human and peoples’ rights.”<sup>122</sup> According to most African traditions, a human being includes the unborn.<sup>123</sup> Traditional African

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114. D’Sa, *supra* note 109, at 73 (emphasis added).

115. African Charter, *supra* note 5, art. 61.

116. *Id.* pmb. (internal quotation marks omitted).

117. *Id.*

118. *Id.*

119. *Id.* art. 17(3) (emphasis added).

120. It does so in almost all the provisions dealing with human rights. African Charter, *supra* note 5, arts. 2–4, 6–7, 9–11, 13, 15–17. Indeed, the same observation can be made with regard to the portion of the Charter dealing with duties.

121. Constitutive Act of the African Union, *supra* note 50, art. 4(o) (emphasis added).

122. African Charter, *supra* note 5, pmb.

123. For example, “[o]n becoming pregnant a Bachwa woman cooks food and takes portions of it to the forest where she offers them to God, saying ‘God, from Whom I have received this child, take Thou and eat!’” JOHN S. MBITI, *AFRICAN RELIGIONS AND PHILOSOPHY* 59–60 (2d ed. 1990). On April 19, 2007, a joint statement was released by many prominent African bishops:

religions accompany the individual from long before his birth to long after his physical death.<sup>124</sup> As Professor John Mbiti explained, “[i]n African societies, the birth of a child is a process which begins long before the child’s arrival in this world.”<sup>125</sup> Social life itself is conceived as a partnership of the unborn, the living, and the living dead. Against this backdrop, it is possible for Western thinkers to understand why under many African countries’ constitutional arrangements, *it is axiomatic that the unborn have the right to life.*<sup>126</sup> Admittedly, not every traditional African norm is consistent with

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We would like to draw the attention of the political leaders of Africa to our strong reservations concerning some aspects of Article 14 of the Maputo Protocol . . . . We observe that the rights of women to protect and promote their sexual and reproductive health in this article exclude the rights of the couple, the family and the larger society (civil, traditional, cultural and religious) from playing a part in promoting precisely the women’s rights to their health care. For instance, the authorization to have recourse to abortion and the choice of any method of contraception by the women (cf. Article 14, # 1, c and # 2, c) are particularly incompatible with our Catholic Church teaching, tradition and practice . . . . Additionally, the Church has continually affirmed since the first century that it is a moral evil for any person or agent to procure an abortion. This teaching has not changed and remains unchangeable . . . . In the light of this, we observe that abortion and infanticide are abominable crimes to almost all of our African cultures, traditional societies and religions.

*Catholic and African Opposition*, MAPUTO PROTOCOL, [http://www.maputoprotocol.org/catholic\\_african\\_opposition.html](http://www.maputoprotocol.org/catholic_african_opposition.html) (last visited Nov. 7, 2012) (alterations in original).

124. See MBITI, *supra* note 123, at 2.

125. *Id.* at 107.

126. See, e.g., Constitution of the Republic of Uganda 1995, art. 22(2). A majority of African countries have restrictive abortion regimes, that is, abortion is illegal except to save the life of the mother or protect her physical health. Included in this category are thirty-one of the fifty-three African countries, namely, Angola, Benin, Central African Rep., Chad, Congo, Côte d’Ivoire, Dem. Rep. of Congo, Gabon, Guinea-Bissau, Kenya, Lesotho, Madagascar, Mali, Mauretania, Mauritius, Niger, Nigeria, Senegal, Somalia, Tanzania, Togo, Uganda, Burkina Faso, Burundi, Cameroon, Eritrea, Ethiopia, Guinea, Malawi, Mozambique, and Zimbabwe. See *Abortion Laws Worldwide*, WOMEN ON WAVES, <http://www.womenonwaves.org/set-158-en.html> (last visited Aug. 17, 2012). But it must be noted that some countries have more permissive regime than the foregoing countries. Botswana permits abortion to save the life of the woman, preserve physical or mental health, and in cases of rape, incest, or fetal impairment. Burkina Faso has a similar regime. Since 1996, abortion has been available without restrictions in South Africa within the first trimester of pregnancy if the mother’s physical or mental health is at risk, if the pregnancy compromises the mother’s social or economic situation, or if the pregnancy resulted from rape or incest. Most Common Law countries’ restrictive laws on abortion derive from the British Offences Against the Person Act of 1861, permitting an abortion to be performed if it is the sole means available to save the life of a pregnant woman. British Offences Against the Person Act, 1861, 24 & 25 Vict., c. 100, § 58 (Eng.); see also Gambia’s Criminal Code, §§ 140–42, 198–99 (Oct. 1, 1934) (Gam.); Benin’s Code of Medical Deontology, Ordinance 73–14, § 37 (Feb. 8, 1973).

fundamental norms of right. Indeed, in making reference to African traditions, the framers may have signaled that human rights are “not universally applicable but rather vary with time and according to regional cultural variations.”<sup>127</sup>

That said, the Preamble of the Cultural Charter for Africa (Cultural Charter) proclaims that because colonial “cultural domination led to the depersonalization of part of the African peoples . . . systematically disparaged and combated African values,” and “encouraged the formation of an elite which is too often alienated from its culture and susceptible to assimilation,” cultural authenticity is key to African development.<sup>128</sup> To this end, the Preamble to the Cultural Charter postulates, “that culture constitutes for our peoples the surest means of overcoming our technological backwardness.”<sup>129</sup> The Cultural Charter recognizes that true development must be premised on “development of all dynamic values in the African cultural heritage and rejection of any element which is an impediment to progress.”<sup>130</sup>

As for development, the African Charter also asserts a right to development according to the Charter’s holistic or integral vision of the human person.<sup>131</sup> According to the Charter, “civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality.”<sup>132</sup> Substantively, the African Charter provides for the right to development: a “right to work under equitable and satisfactory conditions,”<sup>133</sup> a right to health,<sup>134</sup> and a “right to education.”<sup>135</sup> There is some question as to whether these economic, social, and cultural rights are genuine rights

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127. Swanson, *supra* note 102, at 308. The African Charter recognizes the universality of human rights, which can be discerned from its reference to various global human rights instruments as normative sources of inspiration for the African Commission on Human and Peoples’ Rights. See African Charter, *supra* note 5, art. 61. However, the African Charter also recognizes certain conceptions of human rights specific to the African existential situation. See D’Sa, *supra* note 109, at 72, 74.

128. Cultural Charter for Africa pmbl., available at [http://www.au.int/en/sites/default/files/CULTURAL\\_CHARTER\\_AFRICA.pdf](http://www.au.int/en/sites/default/files/CULTURAL_CHARTER_AFRICA.pdf).

129. *Id.*

130. *Id.* art. 1(h).

131. African Charter, *supra* note 5, art. 22.

132. *Id.* pmbl.

133. *Id.* art. 15.

134. *Id.* art. 16.

135. *Id.* art. 17.

because of justiciability issues. However, the African Commission has demonstrated that they are justiciable.<sup>136</sup>

The traditional African communitarian view of the human person to development is also significant. The Cultural Charter explicitly recognizes that “[t]he African States recognize that the driving force of Africa is based more on development of the collective personality than on individual advancement and profit.”<sup>137</sup> Although human rights were first conceived as the handmaids of liberalism, which itself sought to liberate the individual from being indistinguishable from the holistic totality of his community, as in medieval times,<sup>138</sup> the African tradition underscores the primacy of the individual’s *membership in the community* while acknowledging his autonomy and personal rights. African societies exhibit cohesiveness, kinship, and collective responsibility.<sup>139</sup> African traditions acknowledge the

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136. In *Social & Economic Rights Action Center v. Nigeria*, the Commission dealt with an allegation of destruction of part of Ogoniland by a petroleum company acting in concert with the Nigerian government. Soc. & Econ. Rights Action Ctr. v. Nigeria, Comm. No. 155/96 (Afr. Comm’n on Hum. & Peoples’ Rts. 2001), *available at* [http://www.achpr.org/files/sessions/30th/comunications/155.96/achpr30\\_155\\_96\\_eng.pdf](http://www.achpr.org/files/sessions/30th/comunications/155.96/achpr30_155_96_eng.pdf). The Commission held that the right to “housing and shelter” could be derived from the Charter’s provisions on health, property, and family life. *Id.* See also *Abdoulaye Mazou v. Cameroon*, where the Commission held that by not reinstating Mr. Mazou in his former position after the Amnesty Law, the Cameroonian government had violated Article 15 of the African Charter providing for the right to work. *Abdoulaye Mazou v. Cameroon*, Comm. No. 39/90 (Afr. Comm’n on Hum. & Peoples’ Rts. 1997), *available at* [http://www.achpr.org/files/sessions/21st/comunications/39.90\\_10ar/achpr21\\_39.90\\_10ar\\_eng.pdf](http://www.achpr.org/files/sessions/21st/comunications/39.90_10ar/achpr21_39.90_10ar_eng.pdf). Further, in *Free Legal Assistance Group v. Democratic Republic of Congo*, the Commission held that Article 16 of the African Charter states that every individual shall have the right to enjoy the best attainable state of physical and mental health; that States Parties should take the necessary measures to protect the health of their people and consequently the failure of the government to provide basic services such as safe drinking water, electricity, and the shortage of medicine as alleged constituted a violation of Article 16; and that because Article 17 of the Charter guarantees the right to education, the closures of universities and secondary schools as described in the communication violated Article 17. *Free Legal Assistance Grp. v. Democratic Republic of Congo*, Comm. No. 25/89, 47/90, 56/91, 100/93 (Afr. Comm’n on Hum. & Peoples’ Rts. 1995), *available at* [http://www.achpr.org/files/sessions/18th/comunications/25.89-47.90-56.91-100.93/achpr18\\_25.89\\_47.90\\_56.91\\_100.93\\_eng.pdf](http://www.achpr.org/files/sessions/18th/comunications/25.89-47.90-56.91-100.93/achpr18_25.89_47.90_56.91_100.93_eng.pdf). See also Murray, *supra* note 79, at 197–98.

137. Cultural Charter for Africa, *supra* note 128, art. 7.

138. See Swanson, *supra* note 102, at 325.

The revolutionary theory of natural rights developed from liberalism. This theory consisted of the belief that autonomous man possessed rights in nature which were prior to and supreme over the sovereignty of all other associations, including that of the state. Individual man had become isolated from his collective associational identity.

*Id.* (footnotes omitted).

139. *Id.* at 328.

truth that the individual does not and cannot exist alone, but only corporately.<sup>140</sup> The very term “individual” by definition denotes his relation to others, and only in terms of other people is it logical to speak of individual duties, privileges, and responsibilities, deriving as they do from man’s social nature and relations. Whatever happens to the individual affects the whole society, and whatever happens to society affects the individual. Professor John Mbiti succinctly captured this ontology and anthropology as follows: “[t]he individual can only say: ‘I am, because we are; and since we are, therefore I am[.]’”<sup>141</sup> It is not surprising that the African Charter on Human and Peoples’ Rights has special concern for economic, social, and cultural rights.

#### IV. RECOMMENDATIONS FOR A NATURAL LAW FOUNDATION

As Africa continues to grapple with development challenges, it is necessary that it develops on an unshakeable foundation. Essential to achieving this is a correct articulation and promotion of human rights. This Article proposes that it is indispensable to consider fundamental principles of right and wrong, that is, the natural law. A natural law foundation for human rights in Africa would provide the bedrock for successful development. Unfortunately, in many respects, African human rights instruments and jurisprudence subscribe to legal realist, legal positivist, utilitarian, third world, and feminist theories, which are inadequate foundations. Particular provisions of several African human rights instruments must be amended to ensure consistency with human dignity.

In a pluralistic society, solutions necessarily require a willingness to find common principles as a starting point for building legal consensus. In light of the wide diversity in philosophical, policy, and legal opinions informed by political, social, historical, economic, religious, and cultural circumstances across the world, it is imperative that a comprehensive and respectful approach be adopted.

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140. D’Sa, *supra* note 109, at 72, 74.

141. MBITI, *supra* note 123, at 106. Modern studies in psychology also indicate that “we are not individuals who form relationships. We are social animals, deeply interpenetrated with one another, who emerge out of relationships.” David Brooks, Op-Ed, *The New Humanism*, N.Y. TIMES, Mar. 7, 2011, at A27, available at <http://www.nytimes.com/2011/03/08/opinion/08brooks.html?scp=1&sq=new%20humanism&st=cse>.