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The human as an intractable problem of the law: A critical appraisal

Isabelle Zundel & Serawit Debele

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Abstract

In this chapter, we suggest that the concept of the human is an intractable problem of the law due to, among others, its exclusionary predilections. The human as a category is incomplete because it refuses to recognise certain bodies (for example, non-normative sexualities and genders) despite claims to its universality; something to which all belong, at least according to international legal conventions and charters. Drawing on observations of recent developments in some African countries concerning anti-homosexuality laws, we will demonstrate that some indigenous conceptions of the human connive with the colonial impositions to exclude queer Africans from the plane of humanness. The law, for its part, reproduces this exclusion by either ignoring and/or justifying violence against those who do not identify with and uphold heteronormativity. To move out of this cultural and socio-legal predicament, we argue that the notion of both the human and law in the African context must be rethought. We reckon that one way of doing this is fostering a dialogue between the African Charter on Human and Peoples' Rights and African thoughts about the human, such as those propagated by Julius Nyerere in his writings on Ujamaa

socialism. Throughout the chapter, we use the term 'queer Africans' to refer to members of the LGBTQI+ communities.

Key words: *intractable problems; human; Ujamaa; queer Africans; African Charter; international human rights law*

1 Introduction

In his book *Critique of black reason,* Achille Mbembe reminds us that, notwithstanding the diverse ways in which we live in it, 'there is only one world. We are all part of it, and we all have a right to it.'[1] It follows that just as we share the world, we also share the desire for the 'fullness of humanity'. For Mbembe, the desire for humanity, particularly by those who experience intense exclusion, can be one of wanting 'to be protected, spared and preserved from danger [especially so] for those whose share of humanity was stolen at a given moment in history'.[2] He goes on to say that this is a desire for redemption, a project of self-determination, the right to govern oneself. This desire presupposes the restoration of the 'humanity stolen from those who have historically been subjected to [violent] processes of abstraction and objectification'.[3]

To be sure, Mbembe's thoughts are mainly concerned with black people and their dignity. Yet, we take our cue from his deliberations and extend it to think about the human and the desire to be included in relation to queer Africans. Like Mbembe and the pioneers who took up the question of the human before him (remember Franz Fanon, Aimé Cesair, Sylvia Wynter), we do not give up on the human as a category; instead, we want to contribute to expanding it.

While acknowledging and building on existing work on the subject of law, human rights and queer Africans, we aim to provoke further thought by suggesting the need to revisit the fundamentals, such as the very categories of the human and law themselves.[4] Since we all know how

1 A Mbembe *Critique of black reason* trans L Dubois (2017) 182.
2 Mbembe (n 1) 183.
3 Mbembe (n 1) 154.
4 There is a wealth of literature about how much the law has failed queer Africans, which we do not reiterate here lest it becomes repetitive. See, eg, K Kaoma 'The interaction of human rights and religion in Africa's sexuality politics' (2023) 21 (1) *International Journal of Constitutional Law* 339-355; A Jjuuko & M Tabengwa 'Expanded criminalisation of consensual same-sex relations in

banal it is for several conservative commentators to question, or even dismiss, the humanity of queer Africans, and since we observe the law being used to justify violence on certain bodies, we reckon that it makes more sense to ask who the human is while lamenting how the notion of human rights has failed queer Africans. Wynter's notion of 'being human as praxis' guides our reflections throughout the chapter. For Wynter,

> once [we] redefine being human in hybrid mythoi and bios terms, and therefore in terms that draw attention to the relativity and original multiplicity of our genres of being human, all of a sudden what [we] begin to recognise is the central role that our discursive formations, aesthetic fields, and systems of knowledge must play in the performative enactment of all such genres of being hybridly [as storytellers, self-instituting and biological] human.[5]

In advocating multiple genres and possibilities of being human, we also draw inspiration from others such as the African queer feminist intellectual Nyeck, who promotes African interiority as a vast plane of accommodative imagination, a source that we can tap into to imagine alter(native) genres of human. Nyeck pushes against that which limits humanity to only procreating subjects and critiques the stifling of imaginations that African worlds make possible to create a liveable world for multiplicities.[6] We ask: When we are working with an exclusionary notion of the human, how can the law protect queer Africans even if a country has a liberal legal framework that claims the protection of all? What is the point of foundational documents, such as the Universal Declaration of Human Rights (Universal Declaration) and the African Charter on Human and Peoples' Rights (African Charter), that claim to protect the rights of all if the community in which one lives does not accept the person as a human? These questions become even more pressing in the context of the broader question raised in the current volume about the intractable problems of the law and, more specifically, human rights.

Africa: Contextualising recent developments' in N Nicol *Envisioning global LGBT human rights:(Neo)-colonialism, neoliberalism, resistance and hope* (2018) 63, 96; T Meer & T Lunau 'Lesbian, gay, bisexual, transgender and intersex human rights in Southern Africa: A contemporary literature review 2012-2016' (2017) Johannesburg: HIVOS.

5 K McKittrick & S Wynter *On being human as praxis* (2015) 31.

6 SN Nyeck *African(a) queer presence: Ethics and politics of negotiation* (2021) 124.

The chapter is divided into three parts. In the first, we critique two ideas of the human as we draw from the literature. We describe incorporation into humanity either through ontological progression or a developmental model, which are conditions and requirements under which one gets included. We show that queer Africans are excluded from humanity because they are perceived as not fulfilling certain requirements. We highlight how the post-colonial state is implicated in perpetuating these problematic notions of the human by enforcing the law. In the second part we present a critique of the law, discussing the dilemmas of existing within and outside the law for queer Africans. We use examples to show the predicaments of the law when applied to or against those who are excluded by dominant social moralities from the plane of humanity. We explore how the law becomes insufficient if not considered together with structural, historical and socio-economic conditions that form or shape the legal subject. In the third part we place the African Charter in dialogue with *Ujamaa*, as articulated and propounded by Nyerere, to suggest a way forward. Here, the category of the peoples is conceptualised more expansively by taking advantage of its elasticity. The duties and responsibilities of citizens and the state are also reconsidered following lessons we glean from Nyerere about how the human is defined from the perspective of care and attention to the well-being of others, despite and because of differences. Finally, we share a few concluding thoughts.

2 The human as an intractable problem of the law

Deliberating on personhood, the Nigerian philosopher Ifeanyi Menkiti's ideas give us some clue as to what lies at the heart of this refusal to accept the fullness of the humanity of queer citizens. Menkiti introduces 'ontological progression' to refer to the gradual process by which an individual referred to as 'it' grows toward becoming a full person and gets incorporated as a member of the community.[7] The progression to personhood depends on, among others, naming, marriage and bearing children. This step-by-step incorporation assumes that 'to be human is to

7 IA Menkiti 'On the normative conception of a person' in K Wiredu (ed) *A companion to African philosophy* (2004) 324-331.

be useful in everything that sustains nature and all existing things'.[8] In one way or another, it ascribes utility to being human, one is good enough if one can do something for the community, for example, by playing a role to ensure the continuity of their kin. This view implies that one could simply be denied the fullness of their humanity because they have failed to fulfil the prescribed roles like those assigned based on one's sexuality and gender identity. The danger is that 'without incorporation into this or that community, individuals are considered to be mere danglers to whom the description "person" does not fully apply'.[9] For personhood is something which has to be achieved, and is not given simply because one is 'born of human seed', as Macharia aptly articulates it.[10] This means that the recognition of those who have not been incorporated is suspended because they have failed to achieve some of the requirements for incorporation. If we agree with Tamale that within a communal society, 'rights are claims not against the state but against society', the 'it' has no basis for making claims to any right if 'it' is not accepted as a person who belongs to the community.[11] It follows that one's 'social legibility' (a phrase we borrow from Macharia) is contested.[12] Too, their rights within the community are withheld. Thus, ontological progression becomes the gatekeeper to determine the fullness of one's humanity and the possibility to exist as a human with dignity and the associated rights, responsibilities and entitlements. However, exclusion from the human on that basis is not to be taken as an absolute, lest we take Menkiti's proposition for granted. Exclusion here is to be understood as a specific

8 C Thiam 'Decolonialitude: Negritude, modernity and the future of African studies' JIAS Lecture Series: The Changing African Idea of Africa and the Future of African Studies, 23 November 2023.

9 IA Menkiti 'Person and community in African traditional thought' in RA Wright (ed) *African philosophy: An introduction* (1984) 171-182.

10 https://gukira.wordpress.com/2021/06/17/scars-not-wounds/ (accessed 17 November 2023).

11 S Tamale *Decolonisation and Afro-feminism* (2020) 204. The problem with Tamale's submission is that she tends to posit the pre-colonial communal laws as 'generally restorative, participatory and communal in finding solutions and reconciling people' (136). While this certainly is the case in many circumstances if one goes by the logic of ontological progression, the conditions of incorporation that leave out those who do not fulfil certain requirements are left out of this communal protection. This might cast doubt on the claims about pre-colonial communal laws.

12 https://gukira.wordpress.com/2021/06/17/scars-not-wounds/ (accessed 17 November 2023).

condition attached to purpose-driven notion of being a human. If we expand 'it' in relational terms with other nonhuman aspects, then the exclusion of the 'it' is not a total one. A simple example could be looking at the relationship of Africans to the fauna and flora that nourish humanity and enable the 'it' to transcend and cancel out the exclusion ontological progression presupposes.

Thus, while ontological progression is the basis for 'social legibility' and an important consideration for inclusion in many African communities before colonialism, the colonial encounter has introduced yet another equally problematic notion of the human to the African plane. This notion in some ways is like the one discussed above in the sense that incorporation through progression also applies here. However, incorporation operates on a different logic that centres around the Western man that Wynter introduces as being overrepresented. According to Jackson, this is a developmental model of 'universal humanity' towards which those labelled as 'sub-humans' have to evolve under the tutelage of the West and its post-colonial representatives in Africa and elsewhere in the so-called Global South.[13] Here, the European heterosexual man emerges as the model of the universal human. Humanness is teleological, and those relegated to the zone of non-being are doomed to aspire towards it.[14] Even though we find race taking centre stage as a determinant parameter for this model, the intersection of race with gender and sexuality is indispensable to the process of designating a legible humanity. This implies that 'taking on the semblance of full humanity requires apposite gender and sexuality provisos' is something those raced as non-white lack.[15] Accordingly, the debate about humanity here is 'rooted in "the body" in an insatiable appetite that made it impossible for the [queer] African to rise above "the body"'.[16] A person's humanity is shaped by their ability – or inability – to exercise control over their own body. Even if the humanity of queer Africans might be recognised in some ways in post-independence Africa (for example, one might argue that they are not racially discriminated against by fellow black Africans), there is still a condition that is attached

13 ZI Jackson *Becoming human: Matter and meaning in an antiblack world* (2020).
14 As above.
15 AG Weheliye *Habeas viscus: Racialising assemblages, biopolitics, and black feminist theories of the human* (2014) 42.
16 Jackson (n 13) 9.

to their acceptance within their community that instrumentalises the body and its functions to deny them incorporation.

From these brief descriptions of the politics of the human, we observe that both the pre-colonial/indigenous and the one that has been imposed via colonial modernity have a narrow notion of the human that privileges heterosexual norms of (re)production. In both cases, the socio-biological function of the body continues to be a crucial consideration in determining incorporation, and, we find the two complementing each other, even thogh a 'crucial distinction … exists between the African view of man and the view of man found in Western thought [where] in the African view it is the community which defines the person as a person, not some isolated static quality of rationality, will, or memory'.[17]

Based on the parameters set by these complementary notions of incorporation, the humanity of queer Africans becomes a 'subject of controversy, debate, and dissension' instead of being a natural entitlement available to all despite differences, if we follow Wynter's proposal of multiple genres.[18] In being relegated to 'not yet humanness', the 'queer other' represents a distinction or a radical difference between the hegemonic 'us' and the subordinated 'them'.

The complementarity between the pre-colonial/colonial notions of the human is further compounded by the determination of African states to continue working with the colonial-era laws that legislated gender and sexuality within the confines of the Western heteronormative moral compass. This confirms McKittrick's assessment that anti-colonial struggles have failed because 'politically independent nation-states came to be epistemologically co-opted' by the civilisational discourses of the West.[19] The law, as known and practised in Africa, pays homage to its colonial roots instead of uprooting them. Decades after flag independence, post-colonial states still deploy inherited colonial-era laws to justify, among others, the exclusion of queer Africans from humanity, while ironically calling homosexuality a Western colonial infiltration against African traditions. Even though the Universal Declaration, the founding document of today's international human

17 https://gukira.wordpress.com/2021/06/17/scars-not-wounds/ (accessed 17 November 2023).
18 Jackson (n 13) 16.
19 McKittrick & Wynter (n 5) 11.

rights framework, declares the unconditional humanity of all and that it demands the respect of fundamental rights for all, selective observation of these laws and conventions seems to be justified and even inevitable in the name of guarding so-called African values. The state often not only tolerates but also enforces and further entrenches discriminatory laws, as evidenced by instances such as the Ugandan Anti-Homosexuality Act of 2023, which goes beyond criminalising specific acts to target the existence of queer individuals themselves. As a result of states' refusal to decolonise the law, queer Africans are subjected to what Nyeck calls 'double victimisation' that emanates from colonial violence and is perpetuated by post-colonial states.[20] By (mis)using the law, double victimisation manifests itself in multiple ways, such as life sentences or imprisonment, ostracisation, exile and death, facilitated by a law that claims objectivity in theory but, in practice, serves the interests of the powerful who dictate what is deemed 'objective'. In sum, sexual and gender profiling is deployed to exclude a significant part of Africans from the plane of Africanness, understood as full humanity. It thus is safe to argue that flag independence has been nothing but an incomplete project for as long as the law remains loyal to its colonial roots.

When it comes to the (mis)application of the law, the rights-based ambivalence in liberal legal frameworks is an issue that needs to be taken up in thinking about the intractable problems of the law. Even if there is the universal notion that everyone is equal before the law, and even if someone exists in a country where homosexuality is decriminalised, if the law is not considered together with other systemic and structural issues, it becomes inefficient. It is here that we find Tamale's insight useful when she suggests that there is a disconnect between law as lived and as written in the books.[21] If we pay attention to Tamale's own juxtaposition of the state-centric view of the law (where she says the state is the sole mother of the law) and individual actors who in their own right make and enforce laws (law in practice), we observe the discrepancies and contradictions between what claims to be universally available to all and what gets to be deployed and on what condition. These contradictions emerge from, among others, the historical and material conditions under which communities make sense of and regulate their existence, as well

20 Nyeck (n 6) 22.
21 Tamale (n 11).

as the role different understandings and practices of law play. We can cite a few countries in Africa to demonstrate the discrepancy between written laws and how social life is regulated. Let us dwell on how the law becomes complicit in producing queer Africans as criminals by looking at comparative examples from Ethiopia and South Africa.

3 Existing in and outside of the law

In a country such as Ethiopia, where the 1957 Penal Code and its 2004 revised version criminalise queer citizens, some can easily circumvent this law while the large majority becomes a target of harsher measures. The normative understanding is that the penal law should apply to those who trespass, regardless of who the person is. The practice demonstrates contradictions. Here is where considering the socio-economic and cultural conditions becomes relevant. For example, while rich, powerful, influential and connected people remain outside of the view of the punishing hands of the law, economically marginalised people are ostracised by the police. Law enforcement bodies simply invoke laws that criminalise queer people, threatening them with imprisonment, outing and/or torture. This threat stops if the police receive – sometimes once, other times people are blackmailed to do it more regularly – bribes, which could be a sexual favour or money. On the one hand, the law enforcement bodies benefit from invoking the law to violate the human rights of the marginalised; they also use the law to refuse to protect queer people from things such as mob justice. On the other hand, these same law enforcement bodies are quick to ensure the comfort of those with capital. One must then ask how these contradictions in the implementation of an otherwise objective law come about. How is the same country hospitable to capital-pumped (broadly conceived) citizens even if they indulge in what the country labels as criminal, and at the same time becomes anxious about homosexuality when it comes to the lives of those on the margins of power and privilege? The implementation of law must be analysed in relation to these structural and systemic issues because the very people who make as well as enforce the laws are those who trespass and thereby exercise double standards. Only with a comprehensive analysis and its daily implementation can the law address and tackle its current insufficiencies.

A similar observation can be made in contexts where there are progressive laws, and what happens at a moment of encounter with law

enforcement bodies or ordinary members of the society who wish to dish out mob justice against queer citizens. Even if the victims plead in the language of the law, their chances of protection are limited because they are faced with homophobic individuals who disregard the law in the name of 'doing the right thing for their religion or community'. Consider South Africa, which has one of the most progressive legal frameworks that promises to protect queer people in all aspects of life, including against discrimination in employment, access to health care or housing. Yet, it is also a country where egregious crimes are committed against queer South Africans; killings and corrective rapes can be cited as dominant examples. Hence, the possibility that the law can be circumvented shows that the question is much more than the law *per se* and that it cannot be considered in isolation from the material conditions of those involved, in addition to the deep-seated conception of the human and who belongs. If the law is disentangled from other considerations and seen only at a moment of enforcement, such as the first encounter with the police, then we fail to arrive at a more complex understanding of the law in attending to the human rights of those on the margins. Thus, we need to understand the in/effectiveness of the law on minoritised groups who exist within a community and whose legal subjectivity is mediated by the interaction of the laws that Tamale juxtaposes as of the book and of the community.

Based on these examples, it can be deduced that, despite claims of universality and objective application, national legal frameworks recognise both humans and crime selectively. If one is not human enough by hegemonic social standards, the law does not care to protect the person. If violence is perpetrated against those considered as 'not-quite-humans', it is rarely considered a crime. A gay man can be beaten up on the streets of Addis Ababa. While this is a crime under normal circumstances, because his humanity is denied, his violators are not necessarily called criminals and their acts are not considered crimes punishable by law.[22] Violent crime is presented as a reasonable and necessary reaction towards the other. The law is thus trapped by and attends to conditionalities to accept crime based on who it is perpetrated in a way that exposes the gap between the statutory legal frameworks that claim equality and non-discrimination and the practice that selectively deploys the law to

22 TA Wilson 'And what of the "black" in black letter law? A BlaQueer reflection' (2021) 30 *Law and Sexuality* 147-151.

enforce violence. This is what the African-American intellectual Wilson describes as being inside and outside of the law.[23] To be in and outside of the law means to be subjected to a violent crime that is not recognised as such because it is committed against the sexually profiled other. Ironically, they are inside the law when it comes to criminalising them for offending the normative public order by living their sexual desires and gender identities differently. In sum, queer Africans are made to exist in and outside of the law that always justifies and/or ignores crimes committed against them. This leaves us with the question of how we then imagine, beyond the law, a world free of queer Africans' 'double victimisation by [heteronormative] colonial hegemonies and post-colonial' legacies.[24] If society withholds incorporation based on certain conditionalities and the state cooperates to enforce unfair societal norms and values, how can the law be reimagined in a manner that it delivers on its promises of being a shield for all? It seems that the human must be reconsidered for the law to genuinely fight against the criminalisation, marginalisation and ostracisation of queer Africans. In the final part of the chapter, we draw on *Ujamaa* to rethink the African Charter, specifically zooming in on the category of people as stipulated in the document. Although *Ujamaa* does not explicitly address sexuality and gender, some ideas of the human and who belongs in it resonate with a broader range of struggles, including the one waged by queer Africans.[25]

4 Revisiting the African Charter on Human and Peoples' Rights through the lens of *Ujamaa*

The African Charter serves as the primary legal document for the African human rights system, from which most normative, institutional and procedural frameworks for the continent's human rights system develop.[26] This international legal document is designed to reflect,

23 Wilson (n 22) 151.
24 Nyeck (n 6) 22.
25 This experiment is inspired by the work Nyeck has done. Nyeck borrows Negritude and other ideas from Senghor to invite us to imagine Africana's interiority as not only accommodative but enabling of different forms of existence.
26 A Jjuuko 'The protection and promotion of LGBTI rights in the African regional human rights system: Opportunities and challenges' in S Namwase & A Jjuuko (eds) *Protecting the human rights of sexual minorities in contemporary Africa* (2017) 266.

contextualise and incorporate the core values of African communities.[27] To this effect, the Preamble to the African Charter underscores the importance of safeguarding African perspectives and specificities of its cultural, social, spiritual and historical assets as well as epistemologies and world views. It is a document that strictly advocates due regard to 'the virtues of [the] historical tradition and the values of African civilisation which should inspire and characterise their reflection on the concept of human and peoples' rights'.[28]

One of the main categories with which the African Charter works is 'peoples'. This category was incorporated into the African Charter in the context of and to account for the struggle for full liberation and decolonisation. Adopted in 1981, the African Charter was inaugurated in a period when self-determination was a crucial and major concern for Africa. Its incorporation of 'people' is closely connected to the objectives of Negritude, which is cultivating the dignity of black people through reclaiming African cultural traditions and civilisations as an anti-colonial project as propounded by Leopold Sedar Senghor and his contemporaries.[29] Inspired by Negritude, the African Charter refused Eurocentrism, which rejects the humanity of the colonised, and in its conception of 'people' it imagined a new humanism that asserted the dignity of Africans. For example, article 19 of the African Charter provides: 'All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.' It can be described as the embodiment of the African conception and philosophical understanding of an individual in society. This acknowledgment and integration of ideals of Negritude in the legal framework through the concept of 'peoples'[30] reflects the African peoples' resistance against foreign domination. It also counters the fragmentation of ethnicities on the continent, which became a problem

27 MA Plagis & L Riemer 'From context to content of human rights: The drafting history of the African Charter on Human and Peoples' Rights and the enigma of article 7' (2020) 23 *Journal of the History of International Law/Revue d'histoire du droit international* 556, 575.

28 Preamble to the African Charter on Human and Peoples' Rights.

29 PH Coetzee & APJ Roux *The African philosophy reader* (2001) 438.

30 F Viljoen *International human rights law in Africa* (2012) 219.

due to arbitrary border demarcation during colonial times.[31] Therefore, in the past, the interpretation and application of the term 'peoples' have been closely connected to questions of sovereignty, self-determination and territory, which is also reflected in large parts of the legal text. In this way, the African Charter attempted to deal with the colonial formation of arbitrary boundaries that led to the fragmentation and resultant wars and conflicts from which the continent suffered.

However, over the years, the priorities of African people have changed, moving away from the immediate post-colonial needs that informed the interpretation and application of the African Charter. As befits the character of international human rights documents, the African Charter is a living document that equally adapts to new priorities, needs and developments of society that have not been considered or anticipated at the time of its drafting. That seems to be the reason why Ouguergouz described peoples as a 'chameleon-like term' which illustrates its versatile application according to need.[32] Expanding on Ouguergouz's take, Viljoen elaborates that the term 'peoples' (or 'a people') may also denote sub-state groups, or distinct minority groups, such as linguistic, ethnic, religious or other groups sharing common characteristics, consisting of individuals who are usually – but not necessarily – inhabitants of the same state.[33]

Furthermore, the African Commission on Human and Peoples' Rights (African Commission) and the African Court on Human and Peoples' Rights (African Court) have construed and elaborated upon the concept of 'peoples' through several cases, effectively formulating a broader understanding of the term. According to this understanding, it is imperative that people are an identifiable group that shares common characteristics. Through the case of *Sudan Human Rights Organisation*, a set of criteria has been established, encompassing elements such as 'language, religion, culture, the territory they occupy in a state, common history, ethno-anthropological factors, race and ethnicity'.[34] This shows that the concept of 'people' has been expanded to include different

31 Viljoen (n 30) 221.
32 F Ouguergouz *The African Charter on Human and Peoples' Rights: A comprehensive agenda for human dignity and sustainable democracy in Africa* (2003) 211.
33 Viljoen (n 30) 222.
34 *Sudan Human Rights Organisation & Another v Sudan* (2009) AHRLR 153 (ACHPR 2009) para 220.

minoritised groups within a state, such as indigenous communities in land and environmental disputes.[35] The jurisprudence of the African Commission and African Court has thus evolved towards a more flexible understanding, expanding the scope of the term 'people'.

Nevertheless, applying peoples to different groups continues to require a demarcation feature (for example, physical boundaries). This demands a specific link to the notions of autonomy and belonging and imposes a necessary compartmentalisation. This, in turn, makes the concept exclusive to some people and results in an inadequate and, therefore, problematic praxis. These deficiencies are presently evident in the workings of the Working Group on Indigenous Populations/Communities and Minorities in Africa of the African Commission, which has yet to critically examine its understanding and scope of the communities for which they are working. Part of the inadequacy of the current interpretation of people in the African Charter emanates from the fact that the notion of people in the African Charter is trapped by the problematic conception of the human that we discussed above. The African Charter seems to suffer from the exclusiveness that victimises those who were not incorporated either through ontological progression or the so-called developmental model. The question then arises as to how we can rethink the currently insufficient understanding of the concept of peoples to attend to humanity in its fullness.

The unique historical context of the concept of peoples in the African Charter compels us to reimagine and rethink the current understanding of the concept beyond compartmentalisation. We exploit the elasticity of the concept and suggest a rethinking of people as articulated in the African Charter alongside/with the African philosophy *Ujamaa* developed by Julius Nyerere.[36] The process of (re)thinking through this African philosophy offers a space for envisioning a holistic humanity that embraces those who have been excluded from the African Charter's consideration of what constitutes people. Therefore, although certain

35 Viljoen (n 30) 228 *et seq*; *Centre for Minority Rights Development & Others v Kenya* (2009) AHRLR 75 (ACHPR 2009); Application 6/2012 *African Commission on Human and Peoples' Rights v Republic of Kenya* ACHPR 26 May 2017), https://www.african-court.org/cpmt/storage/app/uploads/public/5f5/5fe/9a9/5f55fe9a966769743021 32.pdf (accessed 31 October 2025).

36 It is important to acknowledge that, in the subsequent discussion, the philosophy is not the only African philosophy available for reference; instead, it serves as no more and no less than an example supporting our argument.

human rights, such as those related to sexual orientation, gender identity, gender expression and sex characteristics (SOGIESC) were not explicitly addressed in the African Charter, we argue that the document can adopt more inclusive definitions of the people to accommodate those that have not been considered in the initial articulation. If we creatively explore what we can borrow from *Ujamaa* to rethink the people as stipulated in the document, we believe a more complex and inclusive understanding can be arrived at to assess the constraints surrounding the legislation of the rights of queer citizens.

Ujamaa, an African socialist philosophy, was coined by and under the leadership of Julius Nyerere in Tanzania. Nyerere defines *Ujamaa* in various ways, such as an attitude of the mind, familyhood, care for the well-being of others, shared responsibilities and duties, and community. It is the basis of African socialism, which aims to reduce the dominance of capitalism by 'organising society whose possibility is sought outside of class war'.[37] Nyerere draws upon the egalitarian values and structures inherent in 'traditional African societies'. For Nyerere, one crucial element of this familyhood and the societal organisation is to 'care for each other's welfare' as a moral and ethical responsibility we all must share.[38] Integral to Nyerere's advocacy within the philosophy of *Ujamaa* is the belief in the humanity of all that underscores the notion that everyone deserves, and we are obligated to realise, the well-being of others. He reminds us of the conception of life as a practice of care that members of a community owe each other when writing 'we were individuals within a community. We took care of the community, and the community took care of us. We neither needed nor wished to exploit our fellow men.'[39] With this, Nyerere teaches us that welfare and care are neither exclusive nor limited to a distinguished group of people; everyone, regardless of their age or gender, deserves well-being and care just as much as they are expected to fulfil their responsibilities toward others. This realisation is inherently tied to and demands humanity in its fullness that ties all under the rubric of duty and care.

37 S Debele & S Asfaw '*Ujamaa* socialism: Towards cohering tradition and modernity' presentation at African Law Week 17 November 2021.

38 J Nyerere '*Ujamaa*: The basis of African socialism' (1987) 1 *Journal of Pan African Studies* 4.

39 Nyerere (n 38) 7.

Nyerere has also emphasised the correlation between an all-encompassing community and individuals who are obliged to contribute their skills and labour. He states that 'a society which fails to give its individuals the means to work, or, having given them the means to work, prevents them from getting a fair share of the products of their own sweat and toil, needs putting right'.[40] In other words, a community has to allow its members to fulfil their obligations and, through this, become a part of their community. At the same time, he stresses that contributions to the community vary based on one's capacity, ensuring inclusion for those unable to actively participate, such as older persons. One can be a dignified member of their community by virtue of their humanity that deserves care and well-being, but also through their social roles that go beyond reproduction. If one is old or too young, there is still a contribution one can make to their community. So, by this logic, reproductive capacity or the choice not to procreate does not exclude a person from membership in the community as long as they do other things. Thus, *Ujamaa* offers us an extended (rather extendable) view of human value that can help us think of incorporation via social roles that are not limited to marriage, procreation and sexuality. This is so because the ethos of contributing, as outlined by Nyerere, transcends a narrow utilitarian perspective on humanity.

To return to the African Charter, certain indigenous concepts of African societies have been incorporated into it through the articulation of duties. The African Charter not only assigns duties to state parties and their institutions to safeguard the protection of the human rights of individuals, as is common for international human rights documents. It has also uniquely manifested duties to individuals in the Preamble and chapter 2. For example, according to article 27(1) of the African Charter, 'every individual shall have duties towards his family and society'. Today, it is widely acknowledged that the rights and duties of individuals for the family and society in the African Charter are not dependent on or connected to one another.[41] This means that if the individual disregards any of the duties listed in chapter 2 of the African Charter,

40 Nyerere (n 38) 6.

41 Introduction into the discussion: M wa Mutua 'The Banjul Charter and the African cultural fingerprint: An evaluation of the language of duties' in M Ssenyonjo (ed) *Human rights* (2017) 373 *et seq*.

it does not lead to a restriction of the individual's rights. This normative interpretation of the duties of individuals anchored in the African Charter resonates with Nyerere's understanding of an individual's role in the community. While, according to the African Charter, the individual is required to contribute to the community in one or the other way (duties of individuals), one's role in the same community is not limited to performing exclusive roles such as like marriage or child bearing. Fulfilling one's duties and responsibilities to the family and the community at large can take different forms and shapes, as we see in Nyerere's stipulations of the significance of the elderly for the well-being of the community. Humanity conceptualised as care, duty, responsibility and welfare is not necessarily measured by their capacity to contribute in specific ways to the community. It is wider in its scope in a manner that accommodates age, gender, sexuality, geographical location (urban or rural) and so forth. Here is where the potential of *Ujamaa* to explore the idea of full humanism in general and primarily through the concept of peoples in the African Charter becomes useful. The philosophy invites us to further develop our understanding and interpretation of the term 'peoples' in the African Charter by showing us the authenticity and embedding of specific notions within African societies.

The duty and responsibility of individuals towards their community or state presuppose that the community also has the responsibility to ensure the individual's well-being, to cultivate an atmosphere in which individual members could do their part for the community, society, and the country in which they live. This is reflected in the African Charter, which imposes a duty on and an obligation to the respective state to recognise and protect the rights of minority groups. In line with the African Charter's provisions, states must provide minority groups (such as queer individuals) with suitable conditions and opportunities to fulfil the duties outlined in the African Charter and integrate these into society. African polities owe every citizen the right to be free to fulfil their obligations to their communities and, therewith, be an active part of the community. Any restriction of the same contradicts the purpose to 'contribute to the promotion of the moral well-being of society' and, thus, contradicts the necessary fulfilment of duty.[42] In this case, the

42 Art 29(7) African Charter.

respective state would be in violation of its obligations under the African Charter, which is rooted in and derived from the concept of *Ujamaa*.

This works only if the states accept that the fulfilment of one's responsibility must be possible for everyone, irrespective of one's sexual orientation and gender identity. However, the current lived reality of queer citizens forces them into a dilemma: either denying their inherent existence and dignity or depriving them of the opportunity to fulfil their responsibilities to their own community. In the end, reorienting the African Charter within *Ujamaa*'s concept of duties to the community illustrates the disconnect between law as lived and in the books. While underscoring the responsibility that both communities and states have toward their people, it also illuminates the gap between these responsibilities and their actual execution. As a result, law enforcement and society too often diminish the existence of liberal legal frameworks, paradoxically excluding queer individuals from protection designed initially to safeguard their rights.

This discrepancy between law as lived and in the books is inherently connected to the current fixation on state-centred colonial-era legal frameworks. It can only be overcome when the sense of responsibility of the community and the state meet. In the context of the African Charter, this becomes possible through a re-examination and redefinition of the term 'peoples' to foster a different understanding that supports and advances the humanity of all through the legal framework. It also requires a collective recognition by the state and society of their responsibilities in facilitating and promoting a broader conception of humanity. Only through this convergence of efforts does the realisation of humanity in its fullness become possible, and revisiting *Ujamaa*, as we showed above, is one of the ways to go.

5 Conclusion

In presenting a hopefully fresher vision of how the law can work better in the interests of queer Africans, the chapter reflected on the book's central question on intractable problems of human rights. We relied on existing scholarships and documents to revisit both categories of human and law, probing the gaps in existing normative frameworks and the dangers they pose to the lives and dignity of queer Africans. We shed light on the contradictions of claims to protect human rights through legal provisions in a situation where the notion of the human remains to

be exclusive to certain bodies. If repressive social norms limit the human and determine who is a complete human and who is not, it goes without saying that the law may not effectively protect those who do not meet the requirements to be human. This means that criminalising the inhuman treatment of the marginalised without dealing with social environment and discourse that justify the rejection of the very humanity of queer Africans demonstrates that the law alone is not enough unless combined with socio-cultural, economic and political transformations.

What we learn from black thinkers behind the struggles for black liberation and African independence, as well as the reclamation of the humanity of black people, theory and practice, political and epistemic struggles always went hand-in-hand. The intellectual labour and praxis of thinkers, such as Fanon and Nyerere, have proven that deconstructing a Eurocentric idea and model of the human has been an integral part of the struggle for black liberation. Their intellectual and political activism has been the mover behind anti-colonial and post-colonial struggles for freedom. If a lesson is to be transported to the chapter's preoccupation, the human rights of gender and sexual non-normative groups can benefit only if there is a cultural, political, economic and social transformation that goes hand-in-hand with an epistemological move that critically appraises various categories imposed by colonialism. In presenting the human and the law itself as intractable problems, we have shown that as long as the notion of the human as we know it remains dominant, the law in and of itself is insufficient to address any of the challenges queer Africans face, not only in Africa but globally. The law becomes a culprit in reproducing and justifying the violence that queer Africans are quite often subjected to. Thus, unless it is accompanied by a radical shift as stated above, the law will remain to be ineffective even if it claims otherwise.