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EDITORIAL

The *African Human Rights Law Reports* include cases decided by the United Nations treaty bodies, the African Commission on Human and Peoples' Rights and also domestic judgments from different African countries. The fifth volume of the *Reports* covers cases decided in 2004, with the exception of one African Commission decision from 2003 and two domestic cases decided in 2002.

Special mention must be made of the decisions taken by the African Commission at its 36th ordinary session in November 2004. These decisions were not included in the 18th Activity Report, adopted by the AU Assembly in July 2005. However, they were included in an Activity Report also referred to as the 18th Activity Report, that was presented to the AU Executive Council and Assembly in January 2005. The decisions of the Executive Council and Assembly of January 2005 only refer to the adoption of the 17th Annual Activity Report, with no reference being made to the 18th Activity Report. The cases from the 36th session reprinted in these *Reports* are from the 'unofficial' version of the 18th Activity Report, with the exception of the case from Guinea which was later reprinted in the 20th Activity Report. The 20th Activity Report, adopted in 2006, also included the first inter-state complaint decided by the Commission (*DRC v Burundi, Rwanda and Uganda*), which until then had remained unpublished despite being adopted by the Commission in 2003.

Editorial changes have been kept to a minimum, and are confined to changes that are required to maintain consistency in style (with regard to abbreviations, capitalisation, punctuation and quotes) and to avoid obvious errors. Where possible, quotes and references were checked against the original. Corrections which may affect the meaning are indicated in square brackets.

These *Reports*, as well as other material of relevance to human rights law in Africa may be found on the website of the Centre for Human Rights, University of Pretoria, at www.chr.up.ac.za.

The French version of these *Reports, Recueil Africain des Décisions des Droits Humains,* is published by the Pretoria University Law Press (PULP) and may be accessed on the same site in electronic format, or may be obtained from the Centre for Human Rights in hard copy.

A useful companion to the *Reports,* called *Compendium of key human rights documents of the African Union*, is published by the United Nations-affiliated University for Peace in English, French, Arabic and Portuguese. Further information is also available on the site indicated above, or www.upeace.org.

We wish to thank Rebecca Amollo, Omowumi Asubiaro, Victor Dankwa, Yonas Gebreselassie, Joshua Koltun, Lee Stone, Boris Tchoumavi, Tebello Thabane and William Tumwine who helped us obtain cases published in

the *Reports*. Notable domestic decisions for inclusion in future issues of the *Reports* may be brought to the attention of the editors at:

Centre for Human Rights
Faculty of Law
University of Pretoria, Pretoria 0002
South Africa
Fax: + 27 12 362-5125
E-mail: ahrlr@up.ac.za

USER GUIDE

The cases and findings in the *Reports* are grouped together according to their jurisdiction, namely, the United Nations, the African Commission on Human and Peoples' Rights and domestic courts.

The *Subject index* is divided into two parts — general principles or procedural issues and substantive rights. Decisions dealing with a specific article in an international instrument are to be found in the list of *International instruments referred to*. A table that lists *International case law considered* is also included. In these tables case references are followed by the numbers of the paragraphs in which the instruments or cases are cited.

A headnote, to be found at the top of each case, provides the full original title of the case as well as keywords noting the primary issues in the case. These are linked to the keywords in the *Subject index*. Keywords are followed by the numbers of the paragraphs in which a specific issue is dealt with. In instances where the original case contains no paragraph numbers these have been added in square brackets.

The date at the end of a case reference refers to the date the case was decided. The abbreviation before the date indicates the jurisdiction.

ABBREVIATIONS

ACHPR	African Commission on Human and Peoplesaaa Rights
AHRLR	African Human Rights Law Reports
BeCC	Constitutional Court, Benin
BwIC	Industrial Court, Botswana
CCPR	International Covenant on Civil and Political Rights
GhSC	Supreme Court, Ghana
HRC	United Nations Human Rights Committee
KeHC	High Court, Kenya
LeCA	Court of Appeal, Lesotho
NgHC	High Court, Nigeria
SACC	Constitutional Court, South Africa
UgCC	Constitutional Court, Uganda
UgSC	Supreme Court, Uganda
ZwSC	Supreme Court, Zimbabwe

CASE LAW ON THE INTERNET

Case law concerning human rights in Africa may be found on the following sites:

United Nations High Commissioner for Human Rights
www.ohchr.org

African Commission on Human and Peoples' Rights
www.achpr.org

Interights (summaries of case law from Commonwealth countries and international monitoring bodies)
www.interights.org

Centre for Human Rights, University of Pretoria
www.chr.up.ac.za

Association des Cours Constitutionelles (Francophone constitutional court judgments)
www.accpuf.org

Malawi
www.judiciary.mw

Nigeria
www.nigeria-law.org
www.courtofappeal.gov.ng

South Africa
www.constitutionalcourt.org.za

Zambia
www.zamlii.ac.zm

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UNITED NATIONS HUMAN RIGHTS TREATY BODIES

DEMOCRATIC REPUBLIC OF THE CONGO

Mulezi v Democratic Republic of the Congo

(2004) AHRLR 3 (HRC 2004)

Communication 962/2001, *Marcel Mulezi v Democratic Republic of the Congo*
Decided at the 81st session, 8 July 2004, CCPR/C/81/D/962/2001

Torture (2.4, 5.3)
Admissibility (local remedies inaccessible and ineffective, 3.2, 4.3; incompatibility, 4.4)
Evidence (failure of state party to respond to allegations, 5.1)
Personal liberty and security (arbitrary arrest and detention, 5.2)
Life (arbitrary deprivation, 5.4)
Family (killing of wife, 5.4)

1. The author of the communication is Marcel Mulezi, a national of the Democratic Republic of the Congo resident in Geneva. The author claims that he and his wife are victims of violations by the Democratic Republic of the Congo of articles 6(1); 7; 9(1), (2), (4) and (5); 10(1); 14(3); and 15(1) of the International Covenant on Civil and Political Rights. He is not represented by counsel.

The facts as submitted by the author

2.1. In July 1997, under pressure from one Commander Mortos (commander of the Gemena infantry battalion in the north-west area of the Democratic Republic of the Congo), the author, a businessman specialising in coffee and transport, lent the army one of his trucks. The vehicle was not returned and the author decided never again to agree to the military authorities' requests.

2.2. At around 5 am on 27 December 1997, members of a military intelligence service of the Congolese Armed Forces — known as *Détection Militaire des Activités Antipatrie* or DEMIAP, associated with the regime of Congolese President Laurent Désiré Kabila — called on the author at his home to tell him that his services were required by Commander Mortos. The author was taken to the Gemena military camp, where he was immediately placed in detention. At 9 am he was subjected to an interroga-

tion directed by Commander Mortos concerning his alleged collaboration with the former President of the Congo, General Joseph Désiré Mobutu, and his associates.

2.3. At around 9.30 am, the author was confronted with one of his employees, known as Mario, who, the author claims, had been tortured (a broken jaw and other injuries prevented him from speaking or even standing upright) and forced, during his interrogation, to accuse Mr Mulezi of collusion with Mobutu's faction.

2.4. When he contested these accusations, the author was brutally beaten up by at least six soldiers. In addition to injuries to the nose and mouth, his fingers were broken. He was tortured again the following day, when he was tied up and beaten all over his body until he lost consciousness. In the course of some two weeks of detention in Gemena, the author was tortured four or five times every day: hung upside down; lacerated; the nail of his right forefinger pulled out with pincers; cigarette burns; both legs broken by blows to the knees and ankles with metal tubing; two fingers broken by blows with rifle butts. Despite his condition, and in particular his loss of mobility, he was not allowed to see a doctor. Like his fellow-detainees, the author was unable to leave his cell even for a shower or a walk. He states that he was in a cell measuring 3 by 3 metres, which he shared at first with eight and, eventually, 15 other detainees. Furthermore, since he was being held *incommunicado*, he was not getting enough food, unlike the other prisoners, who were brought food by their families.

2.5. After about two weeks, the author was transferred by air to the Mbandaka military camp, where he was held for 16 months. Again, he was unable to see a doctor, despite his physical condition, notably loss of mobility. He was never informed of any charge against him; he was never brought before a judge; and he was not allowed access to a lawyer. He states that he was held with 20 others in a cockroach-ridden cell measuring roughly 5 by 3 metres, with no sanitation, no windows and no mattresses. His food rations consisted of manioc leaves or stalks. Two showers a week were permitted and the soldiers occasionally put the author out in the yard as he could not move by himself. The author states that he eventually obtained some medicines when *Médecins Sans Frontières* (Doctors without Borders) visited the camp.

2.6. In late December 1998, the author's brother-in-law, Mr Mungala, managed to locate Mr Mulezi through an army acquaintance, and paid him a brief visit. It was then that the author learned that, the day after his arrest, soldiers had searched his house and beaten up his wife. Commander Mortos had refused Mrs Mulezi's request to travel to the city of Bangui in the Central African Republic in order to receive medical attention, and she died three days later.

2.7. On 11 February 1999, when seeing what an appalling condition the author was in, a soldier took him to hospital on his own initiative, but the

military police intervened, producing a summons from the Military Tribunal. In actual fact the author was immediately put back in detention in the military camp without being brought before a judge; the soldier who had helped him was given a month's imprisonment.

2.8. On 25 May 1999, the author bribed some soldiers to take him to the harbour next to the military camp, and a boat owner agreed to help him to leave Mbandaka. The author then managed to escape from Africa to Switzerland. According to a medical certificate from the Geneva University Hospital, the author was hospitalised as soon as he arrived in Switzerland in December 1999, for physical and psychological *sequelae* of the violence he had been subjected to in his country of origin. After intensive medical care, the author has recovered partial mobility, but he requires further treatment if he is to regain his independence to any satisfactory degree.

The complaint

3.1. The author claims that he and his wife are the victims of violations by the Democratic Republic of the Congo of articles 6(1); 7; 9(1), (2), (4) and (5); 10(1); 14(3); and 15(1) of the International Covenant on Civil and Political Rights.

3.2. On the question of the exhaustion of domestic remedies, the author claims that such remedies were inaccessible and ineffective, insofar as (a) he was unable to apply to a court while he was arbitrarily detained and (b) he is alive only because he managed to escape from the Mbandaka military camp and flee to Switzerland.

3.3. Despite the request and reminders sent by the Committee to the state party asking for a reply to the author's allegations (*notes verbales* of 8 January 2001, 17 October 2001 and 28 October 2003), the Committee has received no response.

Committee's decision on admissibility

4.1. Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its Rules of Procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

4.2. In accordance with article 5(2)(a) of the Optional Protocol, the Committee has ascertained that the same question is not being examined under another procedure of international investigation or settlement.

4.3. In the light of the author's arguments concerning the exhaustion of domestic remedies and the complete lack of cooperation from the state party, the Committee considers that the provisions of article 5(2)(b) of the Optional Protocol are not an impediment to examination of the communication.

4.4. The Committee considers that the author's complaint that the facts as

submitted constitute a violation of articles 14(3) and 15(1) of the Covenant has not been sufficiently substantiated for the purposes of admissibility. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

4.5. The Committee considers that, in the absence of any information from the state party, the complaints submitted by the author may raise issues under articles 6(1); 7; 9(1), (2), (4) and (5); 10(1), and 23(1) and should therefore be examined as to the merits.

Examination of the merits

5.1. The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as required under article 5(1) of the Optional Protocol. It notes that the state party has not, despite the reminders sent to it, provided any replies on either the admissibility or the merits of the communication. The Committee notes that, under article 4(2) of the Optional Protocol, a state party is under an obligation to co-operate by submitting to it written explanations or statements clarifying the matter and indicating the measures, if any, that may have been taken to remedy the situation. As the state party has failed to cooperate in that regard, the Committee had no choice but to give the author's allegations their full weight insofar as they have been substantiated.

5.2. With regard to the complaint of a violation of article 9(1), (2) and (4), of the Covenant, the Committee notes the author's statement that no warrant was issued for his arrest and that he was taken to the Gemena military camp under false pretences. Mr Mulezi also maintains that he was arbitrarily detained without charge from 27 December 1997 onwards, first at Gemena, for two weeks, and then at the Mbandaka military camp, for 16 months. It is clear from the author's statements that he was unable to appeal to a court for a prompt determination of the lawfulness of his detention. The Committee considers that these statements, which the state party has not contested and which the author has sufficiently substantiated, warrant the finding that there has been a violation of article 9(1), (2) and (4), of the Covenant. On the same basis, the Committee concludes, however, that there has been no violation of article 9(5), as it does not appear that the author has in fact claimed compensation for unlawful arrest or detention.

5.3. As to the complaint of a violation of articles 7 and 10(1) of the Covenant, the Committee notes that the author has given a detailed account of the treatment he was subjected to during his detention, including acts of torture or ill-treatment and, subsequently, the deliberate denial of proper medical attention despite his loss of mobility. Indeed, he has provided a medical certificate attesting to the *sequelae* of such treatment. Under the circumstances, and in the absence of any counter-argument from the state party, the Committee finds that the author was a

victim of multiple violations of article 7 of the Covenant, prohibiting torture and cruel, inhuman and degrading treatment. The Committee considers that the conditions of detention described in detail by the author also constitute a violation of article 10(1) of the Covenant.

5.4. With regard to alleged violations of articles 6(1) and 23(1) of the Covenant, the Committee notes the author's statement that his wife was beaten by soldiers, that Commander Mortos refused her request to travel to Bangui to receive medical attention, and that she died three days later. The Committee considers that these statements, which the state party has not contested although it had the opportunity to do so, and which the author has sufficiently substantiated, warrant the finding that there have been violations of articles 6(1) and 23(1) of the Covenant as to the author and his wife.

6. The Human Rights Committee, acting under article 5(4) of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it reveal violations by the Democratic Republic of the Congo of articles 6(1); 7; 9(1), (2) and (4); 10(1); and 23(1) of the Covenant.

7. Under article 2(3)(a), of the Covenant, the state party has an obligation to ensure that the author has an effective remedy available. The Committee therefore urges the state party (a) to conduct a thorough investigation of the unlawful arrest, detention and mistreatment of the author and the killing of his wife; (b) to bring to justice those responsible for these violations; and (c) to grant Mr Mulezi appropriate compensation for the violations. The state party is also under an obligation to take effective measures to ensure that similar violations do not occur in future.

8. The Committee recalls that, by becoming a state party to the Optional Protocol, the Democratic Republic of the Congo recognised the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, under article 2 of the Covenant, the state party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the Covenant and to provide an effective and enforceable remedy in the event that a violation is established. Consequently, the Committee wishes to receive from the state party, within 90 days of the transmission of these findings, information about the measures taken to give effect to its views. The state party is also requested to make these findings public.

LIBYA

El Ghar v Libya

(2004) AHRLR 8 (HRC 2004)

Communication 1107/2002, *Loubna El Ghar v Socialist People's Libyan Arab Jamahiriya*
Decided at the 82nd session, 29 March 2004, CCPR/C/82/D/1107/2002

Admissibility (exhaustion of local remedies, 6.3)
Movement (passport, 7.2, 7.3, 8)

1.1. The author of the communication is Loubna El Ghar, a Libyan citizen born on 2 September 1981 in Casablanca and residing in Morocco. She claims to be a victim of violations by the Socialist People's Libyan Arab Jamahiriya. She does not refer to any particular provisions of the Covenant, but her allegations would seem to give rise to questions under article 12 thereof. She is not represented by counsel.

1.2. The Covenant and its Optional Protocol entered into force for the Socialist People's Libyan Arab Jamahiriya on 23 March 1976 and 16 August 1989 respectively.

The facts as submitted by the author

2.1. The author, of Libyan nationality, has lived all her life in Morocco with her divorced mother and holds a residence permit for that country. As a student of French law at the Hassan II University faculty of law in Casablanca, she wished to continue her studies in France and to specialise in international law. To that end, she has been applying to the Libyan consulate in Morocco for a passport since 1998.

2.2. The author claims that all her applications have been denied, without any lawful or legitimate grounds. She notes that although she is an adult, she attached to her application form an authorisation from her father, who is resident in the Libyan Arab Jamahiriya, that was certified by the Libyan Ministry of Foreign Affairs in order to obtain any official document required. She adds that in September 2002 the Libyan consul stated, without giving any details, that on the basis of the pertinent regulations he could not issue her a passport, but could only provide her with a temporary travel document allowing her to travel to the Libyan Arab Jamahiriya.

2.3. The author also contacted the French diplomatic mission in Morocco to ascertain whether it would be possible to obtain a *laissez-passer* for France, a request which the French authorities were unable to comply with.

2.4. Since she had no passport, the author was unable to enrol in the University of Montpellier I in France.

The complaint

3. The author claims that the refusal by the Libyan consulate in Casablanca to issue her with a passport prevents her from travelling and studying and constitutes a violation of the Covenant.

State party's observations

4.1. In its observations of 15 October 2003, the state party provides the following information. Having been informed of the author's communication, the Passport and Nationality Department contacted the Brotherhood Bureau in Rabat, which indicated that as at 1 September 1999 it had not received any official application for a passport from the author.

4.2. On 6 September 2002, the Passport and Nationality Department asked the consulate-general to inform it whether the author had submitted an application for a passport, given that it had no record of any information concerning Ms El Ghar.

4.3. On 13 October 2002, the Passport and Nationality Department sent a telegram to the consulate-general in Casablanca requesting that the author's application should be forwarded, in the event it had been received, together with all the documents required for the issuing of a passport.

4.4. The state party alleges that it is clear from the foregoing that the Libyan authorities concerned are giving the matter due attention and that the delay is caused by the fact that the author did not go to the Brotherhood Bureau in Morocco at the proper time. The state party points out that there is nothing in the legislation in force to prevent Libyan nationals from obtaining travel documents when they meet the necessary requirements and submit the documents requested.

4.5. Lastly, the state party explains that instructions were sent on 1 July 2003 to the Brotherhood Bureau in Rabat to issue a passport to Ms Loubna El Ghar. Moreover, the author was contacted at home by telephone and told that she could go to the Libyan consulate in Casablanca to collect her passport.

Comments of the author on the state party's observations

5.1. In her comments of 24 November 2003 concerning the official date of the submission of her passport application, the author points out that

she had initiated procedures as early as 1998, when her mother went to Libya to seek her father's permission to obtain a passport (see paragraph 2.2). She adds that the actual date of her official application for a passport was 25 February 1999.

5.2. With regard to the Passport and Nationality Department and the date of 6 September 2002 mentioned by the state party (see paragraph 4.2), the author recalls that on 18 September 2002, during one of her visits to the Libyan consulate-general to find out the status of her application, the Libyan officials had indicated that they were unable to give her a passport but would give her a *laissez-passer* for Libya. The *laissez-passer*, which was issued that very day and has been submitted by the author, clearly states that 'in view of the fact that she is a native of Morocco and has not obtained a passport, this travel document is issued to enable her to return to national territory'.

5.3. The author confirms that she received a telephone call on 1 August 2003 from the Libyan ambassador to the United Nations office at Geneva informing her that she could go to the Libyan consulate-general in Casablanca to collect her passport, a communiqué to that effect having been sent by the Passport Department. On the same day the author went to the consulate with all the documents likely to be needed for the collection of her passport. However, the Libyan officials denied having received the above-mentioned communiqué. Upon her return home, the author called the Libyan ambassador to the United Nations in Geneva to tell her what had happened, and two days later returned to the consulate. The author explains that the consul himself told her that there was no need for her to go there each time, and that she would be contacted as soon as the communiqué in question was received. Since then the author has been unable to obtain a passport and thus go abroad to continue her studies.

5.4. The author adds that it is impossible for her to request legal aid with a view to bringing court proceedings against the Libyan authorities from Morocco, and that she cannot lodge an appeal alleging an abuse of authority.

Consideration of admissibility

6.1. Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its Rules of Procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2. As it is obliged to do so pursuant to article 5(2)(a) of the Optional Protocol, the Committee ascertained that the same matter is not being examined under another procedure of international investigation or settlement.

6.3. Having taken note of the author's arguments concerning the exhaustion of domestic remedies, namely the obstacles standing in the way of

any request for legal aid and of an appeal against the decision of the Libyan authorities from Morocco, and given the absence of any relevant objection to the admissibility of the communication by the state party, the Committee considers that the provisions of article 5(2)(b) of the Optional Protocol do not preclude it from considering the communication.

6.4. The Committee considers that the author's claim may give rise to issues under article 12(2) of the Covenant and therefore proceeds to consider them on the merits, in accordance with article 5(2) of the Optional Protocol.

Consideration of the merits

7.1. The Human Rights Committee has considered this communication in the light of all the written information made available to it by the parties, in accordance with article 5(1) of the Optional Protocol.

7.2. The Committee notes that to date the author has been unable to obtain a passport from the Libyan consular authorities even though, according to the authorities' own statements, her official application dates back at least to 1 September 1999. Moreover, it is clear that initially, on 18 September 2002, the Libyan consul had indicated to the author that it was not possible to issue her a passport but that she could be given a *laissez-passer* for Libya, by virtue of a regulation that was explained neither orally nor on the *laissez-passer* itself. The passport application submitted to the Libyan consulate was thus rejected without any explanation of the grounds for the decision, the only comment being that since the author 'is a native of Morocco and has not obtained a passport, this travel document (*laissez-passer*) is issued to enable her to return to national territory'. The Committee considers that this *laissez-passer* cannot be considered a satisfactory substitute for a valid Libyan passport that would enable the author to travel abroad.

7.3. The Committee notes that subsequently, on 1 July 2003, the Passport Department sent a communiqué to the Libyan consular authorities in Morocco with a view to granting the author a passport; this information was certified by the state party, which produced a copy of the document. The state party alleges that the author was contacted personally by telephone at home and told to collect her passport from the Libyan consulate. However, it appears that thus far, despite the author's two visits to the Libyan consulate, no passport has been issued to her, through no fault of her own. The Committee recalls that a passport provides a national with the means 'to leave any country, including his own' as stipulated in article 12(2) of the Covenant, and that owing to the very nature of the right in question, in the case of a national residing abroad, article 12(2) of the Covenant imposes obligations both on the individual's state of residence and on the state of nationality, and that article 12(1) of the Covenant cannot be interpreted as limiting Libya's obligations under article 12(2) to nationals living in its territory. The right recognised by article 12(2) may,

by virtue of paragraph 3 of that article, be subject to restrictions 'which are provided by law [and] are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognised in the present Covenant'. Thus there are circumstances in which a state may, if the law so provides, refuse to issue a passport to one of its nationals. In the present case, however, the state party has not put forward any such argument in the information it has submitted to the Committee but has actually assured the Committee that it issued instructions to ensure that the author's passport application was successful, a statement that was not in fact followed up.

8. The Human Rights Committee, acting under article 5(4) of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 12(2) of the Covenant insofar as the author was denied a passport without any valid justification and subjected to an unreasonable delay, and as a result was prevented from travelling abroad to continue her studies.

9. In accordance with article 2(3) of the Covenant, the state party is under an obligation to ensure that the author has an effective remedy, including compensation. The Committee urges the state party to issue the author with a passport without further delay. The state party is also under an obligation to take effective measures to ensure that similar violations do not recur in future.

10. The Committee recalls that by becoming a state party to the Optional Protocol, the Socialist People's Libyan Arab Jamahiriya has recognised the competence of the Committee to determine whether there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the state party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the Covenant and to ensure an effective and enforceable remedy when a violation has been disclosed. The Committee therefore wishes to receive from the state party, within 90 days following the submission of these views, information about the measures taken to give effect to them. The state party is also requested to publish the Committee's views.

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

BENIN

Odjouoriby v Benin

(2004) AHRLR 15 (ACHPR 2004)

Communication 199/97, *Odjouoriby Cossi Paul v Benin*
Decided at the 35th ordinary session, June 2004, 17th Annual Activity Report
Rapporteurs: 22nd-29th sessions: Nguéma; 30th-35th sessions: Sawadogo Salimata

Fair trial (trial within reasonable time, 12, 21, 27, 28)

Summary of facts

1. The complainant is a national of Benin who alleges violation of his rights by the judiciary of his country.

2. It is alleged that the Appeal Court of Cotonou refused to restore his rights in a case pending before the said Court since 1995 which sets him up against Mr Akitobi Honoré whom he accuses of having despoiled him of his real estate property with the complicity of some judges.

3. The complainant considers that the attitude of the Appeal Court constitutes a denial of justice.

Complaint

4. The complainant alleges violation of articles 7 and 14 of the African Charter.

Procedure

5. The Secretariat of the African Commission acknowledged having received the communication on 8 April 1997.

6. The African Commission was seized of the communication at its 22nd ordinary session and deferred its decision on admissibility to its 23rd ordinary session scheduled for April 1998.

7. During its 23rd session held from 20 to 29 April 1998 in Banjul, The Gambia, the African Commission declared the communication admissible and deferred consideration of the merits of the case to its 24th ordinary session.

8. On 1 June 1998, a note was sent to the government of Benin informing them that the communication had been declared admissible by the African Commission, pursuant to article 56(5) and that the Commission would rule on the merits during its 24th ordinary session scheduled for October 1998. A letter with the same message was sent also to the complainant.

9. During the 28th ordinary session, the African Commission heard both parties. Through its representative, the respondent state asked the African Commission to review its decision on admissibility as the complainant had not exhausted local remedies.

10. The African Commission, noting that the complainant had not put his case across logically, advised some NGO's to assist him. To this end, the case was entrusted to Interights and to the Institute for Human Rights and Development in Africa on behalf of the complainant.

11. In any case, the African Commission took note of the undue delay of the complainant's case before the courts.

12. From the submissions, it became apparent that, in a civil case like this one, the conduct of proceedings is the responsibility of the parties in the case. The appeal filed against the judgment of the Court of First Instance is dated 19 September 1995 and the Commission was seized of the case on 8 April 1997, that is, 20 months after the filing of the appeal. It appears from the practice of the Appeal Court accepted by the Supreme Court that average period ranges between four and five years.

13. The African Commission upheld its decision on admissibility and deferred its decision on the merits to the 30th ordinary session held in Banjul, The Gambia, from 13 to 27 October 2001.

14. The communication was deferred on several occasions because the complainant was not very familiar with the procedures of the African Commission.

15. The African Commission considered this communication at its 35th ordinary session held in Banjul, The Gambia and decided to deliver its decision on the merits.

Law

Admissibility

16. Article 56(5) of the Charter provides, among other things, that communications shall be considered by the Commission if they 'are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged'.

17. Odjouoriby Cossi Paul (the complainant) claims that the case opposing him to Mr Akitobi Honoré has been pending before the Appeal Court of

Cotonou since 19 September 1995 and that up to now the Court has delivered no judgment.

18. And yet, it is obvious that the local proceedings will remain in impasse as long as the Appeal Court has not made any ruling on the appeal pending before it.

19. The African Commission has moreover established the evidence of silence of the State of Benin to all the notifications and other requests for clarification addressed to it through its Secretariat.

20. This situation has led the African Commission to rule on the admissibility of the communication submitted to it on the basis of the facts brought to its attention by the complainant.

21. In accordance with the provisions of article 7(1)(d) of the African Charter and its previous decisions, (*cf* in particular communication 39/90, *Pagnoulle (on behalf of Mazou) v Cameroon*[1]), the Commission considered that the waiting period before the Appeal Court of Cotonou had been unduly prolonged and on these grounds, it had declared the communication admissible.

22. Details brought later to the case file by Interights and the Institute for Human Rights and Development as well as by the government of Benin indicate that:

- Following an appeal lodged by the two parties, the case was the subject of a joinder by interlocutory decision dated 9 March 1996.
- After several adjournments due mainly to non-attendance by one or the other party at the hearings, the Court gave judgment by default on 5 August 1999, indicating that non-production of the disputed decision and conclusions by the parties caused damage to the smooth administration of justice.
- Mr Akitobi Honoré, the opponent of Mr Odjouoriby, lodged an appeal against this decision and Mr Yansunnu, counsel of Mr Odjouoriby, submitted further pleadings in defence before the chamber of the Supreme Court on 27 June 2001.

23. But the African Commission maintains that in any case, the State of Benin remains the guarantor of a good administration of justice on its territory and for those reasons, the African Commission upholds its decision on admissibility.

[1] [(2000) AHRLR 57 (ACHPR 1997)]. The victim had unsuccessfully initiated many proceedings, both non-contentious and contentious. The Commission felt then that local remedies had been exhausted.

Merits

24. The African Charter on Human and Peoples' Rights stipulates in article 7(1)(d) that '[e]very individual shall have the right to have his cause heard. This comprises . . . the right to be tried within a reasonable time'.

25. On 19 September 1995, the plaintiff lodged an appeal against judgment 75/95 4° CCM delivered on 7 August 1995 by the Civil Chamber of the Court of First Instance of Cotonou in its provisions on damages granted to him by the said Court.

26. On his part, Mr Honoré Akitobi (the opponent of Mr Odjouoriby) filed a cross-appeal in reply to the principal appeal and as pointed out earlier, the proceedings pending before the Appeal Court are unduly prolonged.

27. Accordingly, the African Commission observes that the case before the Appeal Court has been unduly prolonged.

28. The African Commission is of the view that this undue prolonging of the case at the level of the Appeal Court is contrary to the spirit and the letter of above-mentioned article 7(1)(d).

29. Concerning the allegations of the plaintiff of violation of his right to property, the Commission recalls that the right to property is recognised and guaranteed by the African Charter of which article 14 stipulates that this right may be encroached upon only 'in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws'.

30. The African Commission, however, is of the opinion that to the extent that there has been no definitive decision in this case, it cannot substitute itself to the national courts to appreciate violation of the enjoyment of the right to property of the plaintiff.

For these reasons, the African Commission:

- Finds the Republic of Benin in violation of article 7(1)(d) of the African Charter;
- Requests the Republic of Benin to take appropriate measures to ensure that the complainant's appeal is determined by the Court of Appeal as quickly as possible; and
- Urges the Republic of Benin to take the necessary steps to pay appropriate compensation for damages suffered by Mr Odjouoriby Cossi Paul due to the unduly prolonged proceedings in the processing of his case.

BURUNDI

Democratic Republic of the Congo v Burundi, Rwanda and Uganda

(2004) AHRLR 19 (ACHPR 2003)

Communication 227/99, *DR Congo v Burundi, Rwanda and Uganda*
Decided at the 33rd ordinary session May 2003, 20th Activity Report
Rapporteurs: 25th session: Ben Salem; 26th-28th sessions: Ben Salem, Nguema, Dankwa; 29th-33rd sessions: Ben Salem, Dankwa, Rezag Bara

Inter-state complaints (procedure, 55-61; exhaustion of local remedies, 62, 63; jurisdiction, 64, 65; conciliation, 57, 61)
International law (peaceful settlement of disputes, 66, 75; military occupation, 68, 73, 74, 76)
Peoples' right to self-determination (military occupation, 68, 77)
International humanitarian law (69-71, 78, 79; siege of hydroelectric dam, 82-84; rape, 86)
Interpretation (international standards, 69, 70, 78, 83, 86, 87)
Peoples' right to peace (military occupation, 73, 75, 76)
Equality, non-discrimination (discrimination on the grounds of ethnicity, origin or nationality, 79, 80)
Life (arbitrary deprivation, 79, 80, 88)
Family (right to return to home country, 81)
Movement (right to return to home country, 81)
Property (effects of occupation, 85, 88)
Peoples' right to development (cultural development, 87; plunder of natural resources, 95)
Health (effects of occupation, 88)
Education (effects of occupation, 88)
Peoples' right to natural resources (plunder, 90-95; evidence, 91-93)

Summary of facts

1. On 8 March 1999, the Secretariat of the African Commission on Human and Peoples' Rights received from Mr Léonard She Okitundu, Minister of Human Rights of the Democratic Republic of Congo, a letter with reference CABMIN/MDH/MM/201/MZ/99, dated 24 February 1999, a communication presented on behalf of the Congolese government based on the provisions of article 49 of the Charter.

2. The communication is filed against the Republics of Burundi, Rwanda and Uganda (hereinafter referred to, respectively, as 'Burundi', 'Rwanda' and 'Uganda'). It alleges grave and massive violations of human and peoples' rights committed by the armed forces of these three countries in the Congolese provinces where there have been rebel activities since 2 August 1998, and for which the Democratic Republic of Congo blames Burundi, Uganda and Rwanda. In support of its complaint the Democratic Republic of Congo states that the Ugandan and Rwandan governments have acknowledged the presence of their respective armed forces in the eastern provinces of the Democratic Republic of Congo under what it terms the 'fallacious pretext' of 'safeguarding their interests'. The complaint states, furthermore, that the Congolese government has 'sufficient and overwhelming evidence of Burundi's involvement'.

3. In particular, the Democratic Republic of Congo asserts that on Monday, 3 August 1998, 38 officers and about 100 men of the Congolese forces were assassinated, after being disarmed, at Kavumu airport, Bukavu, in the Congolese province of South Kivu. Relatedly, on Tuesday, 4 August 1998, over 50 corpses were buried in Bukavu, about twenty of them near the fuel station at the Nyamwera market, opposite Ibanda mosque. Other corpses (mostly civilians) were found at the military camp called 'Saïo camp' in Bukavu. On 17 August 1998, the Rwandan and Ugandan forces that had been on Congolese territory for many weeks, besieged Inga hydroelectric dam, in Lower Congo province, a wholly civilian facility. The presence of these forces disrupted the lives of millions of people and the economic life of the Democratic Republic of Congo. It also caused the death of many patients including children in hospitals, due to the cutting off of electricity supply to incubators and other respiratory equipment.

4. On Monday, 24 August 1998, over 856 persons were massacred in Kasika, in Lwindi chiefdom, and Mwenga. The bodies found over a distance of 60 kilometres from Kilungutwe to Kasika (in South Kivu province) were mainly those of women and children. The women had been raped before being killed by their murderers, who slashed them open from the vagina up to the abdomen and cut them up with daggers. On 2 September 1998, in a bid to ambush the men of the Congolese army based in Kamituga, the Rwandan and Ugandan forces in Kitutu village massacred 13 people. On 6 October 1998, 48 civilians were killed in Lubarika village. In Uvira town, on the banks of Lake Tanganyika, a massacre of the population including intellectuals and other able-bodied persons took place. This was partly evidenced by the discovery of 326 bodies in Rushima river, near Luberizi. 547 bodies were also discovered buried in a mass grave at Bwegera, and 138 others were found in a butcher's shop in Luvingi village. From 30 December 1998 to 1 January 1999, 612 persons were massacred in Makobola, South Kivu province. All these atrocities were committed by the Rwandan and Ugandan forces which invaded territories of the Demo-

cratic Republic of Congo, according to the complaint of the Democratic Republic of Congo.

5. The Democratic Republic of Congo also claims that the forces of Rwanda and Uganda aimed at spreading sexually transmitted diseases and committing rape. To this end, about 2 000 AIDS suffering or HIV-positive Ugandan soldiers were sent to the front in the eastern province of Congo with the mission of raping girls and women so as to propagate an AIDS pandemic among the local population and, thereby, decimate it. The Democratic Republic of Congo notes that 75 per cent of the Ugandan army are suffering from AIDS. A white paper annexed to the communication enumerates many cases of rape of girls and women perpetrated by the forces of Rwanda and Uganda, particularly in South Kivu province. It further states that on Monday, 5 October 1998, in Lumunba quarter, Babozo division, Bagira commune, under the instructions of a young Rwandan officer nicknamed 'Terminator', who was then commanding the Bagira military camp, several young Congolese girls were raped by soldiers based at the said camp. Similar cases of rape have been reported from Mwenga, Walungu, Shabunda and Idjwi.

6. The Democratic Republic of Congo avers that since the beginning of the war in its eastern provinces, the civilian population has been deported by the Rwandan and Ugandan armies to what it refers to as 'concentration camps' situated in Rwanda. It further states that other people are simply massacred and incinerated in crematories (especially in Bugusera, Rwanda). The goal of these operations is to make the indigenous people disappear from these regions and thus, to establish what it terms 'Tutsi-land'.

7. The Democratic Republic of Congo also accuses Rwanda and Uganda of carrying out systematic looting of the underground riches of the regions controlled by their forces, just as the possessions of the civilian population are being hauled away to Burundi, Rwanda and Uganda. To substantiate its accusations, it states that on 4 September 1998, the contents of all the safes of the local branch of the Central Bank of Congo in Bukavu town were looted and the booty taken away to Rwanda. In Kalema, a town in Maniema province, all the minerals in the factory of the Sominiki firm were looted by the same forces. The Democratic Republic of Congo claims that between October and December 1998, the gold produced by the Okimo firm and by local diggers, yielding US$ 100 000 000 was carted to Rwanda. Still according to its estimation, the coffee produced in the region and in North Kivu yielded about US$ 70 000 000 to Uganda in the same period. As for the wood produced by the Amexbois firm based in Kisangani town, it is exported to Uganda. Rwanda and Uganda have also taken over control of the fiscal and customs revenue collected respectively by the Directorate General of Taxes. The plunder of the riches of the eastern provinces of Congo is also affecting endangered animal species such as okapis, mountain gorillas, rhinoceros, and elephants.

The complaint

8. The Democratic Republic of Congo claims, among other things, that it is the victim of an armed aggression perpetrated by Burundi, Rwanda and Uganda; and that this is a violation of the fundamental principles that govern friendly relations between states, as stipulated in the Charters of the United Nations and the Organization of African Unity; in particular, the principles of non-recourse to force in international relations, the peaceful settlement of differences, respect for the sovereignty and territorial integrity of states and non-interference in the internal affairs of states. It emphasises that the massacres and other violations of human and peoples' rights that it accuses Burundi, Rwanda and Uganda of, are committed in violation of the provisions of articles 2, 4, 6, 12, 16, 17, 19, 20, 21, 22 and 23 of the African Charter on Human and Peoples' Rights.

9. It also claims violation of the provisions of the International Covenant on Civil and Political Rights, the Geneva Conventions of 12 August 1949 and of the Additional Protocol on the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977.

10. From the foregoing, the Democratic Republic of Congo, based on the facts presented and the law cited, requests the Commission to:

> Declare that the violations of the human rights of the civilian population of the eastern provinces of the Democratic Republic of Congo by Rwanda, Uganda and Burundi are in contravention of the relevant provisions of the African Charter on Human and Peoples' Rights cited above; and
> Examine the communication diligently, especially in the light of article 58(1) & (3) of the Charter with a view to producing a detailed, objective and impartial report on the grave and massive violations of human rights committed in the war-affected eastern provinces and to submit it to the Assembly of Heads of State and Government of the Organization of African Unity.

11. The Democratic Republic of Congo also requests the Commission to:

> Take due note of the violations of the relevant provisions of the Charters of the United Nations, the Organization of African Unity, and the one on Human and Peoples' Rights; Condemn the aggression against the Democratic Republic of Congo, which has generated grave violations of the human rights of peaceful peoples; Deploy an investigation mission with a view to observing *in loco* the accusations made against Burundi, Rwanda and Uganda; Demand the unconditional withdrawal of the invading troops from Congolese territory in order to put an end to the grave and massive violations of human rights; Demand that the countries violating human and peoples' rights in the Democratic Republic of Congo pay just reparation for the damages caused and the acts of looting; and Indicate the appropriate measures to punish the authors of the war crimes or crimes against humanity, as the case may be, and the creation of an *ad hoc* tribunal to try the crimes committed against the Democratic Republic of Congo. The *ad hoc* tribunal may be created in collaboration with the United Nations.

The procedure

12. The communication was received at the Secretariat of the Commission on 8 March 1999. The same day, two letters were dispatched by fax, to the Ministry of Human Rights and the Ministry of Foreign Affairs of the Democratic Republic of Congo respectively, acknowledging receipt.

13. In compliance with the relevant provisions of the Charter and the Rules of Procedure, the Secretariat then submitted the communication to the Commission, meeting at its 25th ordinary session from 26 April to 5 May 1999, in Bujumbura (Burundi).

14. At its 25th ordinary session held in Bujumbura, Burundi, the Commission took a decision of seizure on the communication and requested the complainant state to forward an official copy of its complaint to the Secretary-General of the OAU.

15. On 28 May 1999, *notes verbales* together with a copy of the communication were each sent to the Ministries of External Affairs/External Relations of the respondent states informing them of the communication filed against them by the Democratic Republic of Congo.

16. On 2 June 1999, the Secretariat wrote to the authorities of the Democratic Republic of Congo informing them of the decision of seizure taken by the Commission and requesting them to comply with the provisions of article 49 of the Charter.

17. At the 26th session of the Commission held in Kigali, Rwanda, the communication was not examined, as the Commission considered it necessary to allow the respondent states more time to communicate their reactions.

18. On 14 December 1999, the Secretariat wrote to the various parties requesting their reactions regarding the issue of admissibility.

19. At the 27th ordinary session held from 27 April to 11 May 2000 in Algiers, Algeria, the Commission heard oral submissions on the admissibility of the case from representatives of the complainant state and from two respondent states (Rwanda and Uganda). The Commission, after examining the case according to the provisions of its Rules of Procedure, thereafter declared the communication admissible and requested parties to furnish it with arguments on the merits of the case.

20. The parties were accordingly informed of the above decision on 14 July 2000.

21. At the 28th session of the Commission held from 23 October to 6 November 2000 in Cotonou, Benin, the communication was not considered as the Commission had not received any response from respondent states on the request that was extended to them following the 27th session.

22. During the session, however, the delegation of Rwanda transmitted to

the Secretariat of the Commission, a submission, which stated that the Commission should not have declared communication 227/99 admissible because the procedure followed by the Democratic Republic of Congo was not valid and that the Commission itself had not respected the provisions of its own Rules of Procedure. The submission further stated that the matters addressed by the communication were pending before competent authorities of the Organization of African Unity and other international bodies like the UN Security Council and ECOSOC. Finally, Rwanda refuted allegations of human rights violations made against it by the Democratic Republic of Congo and justified the presence of its troops in this country on grounds of security, while accusing the Democratic Republic of Congo of hosting groups hostile to Rwanda.

23. The submission of Rwanda was transmitted to all states concerned by communication 227/99.

24. In October 2000, the Secretariat of the Commission received from Uganda a submission on communication 227/99 in which the respondent state recognised and justified the presence of its troops in the Democratic Republic of Congo. The troops were said to be in the Democratic Republic of Congo to prevent Ugandan rebels from attacking the Ugandan territory.

25. Uganda stated in its submission that since the early 1990's the territory of the Democratic Republic of Congo (then the Republic of Zaire) has provided sanctuary to bands of armed rebel groups. These rebel groups, which Uganda claims support former dictator Idi Amin, have posed a significant danger for Uganda since 1996.

26. Uganda stated that supported by both Sudan and Mobutu's government in the Democratic Republic of Congo, these groups grew to 6 000, posing a serious security threat to Uganda and that therefore Ugandan troops were present in the Democratic Republic of Congo in order to prevent Ugandan rebels from attacking the Ugandan territory.

27. The submission further states that after Mobutu's overthrow in 1997, the Kabila government invited Uganda to enter eastern Congo to work together to stop the activities of the anti-Uganda rebels and that Ugandan armed forces remained in the Democratic Republic of Congo at the request of President Kabila, since his forces 'had no capability to exercise authority' in the remote eastern region. Uganda attached the Protocol between the Democratic Republic of Congo and the Republic of Uganda on Security along the Common Border to show that both sides recognised the problem of armed groups and decided to co-operate.

28. According to Uganda, President Kabila revoked the above-mentioned agreement in August 1998 as a new rebellion started in the Democratic Republic of Congo (when the coalition that had overthrown Mobutu disintegrated) and blamed this 'internal rebellion', on the invasion of Uganda and Rwanda. The Democratic Republic of Congo then started looking for

allies in its struggle against the rebels and it turned to forces hostile to the governments of Rwanda and Uganda, specifically the Allied Democratic Force and pro-Idi Amin groups. Uganda said it therefore had no option but to keep its troops in the Democratic Republic of Congo, in order to deal with the threat of attacks posed by these foreign-sponsored rebel groups.

29. To support its actions, Uganda cited provisions of international instruments: article 51 of the UN Charter; article 3 of the UN General Assembly Resolution on the Definition of Aggression; The UN General Assembly Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States; and article 23 of the African Charter on Human and Peoples' Rights.

30. In its submission, Uganda also points to the lack of evidence implicating it in the alleged human rights violations, stating for example that, Ugandan troops have never been in some places mentioned in the communication. The submission characterises the violations relating to HIV/AIDS as 'the most ridiculous allegation'. Referring to the joint case against itself, Rwanda, and Burundi, Uganda claims that '[t]here is never group responsibility for violations'. In addition, 'allegations of human rights violations must be verified by an independent body or by a fact-finding Commission.' Uganda contrasts the allegations it faces with evidence of the Democratic Republic of Congo government's involvement in violations in its eastern provinces.

31. As for the withdrawal of Ugandan troops from the Democratic Republic of Congo, the submission relies on the Democratic Republic of Congo's failed request to the International Court of Justice (ICJ) to order the unconditional withdrawal of Ugandan troops.

32. Regarding payment of reparations, Uganda points to the lack of documentation on this issue and, concerning the illegal exploitation of the Democratic Republic of Congo's natural resources, Uganda denied involvement and affirmed its 'unconditional support to the United Nation's efforts to set up a panel of experts [that the Democratic Republic of Congo has also approved] to investigate' the issue.

33. On the issue of investigation of human rights violations, while Uganda welcomed the Democratic Republic of Congo's call for independent investigation, it portrayed the Democratic Republic of Congo's uninvestigated allegations as 'disturbing'.

34. Uganda also noted that the Democratic Republic of Congo has accused Uganda in several other fora: the UN Security Council, the ICJ, the Lusaka Initiative, and the OAU. According to the respondent state, these actions 'present a dilemma to the conduct of international affairs . . . and adjudication', undermining the credibility of these institutions and the Commission as divergent opinions may be reached.

35. In conclusion Uganda contends that 'there is no legal basis on which the African Commission can deal with the communication and declare any of the remedies sought by the Democratic Republic of Congo against Uganda'.

36. Copies of the submissions of Uganda on communication 227/99 were transmitted to all states concerned by the communication.

37. In December 2000, the Secretariat of the Commission received a set of five submissions from the Democratic Republic of Congo containing reports on alleged violations of human rights by armed forces of the respondent states and their alleged allies in the territory of the Democratic Republic of Congo. The submissions also stated that the foreign uninvited troops in the Democratic Republic of Congo were looting the resources of the country.

38. The Secretariat of the Commission transmitted these submissions to the respective parties to the communication.

39. At the 29th session, which was held from 23 April to 7 May 2001 in Tripoli, Libya, the communication was not considered because the Commission had still not received any submission from one of the respondent states, namely, Burundi. On that occasion, all relevant letters and submissions by the other states were transmitted to the delegations of all the respondent states including Burundi, for their consideration and reaction to the Commission.

40. In August 2001, the Secretariat of the Commission received a request from the Ministry of Human Rights of the Democratic Republic of Congo, which deplored the delays in the processing of communication 227/99 and invited the Commission to summon an extraordinary session in order to deal diligently with the communication.

41. By *notes verbales* ACHPR/COMM/044 sent to their respective Ministries of Foreign/External Affairs on 26 September 2001, the Secretariat of the Commission informed all states concerned by communication 227/99 that it was going to consider the said communication on the merits, at its 30th ordinary session scheduled from 13 to 27 October 2001 in Banjul, The Gambia.

42. In October 2001, the Secretariat of the Commission received a *note verbale* from Rwanda, which restated the objections raised in its submission of October 2000 concerning communication 227/99, adding that if Rwanda's arguments were not taken into account, it should not be called upon to present a defence.

43. At its 30th session, the Commission discussed the request by the Democratic Republic of Congo about organising an extraordinary session to deal with communication 227/99 and resolved to raise the issue with the relevant authorities of the Secretariat of the African Union. The Commission also heard oral statements by the delegations of Rwanda and Uganda on the issue, written copies of which were also handed over to its Secretariat

44. In its statement, the Rwandan delegation reiterated its arguments stated during the 28th session and objected to the proposed extraordinary session to deal with the communication on the grounds that the communication could be considered during an ordinary session and that an extraordinary session will have financial implication. Rwanda therefore recommended that the Commission deals with the communication during its 31st session scheduled for May 2002 in Pretoria, South Africa. The statement further justified the presence of Rwandan troops in the Democratic Republic of Congo by the assistance that the government of this country is granting elements hostile to the government of Kigali and concluded that as long as such a threat exists for Rwanda, it could not withdraw its troops from the Democratic Republic of Congo.

45. In its statement, the Ugandan delegation said that they had not received the documents sent to them on communication 227/99 and could not present their defence at that stage. The delegation further objected to the holding of an extraordinary session to deal with the communication and added that the facts complained of by the Democratic Republic of Congo are also pending before the International Court of Justice and that consideration of the communication by the Commission would prejudice the court hearing.

46. At the 31st session of the Commission, which was held from 2 to 16 May 2002 in Pretoria, South Africa, the Commission did not consider the Communication because there had been no response from the Organization of African Unity regarding the request from the Democratic Republic of Congo on the holding of the extraordinary session on the communication. During that session, the Commission resolved to proceed as follows: the African Commission would hold the extraordinary session in case the Secretary General of the OAU agree to it, or (in case the OAU did not accept the idea of extraordinary session), the African Commission would arrange its agenda for the 32nd ordinary session in such a way as to have sufficient time to deal with the communication. That decision was communicated to the delegations of all the states concerned who were attending the session.

47. By *note verbale* ACHPR/COMM 227/99 of 11 June 2002, the Secretariat transmitted that decision to the states concerned by the communication.

48. A reminder was also sent to the same states by *notes verbales* ACHPR/COMM 227/99 on 8 October 2002.

49. During its 32nd ordinary session which took place from 17 to 23 October 2002 in Banjul, the Gambia, the Commission did not consider this communication because of the circumstances of the session[1] which did not provide enough time to deal with this important communication.

[1] Financial constraints caused the 32nd ordinary session of the Commission to last for only seven days.

50. The Commission took a decision on the merits of the communication during its 33rd ordinary session, which was held from 15 to 29 May 2003 in Niamey, Niger.

Law

Admissibility

51. The procedure for bringing inter-state communications before the Commission is governed by articles 47 to 49 of the Charter. At this stage, it is important to mention that this is the first inter-state communication brought before the African Commission on Human and Peoples' Rights.

52. It is to be noted that Burundi,[2] a respondent state was provided with all the relevant submissions relating to this communication, in conformity with article 57 of the African Charter. But neither did Burundi react to any of them nor did it make any oral submission before the Commission regarding the complaint.

53. The African Commission would like to emphasise that the absence of reaction from Burundi does not absolve the latter from the decision the African Commission may arrive at in the consideration of the communication. Burundi by ratifying the African Charter indicated its commitment to cooperate with the African Commission and to abide by all decisions taken by the latter.

54. In their oral arguments before the Commission at its 27th ordinary session held in Algeria (27 April — 11 May 2000), Rwanda and Uganda had argued that the decision of the complainant state to submit the communication directly to the Chairman of the Commission without first notifying them and the Secretary General of the OAU, is procedurally wrong and therefore fatal to the admissibility of the case.

55. Article 47 requires the complainant state to draw, by written communication, the attention of the violating state to the matter and the communication should also be addressed to the Secretary-General of the OAU and the Chairman of the Commission. The state to which the communication is addressed is to give written explanation or statement elucidating the matter within three months of the receipt of the communication.

56. By the provisions of article 48 of the Charter, if within three months from the date on which the original communication is received by the state to which it is addressed, the issue is not settled to the satisfaction of the two states involved through bilateral negotiation or by any other peaceful procedure, either state shall have the right to submit the matter to the Commission through the Chairman and to notify the other states involved.

[2] Burundi, a state party to the African Charter, ratified the said Charter on 28 July 1989.

57. The provisions of articles 47 and 48 read in conjunction with rules 88 to 92 of the Rules of Procedure of the Commission are geared towards the achievement of one of the essential objectives and fundamental principles of the Charter: conciliation.

58. The Commission is of the view that the procedure outlined in article 47 of the Charter is permissive and not mandatory. This is borne out by the use of the word 'may'. Witness the first sentence of this provision:

> If a state party to the present Charter has good reasons to believe that another state party to this Charter has violated the provisions of the Charter, it may draw, by written communication, the attention of that state to the matter.

59. Moreover, where the dispute is not settled amicably, article 48 of the Charter requires either state to submit the matter to the Commission through the Chairman and to notify the other states involved. It does not, however, provide for its submission to the Secretary General of the OAU. Nevertheless, based on the decision of the Commission at its 25th ordinary session, requesting it to forward a copy of its complaint to the Secretary General of the OAU (see paragraph 14 above), the complainant state had done so.

60. Furthermore, it appears that the main reason why the Charter makes provision for the respondent state to be informed of such violations or notified of the submission of such a communication to the Commission, is to avoid a situation of springing surprises on the states involved. This procedure enables the respondent states to decide whether to settle the complaint amicably or not. The Commission is of the view that even if the complainant state had not abided by the said provision of the Charter, such omission is not fatal to the communication since after being seized of the case, a copy of the communication, as is the practice of the Commission, was forwarded to the respondent states for their observations (see paragraph 15 above).

61. Article 49 on the other hand, provides for a procedure where the complainant state directly seizes the Commission without passing through the conciliation phase. Accordingly, the complainant state may refer the matter directly to the Commission by addressing a communication to the Chairman, the Secretary General of the OAU and the state concerned. Such a process allows the requesting state to avoid making contacts with the respondent state in cases where such contacts will not be diplomatically either effective or desirable. In the Commission's considered opinion that seems to be the case here. Indeed, the situation of undeclared war prevailing between the Democratic Republic of Congo and its neighbours to the east did not favour the type of diplomatic contact that would have facilitated the application of the provisions of articles 47 and 48 of the Charter. It was also for this reason that the Commission took the view that article 52 did not apply to this communication.

62. The Commission is mindful of the requirement that it can consider or

deal with a matter brought before it if the provisions of article 50 of the Charter and rule 97(c) of the Rules of Procedure are met, that is if all local remedies, if they exist, have been exhausted, unless such would be unduly prolonged.

63. The Commission takes note that the violations complained of are allegedly being perpetrated by the respondent states in the territory of the complainant state. In the circumstances, the Commission finds that local remedies do not exist, and the question of their exhaustion does not, therefore, arise.

64. The effect of the alleged activities of the rebels and armed forces of the respondent states parties to the Charter, which also back the rebels, fall not only within the province of humanitarian law, but also within the mandate of the Commission. The combined effect of articles 60 and 61 of the Charter compels this conclusion; and it is also buttressed by article 23 of the African Charter.

65. There is also authority, which does not exclude violations committed during armed conflict from the jurisdiction of the Commission. In communication 74/92, *Commission Nationale des Droits de l'Homme et des Libertés v Chad* [(2000) AHRLR 66 (ACHPR 1995) para 21], the Commission held that the African Charter,

> unlike other human rights instruments, does not allow for state parties to derogate from their treaty obligations during emergency situations. Thus, even . . . war . . . cannot be used as an excuse by the state violating or permitting violations of rights in the African Charter.

(See also communication 159/96, *Union Interafricaine des Droits de l'Homme and Others v Angola* [(2000) AHRLR 18 (ACHPR 1997)]). From the foregoing, the Commission declares the communication admissible.

The merits

66. The use of armed force by the respondent states, which the Democratic Republic of Congo complains of contravenes the well-established principle of international law that states shall settle their disputes by peaceful means in such a manner that international peace, security and justice are not endangered. Indeed, there cannot be both national and international peace and security guaranteed by the African Charter under the conditions created by the respondent states in the eastern provinces of the complainant state.

67. Rwanda and Uganda, in their oral arguments before the Commission at its 27th ordinary session held in Algeria had argued that the decision of the complainant state to submit the communication directly to the Chairman of the Commission without first notifying them and the Secretary-General of the OAU, is procedurally wrong and therefore fatal to the admissibility of the case. But the African Commission found otherwise.

68. The Commission finds the conduct of the respondent states inconsistent with the standard expected of them under the UN Declaration on Friendly Relations, which is implicitly affirmed by the Charters of the UN and OAU, and which the Commission is mandated by article 23 of the African Charter on Human and Peoples' Rights to uphold. Any doubt that this provision has been violated by the respondent states is resolved by recalling an injunction in the UN Declaration on Friendly Relations:

> No state or group of states has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other states. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the state or against its political, economic and cultural elements are in violation of international law . . . Also no state shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another state or interfere in civil strife in another state.

The substance of the complaint of the Democratic Republic of Congo against the respondents is covered by the foregoing prohibition. The respondent states have therefore violated article 23 of the African Charter. The conduct of the respondent states also constitutes a flagrant violation of the right to the unquestionable and inalienable right of the peoples of the Democratic Republic of Congo to self-determination provided for by article 20 of the African Charter, especially clause 1 of this provision.

69. The complainant state alleges grave and massive violations of human and peoples' rights committed by the armed forces of the respondent states in its eastern provinces. It details series of massacres, rapes, mutilations, mass transfers of populations and looting of the peoples' possessions, as some of those violations. As noted earlier on, the series of violations alleged to have been committed by the armed forces of the respondent states fall within the province of humanitarian law, and therefore rightly covered by the four Geneva Conventions and the Protocols additional to them. And the Commission having found the alleged occupation of parts of the provinces of the complainant state by the respondents to be in violation of the Charter cannot turn a blind eye to the series of human rights violations attendants upon such occupation.

70. The combined effect of articles 60 and 61 of the African Charter enables the Commission to draw inspiration from international law on human and peoples' rights, the Charter of the United Nations, the Charter of the Organization of African Unity and also to take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules recognized by member states of the Organization of African Unity, general principles recognized by African states as well as legal precedents and doctrine. By virtue of articles 60 and 61 the Commission holds that the four Geneva Conventions and the two Additional Protocols covering armed conflicts constitute part of the general principles of law recognized by African states, and take same into consideration in the determination of this case.

71. It is noted that article 75(2) of the First Protocol of the Geneva Conventions of 1949, prohibits the following acts at any time and in all places whatsoever, whether committed by civilian or by military agents:

> (a) violence to life, health, or physical or mental well-being of persons, in particular: i) murder; ii) torture of all kinds, whether physical or mental; iii) corporal punishment and iv) mutilation
> (b) outrages upon personal dignity, in particular, humiliating and degrading treatment; enforced prostitution and any form of indecent assault.

72. The complainant state alleges the occupation of the eastern provinces of the country by the respondent states' armed forces. It alleges also that most parts of the affected provinces have been under the control of the rebels since 2 August 1998, with the assistance and support of the respondent states. In support of its claim, it states that the Ugandan and Rwandan governments have acknowledged the presence of their respective armed forces in the eastern provinces of the country under what it calls the 'fallacious pretext' of 'safeguarding their interests'. The Commission takes note that this claim is collaborated by the statements of the representatives of the respondent states during the 27th ordinary session held in Algeria.

73. Article 23 of the Charter guarantees to all peoples the right to national and international peace and security. It provides further that '[t]he principles of solidarity and friendly relations implicitly affirmed by the Charter of the United Nations and reaffirmed by that of the Organization of African Unity shall govern relations between states.' The principles of solidarity and friendly relations contained in the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations (resolution 2625 (XXV), adopted by the UN General Assembly on 24 October 1970, prohibits threat or use of force by states in settling disputes. Principle 1 provides:

> Every state has the duty to refrain in its international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations. Such a threat or use of force constitutes a violation of international law and the Charter of the United Nations and shall never be employed as a means of settling international issues.

74. In the same vein, article 33 of the United Nations Charter states that the

> parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security shall first of all,seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

Chapter VII of the same Charter outrightly prohibits threats to the peace,

breaches of the peace and acts of aggression. Article 3 of the OAU Charter states:

> The member states, in pursuit of the purposes stated in article 2, solemnly affirm and declare their adherence to the following principles: . . . 2. Non-interference in the internal affairs of states; 3. Respect for the sovereignty and territorial integrity of each state and for its inalienable right to independent existence; 4. Peaceful settlement of disputes by negotiation, mediation, conciliation or arbitration.

75. It also contravenes the well-established principle of international law that states shall settle their disputes by peaceful means in such a manner that international peace and security and justice are not endangered. As noted in paragraph 66 above, there cannot be both national and international peace and security guaranteed by the Charter with the conduct of the respondent states in the eastern provinces of the complainant state.

76. The Commission therefore disapproves of the occupation of the complainant's territory by the armed forces of the respondent forces and finds it impermissible, even in the face of their argument of being in the complainant's territory in order to safeguard their national interests and therefore in contravention of article 23 of the Charter. The Commission is of the strong belief that such interests would better be protected within the confines of the territories of the respondent states.

77. It bears repeating that the Commission finds the conduct of the respondent states in occupying territories of the complainant state to be a flagrant violation of the rights of the peoples of the Democratic Republic of Congo to their unquestionable and inalienable right to self-determination provided for by article 20 of the African Charter.

78. As previously stated, the Commission is entitled, by virtue of articles 60 and 61 of the African Charter to

> draw inspiration from international law on human and peoples' rights, . . . the Charter of the United Nations, the Charter of the Organization of African Unity . . . also take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules recognised by member states of the Organization of African Unity . . . general principles recognised by African states, as well as legal precedents and doctrine.

Invoking these provisions, the Commission holds that the four Geneva Conventions and the two Additional Protocols covering armed conflicts, fall on all fours with the category of special international conventions, laying down rules recognised by member states of the Organization of African Unity and also constitute part of the general principles recognised by African states, and to take same into consideration in the determination of this case.

79. The Commission finds the killings, massacres, rapes, mutilations and other grave human rights abuses committed while the respondent states'

armed forces were still in effective occupation of the eastern provinces of the complainant state reprehensible and also inconsistent with their obligations under part III of the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 1949 and Protocol I to the Geneva Conventions.

80. They also constitute flagrant violations of article 2 of the African Charter, such acts being directed against the victims by virtue of their national origin; and article 4, which guarantees respect for life and the integrity of one's person and prohibits the arbitrary deprivation of rights.

81. The allegation of mass transfer of persons from the eastern provinces of the complainant state to camps in Rwanda, as alleged by the complainant and not refuted by the respondent, is inconstent with article 18(1) of the African Charter, which recognises the family as the natural unit and basis of society and guarantees it appropriate protection. It is also a breach of the right to freedom of movement, and the right to leave and to return to ones country guaranteed under article 12(1) and (2) of the African Charter respectively.

82. Article 56 of the First Protocol Additional to the Geneva Conventions of 1949 provides:

> 1. Works or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, shall not be made object of attack, even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population. . . .
>
> 2. The special protection against attack provided by paragraph 1 shall cease: (a) for a dam or dyke only if it is used for other than its normal function and in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support . . .
>
> 3. In all cases, the civilian population and individual civilians shall remain entitled to all the protection accorded them by international law, including the protection of precautionary measures provided for in article 57.

83. As noted previously, taking article 56, quoted above into account, and by virtue of articles 60 and 61 of the African Charter, the Commission concludes that, in besieging the hydroelectric dam in Lower Congo province, the respondent states have violated the Charter.

84. The siege of the hydroelectric dam may also be brought within the prohibition contained in The Hague Convention (II) with Respect to the Laws and Customs of War on Land which provides in article 23 that '[b]esides the prohibitions provided by special conventions, it is especially prohibited . . . to destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war'. By parity of reason, and bearing in mind articles 60 and 61 of the Charter, the respondent states are in violation of the Charter with regard to the just noted article 23.

85. The case of *Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo* (the *Celebici* judgment, International Criminal Tribunal for the former Yugoslavia, 16 November 1998 at paragraph 587) is supportive of the Commission's stance. It states, *inter alia*, that

> international law today imposes strict limitations on the measures which a party to an armed conflict may lawfully take in relation to the private and public property of an opposing party. The basic norms in this respect, which form part of customary international law . . . [include] the fundamental principle . . . that private property must be respected and cannot be confiscated . . . [p]illage is formally forbidden.

86. The raping of women and girls, as alleged and not refuted by the respondent states, is prohibited under article 76 of the first Protocol Additional to the Geneva Conventions of 1949, which provides that '[w]omen shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other forms of indecent assault'. It also offends against both the African Charter and the Convention on the Elimination of All Forms of Discrimination Against Women; and on the basis of articles 60 and 61 of the African Charter find the respondent states in violation of the Charter.

87. The Commission condemns the indiscriminate dumping of, and / or mass burial of victims of the series of massacres and killings perpetrated against the peoples of the eastern province of the complainant state while the armed forces of the respondent states were in actual fact occupying the said provinces. The Commission further finds these acts barbaric and in reckless violation of Congolese peoples' rights to cultural development guaranteed by article 22 of the African Charter, and an affront on the noble virtues of the African historical tradition and values enunciated in the Preamble to the African Charter. Such acts are also forbidden under article 34 of the first Protocol Additional to the Geneva Conventions of 1949, which provides for respect for the remains of such peoples and their gravesites. In disregarding the last provision, the respondent states have violated the African Charter on the basis of articles 60 and 61 of this instrument.

88. The looting, killing, mass and indiscriminate transfers of civilian population, the siege and damage of the hydro-dam, stopping of essential services in the hospital, leading to deaths of patients and the general disruption of life and state of war that took place while the forces of the respondent states were occupying and in control of the eastern provinces of the complainant state are in violation of article 14 guaranteeing the right to property, articles 16 and 17 (all of the African Charter), which provide for the rights to the best attainable state of physical and mental health and education, respectively.

89. Part III of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949, particularly in article 27, provides for the humane treatment of protected persons at all times and for protection

against all acts of violence or threats and against insults and public curiosity. Further, it provides for the protection of women against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault. Article 4 of the Convention defines a protected person as those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a party to the conflict or occupying power of which they are not nationals.

90. The complainant state alleges that between October and December 1998, the gold produced by the Okimo firm and by local diggers yielded US$ 100 000 000 to Rwanda. By its calculation, the coffee produced in the region and in North Kivu yielded about US$ 70 000 000 to Uganda in the same period. Furthermore, Rwanda and Uganda took over control of the fiscal and customs revenue collected respectively by the Directorate General of Taxes. The plunder of the riches of the eastern provinces of Congo is also affecting endangered animal species such as okapis, mountain gorillas, rhinoceros, and elephants.

91. Indeed, the respondent states, especially Uganda, has refuted these allegations, pretending for example that its troops never stepped in some of the regions [in which] they are accused of [having perpetrated] human rights violations and looting of the natural resources of the complainant state. However, the African Commission has evidence that some of these facts did take place and are imputable to the armies and agents of the respondent states. In fact, the United Nations have acknowledged that during the period when the armies of the respondent states were in effective control over parts of the territory of the complainant state, there were lootings of the natural resources of the complainant state. The United Nations set up a Panel of Experts to investigate this matter.[3]

92. The report of the Panel of Experts, submitted to the Security Council of the United Nations in April 2001 (under reference S/2001/357) identified all the respondent states among others actors, as involved in the conflict in the Democratic Republic of Congo.[4] The report profusely provides evidence of the involvement of the respondent states in the illegal exploitation of the natural resources of the complainant state. It is stated in paragraph 5 of the summary of the report:[5]

[3] See resolution 1457 (2003) of the Security Council of the United Nations adopted on 24 January 2003 on the Panel of Experts on the illegal exploitation of the natural resources of the Democratic Republic of Congo.

Also see presidential statement dated 2 June 2000 (S/PRST/2000/20), whereby the Security Council requested the Secretary General of the United Nations to establish a Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth in the Democratic Republic of the Congo for a period of six months.

[4] See point 10(a) of the summary of the report.

[5] Also see paras 26, 27, 32, 55, 64, etc of the report.

> Mass-scale looting. During this first phase stockpiles of minerals, coffee, wood, livestock and money that were available in territories conquered by the armies of Burundi, Rwanda and Uganda were taken, and either transferred to those countries or exported to international markets by their forces and nationals.

93. Paragraph 25 of the reports further states:

> The illegal exploitation of resources by Burundi, Rwanda and Uganda took different forms, including confiscation, extraction, forced monopoly and price-fixing. Of these, the first two reached proportions that made the war in the Democratic Republic of the Congo a very lucrative business.

94. The Commission therefore finds the illegal exploitation/looting of the natural resources of the complainant state in contravention of article 21 of the African Charter, which provides:

> 1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it. . . .
> 4. State parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity.

95. The deprivation of the right of the people of the Democratic Republic of Congo, in this case, to freely dispose of their wealth and natural resources, has also occasioned another violation — their right to their economic, social and cultural development and of the general duty of states to individually or collectively ensure the exercise of the right to development, guaranteed under article 22 of the African Charter.

96. For refusing to participate in any of the proceedings although duly informed and invited to respond to the allegations, Burundi admits the allegations made against it.

97. Equally, by refusing to take part in the proceedings beyond admissibility stage, Rwanda admits the allegations against it.

98. As in the case of Rwanda, Uganda is also found liable of the allegations made against it.

For the above reasons, the Commission:

- Finds the respondent states in violation of articles 2, 4, 5, 12(1) and (2), 14, 16, 17, 18(1) and (3), 19, 20, 21, 22, and 23 of the African Charter on Human and Peoples' Rights.
- Urges the respondent states to abide by their obligations under the Charters of the United Nations, the Organization of African Unity, the African Charter on Human and Peoples' Rights, the UN Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States and other applicable international principles of law and withdraw its troops immediately from the complainant's territory.

- Takes note with satisfaction, of the positive developments that occurred in this matter, namely the withdrawal of the respondent states armed forces from the territory of the complainant state.
- Recommends that adequate reparations be paid, according to the appropriate ways to the complainant state for and on behalf of the victims of the human rights by the armed forces of the respondent states while the armed forces of the respondent states were in effective control of the provinces of the complainant state, which suffered these violations.

CAMEROON

Miss A v Cameroon

(2004) AHRLR 39 (ACHPR 2004)

Communication 258/2002, *Miss A v Cameroon*
Decided at the 35th ordinary session, June 2004, 17th Annual Activity Report
Rapporteurs: Dankwa/Melo

Interim measures (7)
Admissibility (exhaustion of local remedies, 24-25)

Summary of facts

1. On 21 August 2002, the Secretariat of the African Commission on Human and Peoples' Rights (the African Commission) received from Miss A, a Cameroonian citizen, a communication relative to the provisions of article 55 of the African Charter on Human and Peoples' Rights (the African Charter). Miss A submitted the communication for and on behalf of her father and [two others].

2. The communication was submitted against the Republic of Cameroon (a state party[1] to the African Charter) and Miss A alleged in the communication that her father and two colleagues, former workers of the Cameroon P & T were arrested and detained in 1998 by the police, as conspirators of the Minister of P & T, who was also arrested and detained for alleged corruption.

3. The complainant further alleged that since 1998, when her father and two of his colleagues have been in detention, they have never been formally charged, they have never appeared in court and never had access to a lawyer. The complainant added that the state did not appear to have any intention to try them in the foreseeable future, whereas the delicate health of her father required constant medical attention.

Complaint

4. Miss A contends that the above-described facts constitute a violation by Cameroon of articles 2, 3, 5, 6, 7, 10, 11, 12 and 26 of the African Charter, and requests the African Commission to:

[1] Cameroon ratified the African Charter on 20 June 1989.

- Ask Cameroon take appropriate measures in order to avoid irreparable damage to the health and well being of the said detainees;
- Pronounce the government of Cameroon in violation of the African Charter and other international human rights treaties;
- Request Cameroon to bring the accused persons to trial immediately or order their release; and
- Request the erring state to compensate her father and his co-detainees for the period they have been in detention.

Procedure

5. By letter ACHPR/COMM/258/2002 of 23 August 2002, the Secretariat of the African Commission acknowledged receipt of the communication and informed the sender that it would be tabled for consideration *prima facie* at its 32nd ordinary session.

6. During its 32nd session, held from 17 to 23 October 2002 in Banjul, The Gambia, the Commission considered the communication and decided to be seized of it.

7. On 22 October 2002, the Chairman of the Commission sent a letter requesting the urgent intervention of the President of the Republic of Cameroon, drawing his attention to the situation of the two detainees and in particular on their state of health and urged the head of state to ensure that appropriate medical care is provided for the detainees. The Chairman of the Commission also requested in his letter that the detainees be charged and given a fair trial or freed in case no charge is made against them.

8. On 28 October 2002, the Secretariat of the Commission sent a *note verbale* to Cameroon informing it of the communication against it and the decision of seizure that the Commission had taken on it. Cameroon was further requested to provide the Commission with its arguments on the admissibility of the case, which the Commission intends to consider at its 33rd Session (5-19 May 2003, Niamey, Niger).

9. On the same date, the Secretariat of the Commission sent a letter to the complainant informing her of the decision of seizure that the Commission had taken on her case as well as of the letter for urgent intervention that the Chairman of the Commission had sent to the President of the Republic of Cameroon at her request. The complainant was also requested to furnish the Commission with possible arguments on the admissibility of the case, which the Commission intended to consider at its 33rd session.

10. Having received no reply from the respondent state, the Secretariat of the Commission sent it a reminder on 10 February 2003, drawing its attention to the fact that its written submissions on the case should reach the Commission as early as possible to allow the Commission take a deci-

sion on admissibility of the case. The Secretariat is yet to receive a reaction from the respondent state.

11. On 20 October 2002, the complainant sent a letter to the Commission requesting it to defer consideration of the communication to allow her to acquire more information on the case from the victims' lawyers.

12. On 21 October 2002, the Secretariat of the Commission acknowledged receipt of the complainant's request for deferment, and informed her that in accordance with her request consideration of the communication would be deferred until the 35th ordinary session of the ACHPR.

13. At its 34th ordinary session held in November 2003 in Banjul, The Gambia, the African Commission formally decided to defer its decision on the admissibility of the complaint, in accordance with the request of the complainant.

14. By *note verbale* ACHPR/COMM 258/2002 of 15 November 2003, the Secretariat of the African Commission handed to the delegation of Cameroon participating at the 34th Session a copy of the said complaint. The *note verbale* further requested Cameroon to convey its comments with regard to the admissibility of the matter within three months and in any case before end February 2004, to enable the Commission to make a well informed ruling on the communication at its 35th ordinary session.

15. On 17 February 2004, the Ministry of Foreign Relations of Cameroon sent a letter to the African Commission in which the respondent state intimated that Mr Ndeh Ningo had been acquitted and freed in November 2003, 'for lack of criminal charges', whilst Mr Takang Philip had been freed in March 2003 'for non-proven facts'.

16. Extracts of the judgment letter indicated the acquittal and liberation of the two individuals as well as the respective arrest warrants which had been attached to the documents mentioned earlier.

17. The respondent state therefore requested the Commission to declare the communication inadmissible 'in view of the presentation of the above mentioned documents, which sufficiently prove that the two cases had been submitted to the legal authorities of Cameroon and had been dealt with'.

18. On 1 March 2004, the Secretariat of the African Commission, through its *note verbale* ACHPR/COMM 258/02 acknowledged receipt of the *note verbale* from the respondent state.

19. By letter ACHPR/COMM 258/02/RK of 1 March 2003, the Secretariat of the African Commission had conveyed the *note verbale* to the complainant requesting her reaction on the contents of the letter.

20. On 14 April 2004, the complainant wrote to the Secretariat of the African Commission to confirm the liberation of Mr Ndeh Ningo who had

been 'judged not guilty and freed on the 23 November 2003 after having spent four years in detention'.

21. The complainant indicated in her letter that Mr Ndeh Ningo would advise the Commission on whether or not he would pursue the matter at the level of the Commission. The complainant further mentioned the possibility of holding negotiations with the respondent state to obtain compensation for Mr Ndeh Ningo. For this reason the complainant requested the African Commission to kindly defer its decision on the admissibility of the communication until its 36th ordinary session and not to declare it inadmissible as per the request of the respondent state.

22. During its 35th ordinary session held from 21 May to 4 June 2004 in Banjul, The Gambia, the Commission considered the communication and declared it inadmissible.

Law

Admissibility

23. Article 56 of the African Charter on Human and Peoples' Rights provides *inter alia* that communications shall be considered by the Commission after exhausting local remedies, unless this procedure is unduly prolonged.

24. In the case under consideration, the African Commission notes that the alleged victims were tried and freed in March and November 2003 respectively. This fact was admitted both by the complainant and respondent state.

25. The African Commission took note of the fact that the case was brought to the African Commission at the time that the matter was still before the courts. Furthermore, the fact that the case was tried properly before a court of law shows the availability of local remedies.

26. The African Commission further took note of the fact that the complainant intends to meet with the respondent state and start negotiations with a view to claim compensation for and on behalf of the alleged victims.

For this reason, the African Commission:

Declares this communication inadmissible for non-exhaustion of local remedies.

* * *

Bakweri Land Claims Committee v Cameroon

(2004) AHRLR 43 (ACHPR 2004)

Communication 260/02, *Bakweri Land Claims Committee v Cameroon*
Decided at the 36th ordinary session, December 2004, not yet reported in an official Activity Report (see editorial)
Rapporteur: Dankwa

Interim measures (16, 17)
Locus standi (ethnic group, 45, 46)
Admissibility (insulting language, 48; consideration by other body, 49-53; exhaustion of local remedies, 54-56)

Summary of facts

1. The complaint is filed by the Bakweri Land Claims Committee (BLCC) on behalf of traditional rulers, notables and elites of the indigenous minority peoples of Fako division (the Bakweri) against the government of Cameroon.

2. The complaint follows Presidential Decree 94/125 of 14 July 1994 where the government of Cameroon listed the Cameroon Development Corporation (CDC), which will allegedly result in the alienation, to private purchasers, of approximately 400 square miles (104 000 hectares) of lands in the Fako division traditionally owned, occupied or used by the Bakweri. The complainant alleges that the transfer would extinguish the Bakweri title rights and interests in two-thirds of the minority group's total land area.

3. The complainant states that the land in question was seized from Bakweri landowners between 1887 and 1905 by German colonial occupiers, which was acknowledged by the British colonial authorities and the United Nations General Assembly (UN document 189, paragraph 16) in November 1949, and that the land in question was bought back by the British colonial government following WWII, and declared 'native lands' and placed under the custody of the Governor of Nigeria to hold in trust for the Bakweri. In 1947, the lands were later leased to a newly created statutory corporation, the Cameroon Development Corporation (CDC) for a period of 60 years to administer and develop same until such time that the Bakweri people were competent to manage them without outside assistance.

4. The complainant alleges that the Bakweri's antecedent rights and interests to this land survived the change of sovereignty from the British crown to the State of Cameroon. The complainant states that the Bakweri title to this land has never been extinguished, confirmed by Cameroon's 1974

Land Tenure Act 74-1 which states that land entered in the *Grundbuch* is subject to the right of private property, and that the lands held in trust were leased in 1947 for a period of 60 years to the CDC, until that time that the Bakweri people were competent to manage them without assistance, and that during this time the rents paid for the land were to be paid to the local councils in Fako division.

5. The complainant alleges that the process of extinguishment set in motion by Decree 94/125, the privatisation of CDC and with it the likelihood of transferring Bakweri private lands to third parties is in violation of the Bakweri people's right to private property and the freedom to dispose of their wealth and natural resources, which are guaranteed in the African Charter. The complainant further alleges that this process is being carried out without any discussion of fair compensation for the Bakweri in a violation of the African Charter and Cameroon's own Constitution.

6. The complainant alleges that the concentration of private Bakweri lands in non-native hands undermines the Bakweri people's right to development, by irrevocably altering existing land holding arrangements and pattern of natural resource exploitation and by forcing a future exodus of the Bakweri population to other parts of Cameroon who will need to relocate for more land for their agricultural and development needs, and thereby risk aggravating social tensions. The complainant further alleges that the government of Cameroon has adopted a discriminatory approach toward the Bakweri that has totally lacked in fundamental fairness and has failed to include proper representation of the Bakweri stakeholders in the negotiations with regard to the future of the CDC.

Complaint

7. The complainant alleges violations of articles 7(1)(a), 14, 21, 22 of the African Charter on Human and Peoples' Rights.

8. The complainant prays for the Commission to recommend that:

- The government of Cameroon affirm the lands occupied by the CDC are private property;
- The Bakweri be fully involved in any CDC privatisation negotiations;
- Ground rents owed to the Bakweri dating back to 1947 be paid to a Bakweri Land Trust Fund;
- The Bakweri, acting jointly and severally, be allocated a specific percentage of shares in each of the privatised companies;
- The BLCC be represented in the current and all future policy and management boards.

Procedure

9. The complaint was dated 4 October 2002 and received at the Secretariat on 8 and 15 October 2002.

10. At its 32nd ordinary session held from 17 to 23 October 2002 in Banjul, The Gambia, the African Commission considered the complaint and decided to be seized thereof.

11. On 4 November 2002, the Secretariat wrote to the complainant and respondent state to inform them of this decision and requested them to forward their submissions on admissibility before the 33rd ordinary session of the Commission.

12. On 31 January 2003, the respondent state forwarded its written submission on the admissibility of the communication, which was forwarded to the complainant.

13. On 3 February 2003 (received on 6 February 2003), the complainant forwarded its written submission on the admissibility of the communication as requested by the African Commission. The Secretariat forwarded a copy of the same to the respondent state on 17 February 2003.

14. On 4 March 2003, the complainant forwarded its response to the submissions by the respondent state. The former also requested for leave to appear before the Commission at its 33rd ordinary session for the purpose of making an oral submission.

15. On 8 May 2003, the Secretariat received the written submission of the respondent state on the admissibility of the complaint.

16. At its 33rd ordinary session held in Niamey, Niger from 15 to 29 May 2003, the African Commission considered the communication and deferred its decision on admissibility to the next ordinary session allowing the complainant more time to forward written response to the respondent state's reply on admissibility, which was handed to the complainant on 24 May 2003. Pending the final decision of the African Commission on the issue, the latter also requested its Chairman to forward an urgent appeal letter to His Excellency, President Paul Biya of the Republic of Cameroon respectfully urging him to ensure that no further alienation of the land in question takes place.

17. Accordingly, the Chairman of the African Commission forwarded the said letter to His Excellency, President Paul Biya of the Republic of Cameroon on 20 May 2003.

18. The complainant forwarded its written response to the respondent state's reply on 23 August 2003.

19. At its 34th ordinary session held in Banjul, The Gambia, from 6 to 20 November 2003, the African Commission heard oral submissions of the parties and decided to defer its consideration on admissibility to the 35th ordinary session. The parties were also requested to avail the Secretariat

with copies of the Constitution of the Republic of Cameroon and relevant legislation cited in their respective submissions.

20. On 10 December 2003, the Secretariat wrote to the parties informing them of this decision.

21. At its 35th ordinary session held in Banjul, The Gambia from 21 May to 4 June 2004, the African Commission deferred its decision on admissibility to the 36th ordinary session due to lack of time.

22. On 17 June 2004, the Secretariat wrote to the parties informing them of this decision.

23. During its 36th ordinary session that took place from 23 November to 7 December 2004 in Dakar, Senegal, the African Commission considered the communication.

The law

Admissibility

24. In its initial complaint dated 4 October 2002, the complainant notes that it is mindful of the requirement of exhausting local remedies under article 56(5) of the African Charter. This rule is waived, however, where it is obvious that the procedure for exhausting domestic remedies is 'unduly prolonged' and further, the complainant holds, that the African Commission, in its jurisprudence, has cautioned against the mechanical application of the domestic remedies rule particularly in 'cases where it is impractical or undesirable for the complainant to seize the domestic courts in the case of each violation'.[1] The complainant also cited the African Commission's jurisprudence on the need to exhaust local remedies.[2] The complainant drew the Commission's attention to the fact that the government of Cameroon has had four decades during which it could have redressed these grievances within the framework of its domestic legal system. It further argues that the government instead was engaged in delaying tactics to avoid taking a principled position on the Bakweri land problem. It has known, for very long time, about the violations of Bakweri land rights and thus had 'ample opportunity' to reverse the situation consistent with its obligations under the Banjul Charter.

25. The complainant further argues that during this entire period, it petitioned the successive Cameroonian governments for restitution. It met with the various officials of the Republic, including the Prime Minister and the Assistant Secretary-General at the Presidency, but to no avail. The complainant holds thus that any further negotiations to seek domestic relief will merely prolong the resolution of the Bakweri land problem.

[1] *Free Legal Assistance Group and Others v Zaire* [(2000) AHRLR 74 (ACHPR 1995)] para 37.
[2] *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* [(2001) AHRLR 60 (ACHPR 2001)].

26. The complainant alleges that even if the exhaustion of domestic remedies rule is given its most restrictive meaning, requiring it to go through the courts of Cameroon would be futile. No judge in Cameroon will risk his/her career, not to mention his/her life, to handle this politically sensitive matter, as the matter implicates the crown jewel of a privatisation programme the government is determined to see through; pits the Bakweri people against a Prime Minister and head of government as well as an Assistant Secretary-General at the Presidency, both of whom are Bakweri but non-elected officials holding their offices at the pleasure of the President; and places the government in a face off with a politically-conscious minority tribe that has refused to stay quiet and watch its ancestral lands being sold to non-natives. The complainant claims that experience has shown that such is not the kind of politically-sensitive litigation that a judiciary firmly under the control of the President would like to handle and it is a contest in which the complainant is not going to receive a fair hearing.

27. The complainant concludes that, under the circumstances, asking the Bakweri to seek domestic relief will merely prolong the agony of the Bakweri in seeking a resolution to their land problem.

28. In its 4 February 2004 further written submissions on the admissibility of the complaint, the complainant contends that BLCC is the accredited agent of the Bakweri People on whose behalf it filed the present communication, that the complaint is not pending before any other international tribunal, that the allegations contained therein are backed by documentary evidence, and that there is no insulting language used. In elucidating further on article 56(5) of the African Charter, the complainant alleges that the thrust of the provision therein is to check whether an effective legal remedy exists in Cameroon of which the complainant could avail itself. The complainant alleges that no such remedy existed and that special circumstances excused it from compliance with the exhaustion requirement.

29. First, the complainant alleges that in Cameroon, the judiciary is neither free nor impartial with the result that justice tends to be dispensed in a discretionary manner thereby making recourse to domestic avenues of redress uncertain, impractical and undesirable. Second, the complainant alleges that the government of Cameroon has had ample time to resolve the Bakweri land claims problem but has failed to do so. Instead it has effectively blocked inferior decision-making organs from taking on the matter.

30. The complainant proceeded to argue that in deciding whether BLCC has made full use of the available legal remedies, attention ought to be focused on what in the Cameroon context passes for effective remedies. It alleges that the legal and political context in which justice is administered in Cameroon is one where the President wields extraordinary powers. It is a unified executive wherein the last word in domestic remedies, whether

of an administrative or legal nature, in the Cameroonian context is the President of the Republic. Presidential decisions carry a kind of *res judicata* on other state institutions and organs.

31. The complainant argues that Cameroon's judiciary lacks independence. To substantiate this, it cites the 1999 and 2001 human rights reports on Cameroon produced by the United States Department of State, and a newspaper report. Although the President is assisted by a Higher Judicial Council in the appointment of members of the bench and officials of the legal department, judicial officers serve at the President's pleasure. Besides, the Judicial Council is completely under the control of the President who appoints the majority of its members and presides over all its meetings.

32. The complainant avers that the supremacy of the Presidency and its dominance of the judiciary give rise to a peculiar form of *de facto* executive 'pre-emption' of decision making by subordinate state organs, regardless of whether there is an actual conflict between them or not. Presidential 'pre-emption' of decision-making at all levels and in all areas, judicial as well as non-judicial, operates in much the same way as an ouster clause which bars 'the ordinary courts from taking up cases placed before the special tribunals or from entertaining any appeals from the decisions of the special tribunals.'[3] The Bakweri case is not entirely dissimilar to *International Pen and Others v Nigeria* as the presidential 'pre-emption' ousts the jurisdiction of the ordinary courts thus depriving the complainant of effective domestic relief.

33. The complainant further reminds the Commission that the relief it is seeking is for the government to acknowledge in writing its legal title to the Bakweri lands, which can only come from the authority that issued the Privatisation Decree of 1994, which is non-other than the President of the Republic. The later can theoretically be ordered to do so by the courts. Yet, that would not be possible as the court system remains under the President's total control, whose judges are personally appointed, promoted or removed by him.

34. The complainant avers that in Cameroon, justice is exercised in a discretionary manner through a process of *de facto* ousting of the jurisdiction of the courts. Executive-controlled organs including ministers can and do make judicial decisions by-passing the courts. Besides, there is inordinate control in the dispensation of justice exercised by law officials, like the *Procureur de la République* [public prosecutor], who as an official of the [justice] department, can order law enforcement officers to either enforce a court judgment or ignore it. For this, the complainant cites the *procureur*'s discretionary action not to enforce a court judgment in the Camer-

[3] *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria* [(2000) AHRLR 212 (ACHPR 1998)] para 75.

oon Tea Estates (CTE) (which plants tea on disputed Bakweri lands) management dispute, where it was ordered that the Board of the CTE reinstate the general manager whom they dismissed. The complainant further alleges that there is also a discretionary exercise of power evident in the judiciary. This has implications on the requirement of exhaustion of domestic remedies by the complainant as the *procureur*'s refusal to enforce the decision in the management dispute foreshadowed the fate of the BLCC if a court were to exercise jurisdiction *in rem* over the disputed Bakweri lands, which also introduced uncertainty undermining confidence in the court system. The complainant draws the Commission's attention to its decision in the *Constitutional Rights Project (in respect of Akamu and Others) v Nigeria* [(2000) AHRLR 180 (ACHPR 1995)]. The issue in that communication was a provision in the Robbery and Firearms Act (Special Provisions) which conferred on the State Governor the power to confirm or disallow a conviction for violations of this law by a special tribunal. The African Commission held that the Governor's power was a' discretionary, extraordinary remedy of a non-judicial nature' and that '[i]t would be improper to insist on the complainants seeking remedies from sources which do not operate impartially and have no obligation to decide according to legal principles.'

35. In expounding further on its claim that the government of Cameroon had adequate notice and opportunity to remedy the violations, the complainant argues that more than nine years have passed since they referred the matter to the President of the Republic, following the privatisation decree of 1994 affecting the Bakweri lands. The President was also sent another memorandum from Bakweri landowners in 1999. The complainant argues that these were done in light of the primacy of the Presidency under the Republic's Constitution and the existent presidential pre-emption of decision-making at all levels. The government of Cameroon has been duly notified of this problem as the Bakweri lands problem has been around for several decades, nine years have passed since the government was seized of it, that in January 2003, a special envoy of the President met and assured the Bakweri chiefs that the government intended to 'provide a sustainable and durable solution' to the Bakweri lands problem, and that the government's own representatives before the UN Sub-Commission in February 2002 had expressed the government's readiness to resolve the problem amicably. The complainant argues that where the republic has been aware of the problem for at least nine years and that where the opportunity to redress the problem has been squandered due to unwarranted delay and slow state response, it should not be compelled to exhaust local remedies.

36. The complainant further avers that the remedies in Cameroon are inadequate and unduly prolonged and hence need not be exhausted. It, however, admits that although the matter never went to court but was referred to the President of the Republic for a political/administrative solution, the government's own conduct in the matter implicitly admitted the

impracticality or undesirability for complainant to seize the courts of Cameroon as demonstrated by the declaration made by the representatives of the government to the UN Sub-Commission to resolve the matter satisfactorily. Still, the complainant maintains that it tried to engage pressure authorities through various means but to no avail. The lack of progress, it holds, meant to suggest that remedies either do not exist or cannot be effective in the complainant's situation and in any event, their application is being increasingly prolonged.

37. The complainant also argues that remedies in Cameroon are unavailable and to the extent they exist ineffective. The continued classification of the Bakweri lands as state property afforded complainant no basis for legally challenging the government's acts or omissions that violate its ownership rights. Besides, the rule of exhaustion of remedies should not be invoked where it offers no possibility of success, which the government will not be able to prove. An insistence on the pursuit and exhaustion of domestic remedies will only prolong the application of the Bakweri people.

38. In its submission on admissibility, dated 31 January 2003, the respondent state requested the Commission to declare it inadmissible. It raised the following preliminary objections, that:

- The author of the communication does not show any proof that it is the victim of a violation of the Charter;
- The object of the communication is unclear as it interchangeably speaks about the violation of the 'right to own land in Cameroon', 'the dispossession of indigenous peoples of lands that they have historically owned and occupied', and 'the violation of the right of an indigenous ethnic minority in Cameroon to own land';
- The communication is improper as the author deliberately remains imprecise about the actual illicit act for which the State of Cameroon is blamed: privatisation or sale;
- The author did not exhaust local remedies as all the actions the BLCC took certainly do not correspond to remedies mentioned by the African Charter;
- The communication casts such suspicions and aspersions on the Cameroonian judicial system and hence could be considered insulting per article 56 of the Charter; and
- The UN Sub-Commission has already settled the case brought before the African Commission, *Mpaka-Nsusu v Zaire* [(2000) AHRLR 71 (ACHPR 1994)].

39. In its further submission of 5 May 2003, the respondent state avers that there is no provision under Cameroonian law that excludes any form of appeal against acts of the executive. It argues that 'it must not hastily be concluded that a state party to the convention has neglected to act in

compliance with its obligation to provide effective local remedies'.[4] The BLCC should not be allowed to transform the African Commission into a court of first instance. The rule of exhaustion of local remedies implies legal action brought before the courts and not just political actions. Since 1994, the BLCC has never taken any action against the State of Cameroon before the courts. Seizure of judicial bodies cannot be avoided on the basis of subjective suspicions or because of allegations that it is a politically charged case or a politically sensitive case.

40. In its 4 March and 22 August 2003 memorials, the complainant rebutted the preliminary objections raised by the respondent state.

41. At its 34th ordinary session held in Banjul, The Gambia from 6 to 20 November 2003, the African Commission granted audience to the parties to complement their respective written submissions orally.

42. In its oral submission, the complainant stated that since it has come forward with a *prima facie* case, the burden should shift to the respondent state to prove that domestic remedies are available, effective and adequate. There are no such remedies, including the Constitutional Council before which BLCC has no standing. BLCC has attempted to settle the matter amicably; yet, the respondent state was not willing and has resorted to harassment, and intimidation. BLCC has been sued and an injunction been issued against it declaring it an illegal body, to curtail it from representing the victims and to generally frustrate the efforts of the victims to exercise their rights under the African Charter. Should the matter be deferred to local procedures, the complainant requested an indication from the respondent state to where it may be directed.

43. The respondent state, in its turn, stated that BLCC has the right to bring its case before the competent bodies in Cameroon. The government respected its own institutions and that it would not accept arguments that its legal system is incompetent to receive or deal with any case from anyone, while it is evident that there are thousands of cases being entertained by its courts. The government respects the African Commission and hopes that it won't admit the present matter when no attempt has been made to seize its courts. The UN Sub-Commission has ruled that the petitioners need to seek local remedies. The Commission could open a floodgate by admitting the present communication despite the fact that no attempt was made to exhaust local remedies. The Commission should thus declare it inadmissible. BLCC should be directed to vindicate itself before local courts. Indeed BLCC is sued in the local courts, but it is not by the government but a private entity. But as an advice, all the BLCC had to do was to seek a declaratory judgment from the High Court to the effect that 'XYZ are the beneficiaries or residual title holders of the disputed land'.

[4] *Velasquez Rodriguez* case, Inter-American Court of Human Rights judgment of 29 July 1988, Inter-Am Ct HR (Ser C) 4 (1988).

44. The Commission has examined the respective written and oral submissions on admissibility of the parties and rules as follows.

45. To the respondent state's objection that the complainant does not have standing (*locus standi*), the complainant avers that the complainants (including the counsel representing them) are all Bakweri and hence victims of the violation. BLCC represents the Bakweri and has authority to speak for them as backed by a resolution adopted by the custodians of the Bakweri lands (resolution attached in the file).

46. The African Commission notes that the *locus standi* requirement is not restrictive so as to imply that only victims may seize the African Commission. In fact, all that article 56(1) demands is a disclosure of the identity of the author of the communication, irrespective of him/her being the actual victim of the alleged violation. This requirement is conveniently broad to allow submissions not only from aggrieved individuals but also from other individuals or organisations (like NGOs) that can author such complaints and seize the Commission of a human rights violation. The existence of direct interest (like being a victim) to bring the matter before the Commission is not a requirement under the African Charter. The clear rationale here for allowing a broad gateway for complaints under the Charter is the practical understanding, in Africa, that victims may face various difficulties impairing them from approaching the African Commission. That notwithstanding, in the present communication, the present complainants are themselves Bakweri, who allege violation of their ownership of historical lands, and that the counsel himself and the BLCC has been duly authorised, by a resolution of chiefs, to further the interests of the Bakweri, which fact has not been denied by the respondent state. The Commission adds that one may be represented, through express consent or by the self-initiative of the author who speaks for him/her, irrespective of the fact that it is known to the Commission that one is soundly capable of representing oneself. The Commission holds, thus, that the present complainant has *locus standi* and is entitled to bring this communication before the African Commission.

47. To the objection that the complainant failed to show a *prima facie* case (the respondent state alleging that the communication is unclear, interchangeably spoke of various matters, and is improper as it remained deliberately imprecise about the illicit acts), the complainant avers that it has provided precise allegations of facts supported by relevant documents. The Commission examined the original complaint and its supporting documents. Contrary to the respondent state's objections, it is evident in the file that the complainant is indeed clearly alleging the alienation of the Bakweri lands, which was triggered by the Presidential Decree 94/125 of 14 July 1994 where the government of Cameroon listed the Cameroon Development Corporation (CDC) which is situated on Bakweri lands. It has alleged that this development will in effect result in the alienation, to private purchasers, of approximately 400 square miles (104 000

hectares) of lands in the Fako division traditionally owned, occupied or used by the Bakweri. The complainant alleges that the transfer would extinguish the Bakweri (who are a particular ethnic group whose status is never any where disputed by the respondent state) title rights and interests in two-thirds of the minority group's total land area in violation of articles 7(1)(a), 14, 21, 22 of the African Charter. In deciding to be seized of this matter at its 32nd ordinary session held from 17 to 23 October 2002 in Banjul, The Gambia the African Commission had found this presentation/narration of violation of rights protected under the Charter to be sufficiently clear to be taken up by the Commission, and hence, finds the present objection of the respondent state untenable.

48. To the objection that the communication casts such suspicions and aspersions on the Cameroonian judicial system and hence could be considered insulting per article 56(3) of the African Charter, the African Commission finds that there is nothing in the various submissions of the complainant to warrant the invocation of article 56(3) of the African Charter so as to declare the complaint inadmissible on the grounds of its being written in disparaging or insulting language. The complainant can allege, among others, and as it did with a view to be exempted from exhausting local remedies, that the President of the Republic wielded extraordinary powers so as to influence the judiciary and that the judiciary is impartial and lacked independence. This would be nothing but a mere allegation depicting, as it perceives it, the complainants comprehension of the offices that it thought would not provide it with any remedies as the African Commission would demand. Whether the allegations are true is another matter. At best, the respondent state may, if it so wishes, employ other means to acquaint the African Commission that the situation is indeed otherwise. The African Commission notes, however, that such a rebuttal is not necessary for purposes of examination under article 56(3). Accordingly, thus, the African Commission finds the respondent state's objection per article 56(3) of the African Charter unsustainable.

49. To the objection that the UN Sub-Commission has settled the matter and hence the African Commission should not entertain the matter per article 56(7) of the African Charter, the complainant responded saying that the respondent state failed to distinguish complaints before the African Commission that are pending before another international tribunal from those where the tribunal was seized of the matter but declined to take action. It alleges that the African Commission has indeed addressed this distinction in *Njoku v Egypt* [(2000) AHRLR 83 (ACHPR 1997)] which the UN Sub-Commission had decided not to entertain. The African Commission had held that the rejection by the UN Sub-Commission 'does not boil down to a decision on the merits of the case and does not in any way indicate that the matter has been settled as envisaged under article 56(7)'.

50. Desirous of getting to the bottom of this issue in the present communication, the African Commission requested for the copy of the decision by

the UN Sub-Commission as relates to the Bakweri lands dispute from both parties. None of them, however, was able to furnish the Commission with a copy of the same. The complainant, however, had availed the African Commission a copy of a letter, dated 18 July 2002, from the Governor of the South West Province of Cameroon, on behalf of the Minister of External Relations, to the President of the BLCC on the 'Decision of the UN High Commission on Human Rights on Bakweri Claim', the relevant contents of which are summarized as follows (during its oral submissions at the 34th ordinary session, the respondent state has claimed that, not denying the fact, the Governor had no right to write such a letter):

> On matters of procedure, the Commission felt that the petitioners did not fully exploit local avenues available to solve the problem and the Cameroon judicial system was deemed competent to handle the petition. Concerning the content of the petition, the Commission commended the government's position on the issue and encouraged government's efforts in her continuous willingness to resolve once and for all, this matter of Bakweri Lands. Considering the above, the Commission considered itself incompetent to handle the matter, and therefore asked the matter to be closed.

51. The African Commission also heard the parties at its 34th ordinary session on this and other issues. Regarding the veracity of this particular claim on the decision of the UN Sub-Commission, both parties seemed to be on all fours that it was in fact so decided. Given that, thus, and although a copy of the said decision was not made available to the African Commission to examine, the Commission notes that the content of that letter adequately reflected the outcome of the complainant's petition to the UN Sub-Commission.

52. As alleged by the complainant, thus, the African Commission notes that the UN Sub-Commission did not decide on the merits of the case so as to warrant the discontinuance of the consideration of this matter by the African Commission as per article 56(7) of the African Charter. The principle behind the requirement under this provision of the African Charter is to desist from faulting member states twice for the same alleged violations of human rights. This is called the *ne bis in idem* rule (also known as the principle or prohibition of double jeopardy, deriving from criminal law) and ensures that, in this context, no state may be sued or condemned for the same alleged violation of human rights. In effect, this principle is tied up with the recognition of the fundamental *res judicata* status of judgments issued by international and regional tribunals and/or institutions such as the African Commission. (*Res judicata* is the principle that a final judgment of a competent court/tribunal is conclusive upon the parties in any subsequent litigation involving the same cause of action.)

53. The parties before the African Commission have not disputed the fact that they were the very same parties at loggerheads before the UN Sub-Commission disputing the same issues as before the African Commission. They both, however, admit that there has been no final judgment on the merits of their dispute by the UN Sub-Commission. The contents of the

excerpts of the letter reproduced above have not been contested either, thereby buttressing the fact that the matter was not conclusively dealt with by the UN Sub-Commission. This means that the provision of article 56(7) incorporating the principle of *ne bis in idem* does not apply in the present case as there has been no final settlement of the matter by the UN Sub-Commission. Therefore, the African Commission holds that the respondent state's allegation that the communication be declared inadmissible per the provision of article 56(7) is unmaintainable.

54. Finally, to the objection that the complainant did not exhaust local remedies as all the actions the BLCC took certainly do not correspond to remedies mentioned by the African Charter, the complainant claimed that local remedies in Cameroon were unavailable, ineffective and inadequate. Both in writing and orally before the African Commission, the complainant admitted that it has not exhausted local remedies. Besides, it claimed that the circumstances in Cameroon warrant that it be granted waiver of this requirement. It argued, among others, that:

- It has been trying to seek relief for the matter from the Cameroonian authorities, including from the President of the Republic, for over nine years, but to no avail;
- The judiciary is not independent;
- The government has had ample time and opportunity to resolve the matter but failed to do so;
- The executive and other organs can pre-empt the decisions of courts thereby rendering approach to the courts futile;
- To approach the courts under the present circumstances means merely prolong the agony of the Bakweri; etc.

55. The African Commission notes that the exhaustion of local remedies requirement under article 56(5) of the African Charter should be interpreted liberally so as not to close the door on those who have made at least a modest attempt to exhaust local remedies. Under this article, all the African Commission wishes to hear from the complainant is that it has approached either local or national judicial bodies.[5] As can be seen from the set of facts adduced before the African Commission by both parties in writing and orally, the complainant, not even once, has seized any local or national court. For this, it explained that the courts are not independent and are likely to decide in favour of the respondent state whose President has a say on their appointment. The African Commission, however, holds that the fact that the complainant strongly feels that it could not obtain justice from the local courts does not amount to saying that the case has been tried in Cameroonian courts. Besides, the complainants assertions are merely subjective assessments on which the African Commission can-

[5] *Cudjoe v Ghana* [(2000) AHRLR 127 (ACHPR 1999)].

not base itself in holding that there indeed lacks an effective remedy in Cameroon to resolve the matter.[6] The African Commission is of the view that it is the duty of the complainant to take all necessary steps to exhaust, or at least attempt the exhaustion of local remedies. It is not enough for the complainant to merely doubt the ability of the domestic remedies of the state to absolve it from pursuing the same.

56. The African Commission would be setting a dangerous precedent if it were to admit a case based on a complainant's apprehension about the perceived lack of independence of a country's domestic institutions, in this case the judiciary. The African Commission does not wish to take over the role of the domestic courts by being a first instance court of convenience when in fact local remedies remain to be approached.

For these reasons, the African Commission:

Declares the communication inadmissible.

[6] *Kenya Human Rights Commission v Kenya* [(2000) AHRLR 133 (ACHPR 1995)]; UN Human Rights Committee communication 192/85, *SHB v Canada*.

GUINEA

African Institute for Human Rights and Development (on behalf of Sierra Leonean refugees in Guinea) v Guinea

(2004) AHRLR 57 (ACHPR 2004)

Communication 249/2002, *African Institute for Human Rights and Development (on behalf of Sierra Leonean refugees in Guinea) v Republic of Guinea*
Decided at the 36th ordinary session, December 2004, 20th Activity Report
Rapporteurs: 31st-33rd sessions: Badawi; 34th-36th sessions: El-Hassan

Evidence (witnesses, 26, 43)
Admissibility (exhaustion of local remedies, not possible to return, 35; mass violations, 36)
Interpretation (international standards, 37, 38, 41, 42)
Refugees (massive violations, 67, 72-74)
Expulsion (mass expulsion, 69)

Summary of facts

1. It is alleged by the complainant that on 9 September 2000, Guinean President Lansana Conté proclaimed over the national radio that Sierra Leonean refugees in Guinea should be arrested, searched and confined to refugee camps. His speech incited soldiers and civilians alike to engage in mass discrimination against Sierra Leonean refugees in violation of article 2 of the African Charter.

2. The complainant alleged that the discrimination occasioned by President Conté speech manifested itself primarily in at least five ways.

3. First, widespread looting and extortion occurred in the wake of President Conté's speech. Guinean soldiers evicted Sierra Leoneans from their homes and refugee camps. The soldiers further looted the homes, confiscated food, personal property and money from refugees at checkpoints. They also extorted large sums of money from detained refugees. These items were never returned to the refugees.

4. Second, the speech motivated soldiers and civilians to rise up against Sierra Leonean refugees inside and outside of the refugee camps. The

resulting physical violence ranged from beatings, rapes, to shootings. Countless refugees died in these attacks, and many have scars as permanent reminders of their time in Guinea.

5. Third, after President Conté's speech, Guinean soldiers targeted Sierra Leonean refugees for arrest and detention without any just cause. Soldiers at checkpoints would inspect refugees for supposed rebel scars, calloused hands from carrying a gun, speaking Krio (the local language in Sierra Leone), or carrying a refugee card. However, the refugees had scars from tribal markings rather than the rebels and calloused hands from farming not carrying a gun. These false identifications were used to then detain refugees for hours and days for no other reason than being a' rebel' based upon being Sierra Leonean.

6. Fourth, the speech instigated widespread rape of Sierra Leonean women in Guinea. Furthermore, Guinean soldiers subjected men and women to humiliating strip searches. These searches were conducted sometimes several times a day and in front of large groups of people and on-looking soldiers.

7. Finally, Sierra Leonean refugees were forced to decide whether they were to be harassed, tortured and die in Guinea, or return to Sierra Leone in the midst of civil war where they would face an equally harsh fate. Thousands chose to flee back to their native Sierra Leone in response to the Guinean mistreatment. Furthermore, Guinean soldiers collected refugees, bussed them to Conakry seaport, and physically put them on the ferry forcing their return to Sierra Leone. The Guinean government was therefore not providing refuge and protection required by law, reported the complainant.

Complaint

8. The complainant alleges that articles 2, 4, 5, 12(5) and 14 of the African Charter on Human and Peoples' Rights have been violated.

Procedure

9. The communication dated 17 April 2002, was submitted by the Institute for Human Rights and Development in Africa on behalf of the Sierra Leonean refugees.

10. On 18 April 2002, a letter was sent to acknowledge receipt and inform the complainant that the communication would be scheduled for consideration at its 31st session.

11. At the 31st ordinary session held from 2 to 16 May 2002 in Pretoria, South Africa, the Commission decided to be seized of the case and requested the parties to submit their observations on the admissibility of the case.

12. On 29 May 2002, the Secretariat of the African Commission informed the parties of the decision of the African Commission.

13. On 24 June 2002, the complainant forwarded to the Secretariat of the African Commission its written submission on the admissibility of the case, a copy was sent to the respondent state by post on 16 August 2002.

14. By letters dated 28 November 2002, 17 January 2003 and 20 March 2003, the Secretariat wrote to the government requesting it to react to this complaint. Up to the holding of the 33rd ordinary session in Niamey, Niger, from 15 to 29 May 2003, the Secretariat had not received any feedback from the respondent state.

15. At the 33rd ordinary session the African Commission declared this communication admissible, and the parties were requested to forward their written submission on the merits.

16. On 18 June 2003, the Secretariat informed the parties of the above decision and requested them to transmit their brief on the merits to the Secretariat within a period of three months. The *note verbale* to the respondent state was hand delivered.

17. On 29 August 2003, the complainant forwarded its written submission on the merits of the case. On 22 September 2003, the Secretariat of the African Commission forwarded the written submission from the complainant to the respondent state.

18. On 9 October 2003, the Secretariat of the African Commission received a *note verbale* from the respondent state stating that they had not received the written submission from the complainant.

19. By *note verbale* dated 14 October 2003, the Secretariat of the African Commission forwarded once again the written submission from the complainant to the respondent state by DHL.

20. During its 34th ordinary session held in Banjul, The Gambia, from 6 to 20 November 2003, the African Commission heard the oral presentations on admissibility of the parties concerned and decided to postpone consideration on the merits of the case to its 35th ordinary session. By *note verbale* dated 4 December 2003, and by letter bearing the same date both parties were accordingly informed of the Commission's decision.

21. The Commission instructed the Secretariat to have the comments of the complainant translated into French and have the translation sent to the respondent state to enable it submit its written comments on the merits of the communication.

22. These submissions on the merits of the case submitted by the complainant were translated into French and sent to the respondent state by *note verbale* on 11 December 2003. The respondent state was also informed that the communication would be considered on the merits at the Commission's 35th ordinary session.

23. By *note verbale* dated 26 December 2003, the Secretariat received an acknowledgement from the respondent state to its *note verbale* of 11 December 2003 noting that the respondent state will forward its submission on admissibility within three months.

24. By *note verbale* dated 9 March 2004 the Secretariat reminded the respondent state to forward its submission on admissibility noting further that the communication will be considered at the 35th ordinary session to be held in Dakar, Senegal from 3 to 17 May 2004.

25. The respondent state sent its reaction as to the merits of the communication to the Secretariat of the Commission on 5 April 2004.

26. At the 35th ordinary session, the respondent state was not represented due to the change of the venue. At the 35th ordinary session, the Commission heard oral submissions from complainants and testimonies from witnesses on the merits of the communication.

27. By *note verbale* dated 18 June 2004 the Secretariat of the African Commission informed the state of its decision taken at the 35th ordinary session and by letter of the same date informed the complainant accordingly.

28. At its 36th ordinary session held from 23 November to 7 December 2004 in Dakar, Senegal, the African Commission considered this communication and decided to deliver its decision on the merits.

Law

Admissibility

29. The admissibility of communications brought pursuant to article 55 of the African Charter is governed by the condition stipulated in article 56 of the Charter. This article lays down seven conditions for admissibility.

30. The African Commission requires that all these conditions be fulfilled for a communication to be declared admissible. Regarding the present communication, the two parties do not dispute that article 56 sub-paragraphs 1, 2, 3, 4, 6 and 7 have been fulfilled, and the only article that is in dispute is article 56(5) of the African Charter.

31. Article 56(5) requires the exhaustion of local remedies as a condition of the presentation of a complaint before the Commission is premised on the principle that the respondent state must first have an opportunity to redress by its own means within the framework of its own domestic legal system, the wrong alleged to have been done to the individual.

32. Concerning the matter of exhausting local remedies, a principle endorsed by the African Charter as well as customary international law, the complainant argues that any attempt by Sierra Leonean refugees to seek local remedies would be futile for three reasons.

33. First, the persistent threat of further persecution from state officials has fostered an ongoing situation in which refugees are in constant danger of reprisals and punishment. When the authorities tasked with providing protection are the same individuals persecuting victims an atmosphere in which domestic remedies are available is compromised. Furthermore, according to the precedent set by the African Commission in *Jawara v The Gambia* [(2000) AHRLR 107 (ACHPR 2000)], the need to exhaust domestic remedies is not necessarily required if the complainant is in a life-threatening situation that makes domestic remedies unavailable.

34. Second, the impractical number of potential plaintiffs makes it difficult for domestic courts to provide an effective avenue of recourse. In September of 2000, Guinea hosted nearly 300 000 refugees from Sierra Leone. Given the mass scale of crimes committed against Sierra Leonean refugees — 5 000 detentions, mob violence by Guinean security forces, widespread looting — the domestic courts would be severely overburdened if even a slight majority of victims chose to pursue legal redress in Guinea. Consequently, the requirement to exhaust domestic remedies is impractical.

35. Finally, exhausting local remedies would require Sierra Leonean victims to return to Guinea, the country in which they suffered persecution, a situation that is both impractical and unadvisable. According to precedent set by the Commission in *Rencontre Africaine pour la Défense des Droits de l'Homme v Zambia* [(2000) AHRLR 321 (ACHPR 1996)], victims of persecution are not necessarily required to return to the place where they suffered persecution to exhaust local remedies.

36. In this present case, Sierra Leonean refugees forced to flee Guinea after suffering harassment, eviction, looting, extortion, arbitrary arrests, unjustified detentions, beatings and rapes. Would it be required to return to the same country in which they suffered persecution? Consequently, the requirement to exhaust local remedies is inapplicable. For these reasons, the communication is declared admissible.

Merits

37. In interpreting and applying the African Charter, the African Commission relies on its jurisprudence and, as provided by articles 60 and 61 of the African Charter, on appropriate and relevant international and regional human rights instruments, principles and standards.

38. The African Commission is therefore amenable to legal arguments that are supported by appropriate and relevant international and regional human rights principles, norms and standards.

39. The petitioners have enclosed several affidavits from Sierra Leonean refugees who suffered widespread human rights abuses including harassment, evictions, looting, extortion, arbitrary arrests, beatings, rapes and killings while seeking refuge in the Republic of Guinea.

40. These accounts are based on interviews obtained from collaboration between the Institute for Human Rights and Development in Africa and Campaign for Good Governance, a Sierra Leonean NGO. Lawyers from both organisations interviewed and recorded statements from refugees who had returned to Sierra Leone from Guinea. For the most part, the depiction of events is substantiated by reports from Human Rights Watch and Amnesty International who have documented the situation of Sierra Leonean refugees in Guinea during the period in question.

41. The Republic of Guinea has ratified several regional and international human rights instruments which include the African Charter, the OAU Convention on the Specific Aspects of Refugee Problems in Africa, the International Covenant on Civil and Political Rights, the UN Convention Against Torture, and the 1951 UN Convention on the Status of Refugees, together with its 1967 Optional Protocol.

42. While the efforts of the Guinean authorities to host refugees are commendable, the allegations that the government instigated and directly discriminated against Sierra Leonean refugees present a picture of serious human rights abuses which contravene the African Charter and the other international human rights instruments to which Guinea is a party.

43. The statements made under oath by several refugees indicate that their refugee camps were direct targets and taken together with accounts of numerous other abuses, constitute tangible evidence that the Sierra Leonean refugees in this situation had been targeted on the basis of their nationality and had been forced to return to Sierra Leone where their lives and liberty were under threat from the on-going war.

44. In view of the circumstances, the complainant alleges that the situation which prevailed in Guinea in September 2000 manifestly violates article 12(5) of the African Charter which sets forth that: 'The mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which targets national, racial, ethnic or religious groups.'

45. Among the articles and other legal instruments to which the respondent state is a party and by which it is bound to protect all persons against discrimination can be noted: article 4 of the OAU Convention on the Specific Aspects of Refugees, article 26 of the International Covenant on Civil and Political Rights and article 3 of the 1951 United Nations Convention on the Status of Refugees.

46. The complainants allege that in his speech of 9 September 2000, delivered on radio in *Susu* language, President Conté incited soldiers and civilians to engage in large scale discriminatory acts against Sierra Leonean refugees, the consequences of which had been that these persons were the direct victims of harassment, deportations, looting, stealing, beatings, rapes, arbitrary arrests and assassinations. It is further alleged that the President made no effort to distinguish between refugees and rebels and that the government is therefore directly responsible for the

violation of this fundamental precept of international law: non-discrimination.

47. The complainants also allege that the respondent state violated the principle of non-refoulement under which no person should be returned by force to his home country where his liberty and life would be under threat.

48. The complainants contend that President Conté's speech not only made thousands of Sierra Leonean refugees flee Guinea and return to the dangers posed by the civil war, but it also clearly authorised the return by force of Sierra Leonean refugees. Thus, the voluntary return of refugees to Sierra Leone under these circumstances cannot be considered as voluntary but rather as a dangerous option available for the refugees.

49. The respondent state alleges that on the 1 September 2000, the Republic of Guinea was victim of armed aggression perpetrated by elements from Liberia and Sierra Leone. These surprise attacks which were carried out simultaneously at its south and south-eastern borders resulted in the fleeing *en masse*, of the populations from these zones.

50. Matching reports which came from all fronts to the respondent state denounced persons who had lived for a long time in Guinea as refugees, and who had turned out to be, where they did not figure among those who had attacked Guinea, at least as accomplices of the attackers.

51. The President of the Republic, by virtue of the powers granted him under the Constitution, jumped to it by taking the measures necessary for safeguarding the nation's territorial integrity. In the process he recommended that all refugees be quartered and that Guineans scatter in all districts in order to unmask the attackers who had infiltrated the populations.

52. The respondent state emphasises that such measures are in conformity with the provisions of article 9 of the 1951 UN Convention on the Status of Refugees and article 41 of the [Constitution] of Guinea which provides that: 'the President of the Republic is the guarantor/custodian of the independence of the nation and of territorial integrity. He is responsible for national defence . . .'.

53. The respondent state intimates that for the majority of the refugees the statement by the Head of State had been beneficial since the refugees had been registered, given supplies and placed in secured areas.

54. The state underscored the fact that at the time of the events there were not only Sierra Leonean refugees in Guinea but also Liberians and Guinea-Bissau nationals. Guinea therefore had no interest in targeting Sierra Leonean refugees since it was public knowledge that all the attacks against the country had been directed from Liberia.

55. The respondent state points out that there is no violation of the right

to non-discrimination, since the speech referred to never mentioned specifically Sierra Leonean refugees. The respondent state recalled that during the 34th ordinary session the complainant had been requested to produce a transcript of the entire statement, which had not been done, whereas it is the responsibility of the complainant to provide evidence.

56. The complainants allege that almost immediately after the broadcast of President Conté's speech, the Guinean authorities and civilians started to harass the Sierra Leonean refugees and to carry out large scale looting, expulsions and robbery of assets.

57. The complainants contend that the rapes and physical searches carried out by the Guinean authorities to establish a kind of discrimination against Sierra Leonean refugees constitute some form of inhuman treatment, thereby violating the dignity of the refugees.

58. The complainants allege that the President's speech had given rise to widespread sexual violence largely against the Sierra Leonean women in Guinea with the Guinean soldiers using rape as a weapon to discriminate against the refugees and to punish them for being so-called rebels. The communication contains detailed reports of the raping of women of various ages in the prisons, in houses, control posts and refugee camps.

59. The complainants contend that the violence described in the statements made under oath was undeniably coercive, especially since the soldiers and the civilians used arms to intimidate and threaten the women before and during the forced sexual relations.

60. The complainant reports large scale acts of violence carried out by the soldiers, police and Guinean civilian protection groups against the thousands of Sierra Leonean refugees in the camps and in the capital, Conakry. Different cases are mentioned, namely SB who is said to have been seriously injured, his hip dislocated and his knees broken with a gun in the Gueckedou camp. SY talks about soldiers who had shot her in the leg; she reports having been witness to a scene where soldiers were cutting off the ears of Sierra Leoneans with bayonets. LC recounts that Guinean soldiers had been shooting at random at the Sierra Leone embassy on a group of Sierra Leoneans who had been waiting to be repatriated and that a large number of these refugees had been killed; he mentioned having also been witness at a scene where soldiers in trucks were shooting at Sierra Leoneans who were boarding the ferry to be repatriated: several of them fell into the water and were drowned.

61. The respondent state, in a critical appraisal of these testimonies as reported, not only made comments but also raised some questions. With regard to isolated cases like those of SB, MF and SY, the issues alluded to remain to be proved, declared the respondent state, since they constitute a simple gathering of evidence. Concerning SY's testimony, who contends that she saw Guinean soldiers cutting off the ears of Sierra Leoneans with bayonets, it has to be pointed out that if such practices have

been noted in certain countries, they do not figure among the habits of the Guinean army.

62. The complainants allege that the Guinean soldiers also subjected the Sierra Leonean men and women to humiliating physical searches. These searches were frequently carried out, sometimes in the presence of a group of soldiers and curious onlookers, which constituted a serious insult to their dignity.

63. The respondent state disputes the testimony of LC who recounts that in front of the Sierra Leone embassy building Guinean soldiers were shooting at random at a group of Sierra Leoneans who were waiting to be repatriated.

64. The respondent state recalls that the Republic of Guinea and the Republic of Sierra Leone have always enjoyed relations of fraternity and good neighbourliness. This is evidenced by the fact that the government of Sierra Leone has never complained to the government of Guinea about any such situation. To say that Sierra Leonean refugees have been shot at by Guinean soldiers is more fiction than reality.

65. Considering all the accusations thus described by the complainant, the respondent state wonders if it is only Sierra Leonean refugees who live on Guinean soil. The respondent state alleges that some hundreds of thousands of Liberian refugees also live in Guinea and enjoy the same privileges and protection as do the Sierra Leoneans. It requested the complainant to provide evidence with regard to the number of persons killed or injured and to indicate where or to which hospital they had been taken during the so called shooting incident by the Guinean soldiers of Sierra Leonean refugees.

66. The respondent state recognises that if these testimonies as reported by the complainant are proved they can only give rise to emotion and reprobation. But it insists that evidence must be produced and it is the responsibility of the complainant to produce all the required evidence on the cases reported. The respondent state points out that if these accounts have a basis the necessary investigations will be carried out and those responsible will be punished for their crimes.

67. The African Commission is aware that African countries generally and the Republic of Guinea in particular, face a lot of challenges when it comes to hosting refugees from neighbouring war torn countries. In such circumstances some of these countries often resort to extreme measures to protect their citizens. However, such measures should not be taken to the detriment of the enjoyment of human rights.

68. When countries ratify or sign international instruments, they do so willingly and in total cognisance of their obligation to apply the provisions of these instruments. Consequently, the Republic of Guinea has assumed

the obligation of protecting human rights, notably the rights of all those refugees who seek protection in Guinea.

69. In *Rencontre Africaine pour la Défense des Droits de l'Homme v Zambia* [(2000) AHRLR 321 (ACHPR 1996)], the African Commission pointed out that 'the drafters of the Charter believed that mass expulsion presented a special threat to human rights'. In consequence, the action of a state targeting specific national, racial, ethnic or religious groups is generally qualified as discriminatory in this sense as it has no legal basis.

70. The African Commission notes that Guinea is host to the second largest refugee population in Africa with just under half a million refugees from neighbouring Sierra Leone and Liberia. It is in recognition of this role that Guinea was selected to host the 30th anniversary celebrations of the 1969 OAU Convention on the Specific Aspects of Refugee Problems in Africa, which was held in Conakry, Guinea in March 2000.

71. The African Commission appreciates the legitimate concern of the Guinean government in view of the threats to its national security posed by the attacks from Sierra Leone and Liberia with a flow of rebels and arms across the borders.

72. As such, the government of Guinea is entitled to prosecute persons that they believe pose a security threat to the state. However, the massive violations of the human rights of refugees as are outlined in this communication constitute a flagrant violation of the provisions of the African Charter.

73. Although the African Commission was not provided with a transcript of the speech of the President, submissions before the Commission led it to believe that the evidence and testimonies of eye witnesses reveal that these events took place immediately after the speech of the President of the Republic of Guinea on 9 September 2000.

74. The African Commission finds that the situation prevailing in Guinea during the period under consideration led to certain human rights violations.

For the above reasons, the African Commission:

- Finds the Republic of Guinea in violation of articles 2, 4, 5, 12(5) and 14 of the African Charter and article 4 of the OAU Convention Governing the Specific Aspects of Refugees in Africa of 1969.
- Recommends that a Joint Commission of the Sierra Leonean and the Guinean governments be established to assess the losses by various victims with a view to compensate the victims.

KENYA

B v Kenya

(2004) AHRLR *67* (ACHPR 2004)

Communication 283/2003, *B v Kenya*
Decided at the 35th ordinary session, June 2004, 17th Annual Activity Report
Rapporteur: Nyanduga

Interim measures (request for, 11)
Withdrawal (18, 21, 33)

Summary of facts

1. The communication is submitted by a complainant who requests anonymity and presents the facts of the case as follows:

2. The complainant alleges that on 30 September 2003, the Anti-Corruption Committee presented a report on corruption in the judiciary to the Chief Justice of Kenya in the presence of the press. The report, also known as the Ringera report, reveals shocking and endemic corruption in the judiciary and further lists the names of the judges alleged to have been involved in corrupt and unethical practices in the course of performing their duties.

3. On 4 October 2003, during a press conference, the Chief Justice without naming the judges is alleged to have given the said judges a two-week ultimatum to resign or face trial. Two days later, the Constitutional Affairs Assistant Minister is reported to have reiterated the deadline issued by the Chief Justice and warned that judges who ignore the deadline would face tribunals and prosecution for crimes committed.

4. The complainant states that the Kenya Magistrates and Judges Association was quoted in the press as saying 'we urge the judicial administration to inform those affected so that they can decide on their next course of action not forgetting the need for confidentiality'. However, the complainant claims that over the following several days, none of the judges named in the report were informed of their presence on the list, nor of the allegations leveled against them.

5. The complainant avers that on 14 October 2003 it was reported through a six o'clock news broadcast that the President had appointed two tribunals to investigate the 23 judges whose names were announced

during the broadcast as well as their suspension. The complainant asserts that this is the first time that the judges learnt of their presence on the list and of their immediate suspension. The announcement however did not contain details of the allegations made against each Judge. It is however reported in the *Daily Nation* newspaper on 18 October 2003 that the police would question some of the judges before they appear before the tribunals and it is only during those interrogations they will be informed of the accusations against them and their statements taken.

6. The complainant alleges that as of 17 October 2003, the judges had still not received details of the allegations made against them despite continued press coverage of the matter. Although maintaining their innocence, some of the named judges tendered their resignations or sought retirement.

7. The complainant further submits that the chair of the Law Society of Kenya on 18 October 2003 announced through the press that the Society would in two weeks' time release its report containing a list of judges other than those named in the Ringera report.

8. The complainant on the whole submits that failure to advise the judges mentioned in the Ringera report of the allegations against them and to give them an opportunity to accept or dispute the allegations coupled with varied threats and warnings amounts to harassment and hounding of judges thereby undermining the principles of security of tenure and the independence of the judiciary.

9. Furthermore, the complainant claims that the manner in which the whole matter was dealt with violates articles 7 and 26 of the African Charter as well as other international human rights instruments namely the UN Basic Principles on the Independence of the Judiciary, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights

Complaint

10. The complainant alleges a violation of articles 7 and 26 of the African Charter on Human and Peoples' Rights.

Procedure

11. The communication was faxed and received at the Secretariat of the African Commission on 21 October 2003. The complainant also requested the African Commission to take provisional measures under rule 111 of the Rules of the African Commission to ensure that the process of removal of judges does not interfere with independence of the judiciary and the right to a fair hearing.

12. The Secretariat of the African Commission on 24 October 2003 forwarded a copy of the communication as well as a draft appeal letter to the

chair of the African Commission and requested him to take necessary action.

13. By email dated 28 October 2003, the chair of the African Commission wrote advising the Secretariat that since the matter would be handled as a communication at the African Commission's forthcoming 34th session, an appeal letter should not be sent to the government of Kenya until after the African Commission had examined the matter and determined what course of action to take.

14. On 31 October 2003, the Secretariat of the African Commission wrote to the complainant acknowledging receipt of the communication.

15. At its 34th ordinary session held from 6 to 20 November 2003 in Banjul, The Gambia, the African Commission examined the communication and decided to be seized of the matter.

16. On 4 December 2003, the parties to the communication were informed accordingly and requested to forward their written submissions on admissibility of the communication within three months.

17. On 15 March 2004, the parties to the communication were reminded to forward their written submissions on admissibility to the Secretariat.

18. By email dated 16 March 2004, the Secretariat received a letter from the complainant withdrawing the matter as she believed that the matter was now being addressed by the respondent state.

19. On 25 March 2004, the Secretariat received the respondent state's submissions on admissibility and acknowledged receipt of the same on 26 March 2004.

20. By letter dated 26 March 2004, the Secretariat acknowledged receipt of the complainant's letter withdrawing the communication and also forwarded a copy of the respondent state's submissions on admissibility.

21. At its 35th ordinary session held in Banjul, The Gambia, the African Commission considered this communication and decided to close the file.

Respondent state's submissions on admissibility

22. The respondent state provides a background against which it undertook the judicial reforms which have in part given rise to this communication. They argue that a well functioning judicial system is crucial to improving governance, combating corruption and consolidating the democratic order, thereby fostering economically sustainable development. Therefore, a judicial system with integrity should be free from political and external interference. Furthermore, judicial independence must be balanced by accountability in order to facilitate transparency within the system and control of corruption.

23. It is submitted by the respondent state that the tendency towards

corruption and abuse of power among certain members of the judiciary in Kenya has been lamented over time. As such, one of the key objectives of the Kenyan government has been to undertake judicial reform in order to develop an impartial, independent, accountable and effective judiciary that is able to improve governance and advance development in the country.

24. The respondent state contends that the communication does not meet the requirements in article 56(2), (4) and (5) of the African Charter.

25. It is submitted that the communication is substantially based on newspaper reports and is therefore not founded on factual realities of the case contrary to article 56(4) of the African Charter.

26. The respondent state further submits that the complainant did not even attempt to exhaust local remedies in their case as required by article 56(5) of the African Charter. In this regard, the respondent state argues that the national legal framework in Kenya is adequate to address the concerns raised by the complainant and should have therefore been utilised. For instance, the concerns raised by the complainant could have been addressed through, the constitutional provisions or national statutes like the Public Officer Ethics Act 2003 or the Anti Corruption and Economic Crimes Act 2003. Furthermore, local judicial action and remedy is available to the judges, should any of the procedures adopted be deemed illegal or in any case *ultra vires.*

27. The respondent state reports that the judges are not on trial as understood but that special investigative tribunals were set up to determine issues touching upon the behaviour and ability of the judges implicated to perform the functions of their office. A total of 23 judges from both the Court of Appeal and High Court of Kenya were involved and were investigated within 14 days of the presentation of the Ringera report. The tribunals started sitting on 9 and 16 February 2004.

28. Confidentiality was assured for the affected judges in the initial stages and at all crucial times. Only broad categories of alleged offences were highlighted in the media. The respondent state argues that it was therefore possible for a judge to privately and conscientiously place him/herself into any of the categories and make a personal decision to resign or appear before the tribunals. Consequently, majority of the judges mentioned opted for early retirement with full benefits as a result.

29. In any case, the respondent state argues, that the judges had the option within the laws to challenge the process before the High Court should they be aggrieved by it but none of the said judges opted for the judicial remedy.

30. The respondent state maintains that the domestic legislation of Kenya is in consonance with both the letter and spirit of international law includ-

ing the UN Basic Principles on the Independence of the Judiciary and asks the African Commission to declare the communication inadmissible.

Reasons given by the complainant for withdrawing the communication

31. The complainant wrote to inform the African Commission that they received information that the Registrar and Chief Justice did not authorise the leaking of the names of the implicated judges to the press and that this particular matter was now being investigated by the judiciary. Furthermore, the issue of a fair trial in light of the publicity created prior to the suspension of the judges had been raised before the tribunals and that the matter was being handled and could end up with the constitutional courts of Kenya.

32. It is for this reason that the complainant wishes to withdraw the communication.

33. The African Commission takes note of the withdrawal of the communication by the complainant.

For these reasons, the African Commission:

Decides to close the file.

* * *

Kenyan Section of the International Commission of Jurists and Others v Kenya

(2004) AHRLR 71 (ACHPR 2004)

Communication 263/02, *Kenyan Section of the International Commission of Jurists, Law Society of Kenya, Kituo Cha Sheria v Kenya*
Decided at the 36th ordinary session, December 2004, not yet reported in an official Activity Report (see editorial)
Rapporteur: Chigovera

Admissibility (exhaustion of local remedies, 41-44)

Summary of facts

1. The complainants are the Kenya Section of the International Commission of Jurists (first complainant), Law Society of Kenya (second complainant) and Kituo Cha Sheria (third complainant), all based in the Republic of Kenya.

2. The complaint was received at the Secretariat of the Commission on 18 October 2002 and is against the Republic of Kenya a state party to the African Charter on Human and Peoples' Rights (the African Charter) since 1991.

3. According to the complainants, the Constitution of Kenya Review Act Chapter 3A of the Laws of Kenya (the Review Act) sets up the Constitution Review Commission (CKRC) to facilitate the comprehensive review of the Constitution by the people of Kenya and for connected purpose.

4. Pursuant to the provisions of the Constitution of Kenya Review Act and in exercise of the rights conferred upon it by section 79 of the Constitution of Kenya and article 9(2) of the African Charter, the first complainant submitted a written memorandum on the judiciary and human rights in Kenya to the CKRC.

5. The first complainant also facilitated an examination of the Kenya judiciary by a panel of eminent jurists drawn from the Commonwealth, which in turn presented its views in a form of a written memorandum to the CKRC. Among other things, the written memorandum highlighted the fact that from the programme of consultation, the advisory panel concluded that as constituted, the Kenyan judicial system suffered from a serious lack of public confidence and was generally perceived as being in need of fundamental structural reform.

6. The second and third complainants submitted written memoranda pursuant to their mandate and in exercise of rights conferred upon them by section 79 of the Constitution of Kenya and article 9(2) of the African Charter. In the memoranda, presentations were also made on how the Kenyan judicial system could be improved.

7. In September 2002, the CKRC published a draft report of its work, which collated the views submitted by Kenyans in terms of the Review Act. In so far as the legal system was concerned, the CKRC reported, among other things, that many Kenyans submitted that they had lost confidence in the judiciary as a result of corruption, incompetence and lack of independence. To this end, the CKRC recommended the inclusion of several basic principles of a fair and acceptable judicial system into the draft Constitution.

8. After the publication of the report, Justice Moijo Ole Keiwua, a Judge of the Court of Appeal of Kenya and Justice Vitalis Juma, a Judge of the High Court, jointly sought leave before the High Court of Kenya to file judicial review proceedings against the CKRC and its chairperson, Professor Yash Pal Ghai.

9. Amongst other things, the judicial review proceedings sought an order of certiorari for the quashing of the decision and/or proposals actual or intended and/or recommendations of the CKRC and Professor Ghai con-

cerning and touching on the Kenyan judiciary contained in the CKRC report.

10. On 26 September 2002, Justice Andrew Hayanga, Judge of the High Court issued an order granting leave of court to file a judicial review. The complainants allege that the effect of this order was that in terms of order 53 of the Civil Procedure Rules of Kenya it doubled as a staying order on further proceedings subject to the review application.

11. Subsequent to this ruling, the complainants allege that the High Court barred the CKRC, its chairperson and a national forum yet to be constituted known as the National Constitutional Conference from discussing or making any suggestions in relation to any provisions touching upon the judiciary.

12. On 30 September 2002 the CKRC published its Bill of the Constitution of Kenya in terms of the Review Act and further issued a notice that the National Constitutional Conference would be held in early November 2002.

13. The complainants allege that the existence of the suit by the judges and the staying orders granted by the High Court of Kenya pose an effective and immediate threat to the denial of a new constitutional review process which will result in the denial of a new Constitution that protects all human rights to which all Kenyans are entitled under the African Charter and these rights have been proposed to be guaranteed in the new Constitution of Kenya.

14. The complainants allege that the following articles of the African Charter have been violated: articles 1, 7(1)(a) and 9(2).

Procedure

15. The communication was sent by DHL and was received at the Secretariat of the African Commission on 18 October 2002.

16. At its 33rd ordinary session, the African Commission considered the communication and decided to postpone its decision on seizure pending receipt of the following information from the complainants:

- Status of the work of the Constitution of Kenya Review Commission (CKRC) bearing in mind the major developments that had taken place in relation to constitutional review process in Kenya;
- Whether or not the complainants cannot challenge the staying orders granted by the High Court before a court of superior jurisdiction in Kenya because from the facts presented on the file, it is evident that the matter is still before the High Court of Kenya.

17. On 29 August 2003, a letter was sent to the complainants reminding them to provide the information requested for by the African Commission.

18. On 4 November 2003, the complainants transmitted a written response to the additional information requested for by the African Commission.

19. During the 34th ordinary session held from 6 to 20 November 2003 in Banjul, The Gambia, the complainants made oral submissions urging the African Commission to be seized with the matter. The African Commission considered the complaint and decided to be seized thereof.

20. On 4 December 2003, the Secretariat wrote informing the parties to the communication that the African Commission had been seized with the matter and requested them to forward their submissions on admissibility within three months.

21. By letter and *note verbale* dated 15 March 2004, the parties to the communication were reminded to forward their written submission on admissibility of the communication.

22. On 25 March 2004, the Secretariat of the African Commission received the respondent state's written submissions on admissibility.

23. By *note verbale* dated 26 March 2004, the Secretariat of the African Commission acknowledged receipt of the respondent state's submissions on admissibility and forwarded the same to the complainant by fax.

24. On 2 April 2004, the Secretariat of the African Commission received the complainants' written submissions on admissibility.

25. By letter dated 6 April 2004, the Secretariat of the African Commission acknowledged receipt of the complainants' submissions on admissibility and forwarded a copy of the same by DHL to the respondent state.

26. At its 35th ordinary session held in Banjul, the Gambia from 21 May to 4 June 2004, the African Commission decided to defer further consideration on admissibility of the matter to its 36th ordinary session because the complainant undertook to provide the African Commission with information in respect of miscellaneous case 1110 of 2002 — *Justice Ole Keiwua and Justice Vitalis Juma v Prof Yash Pal Ghai and two others* which was heard in the High Court of Kenya.

27. By *note verbale* dated 15 June 2004 addressed to the responding state and by letter carrying the same date addressed to the complainant, both parties were informed of the African Commission's decision.

28. By letter dated 23 September 2004, the complainant was reminded to submit the information they undertook to submit during the 35th ordinary session of the African Commission.

29. At its 36th ordinary session held from 23 November to 7 December in Dakar, Senegal, the African Commission considered the communication and declared it inadmissible.

Law

Admissibility

30. The African Commission was seized with the present communication at its 34th ordinary session which was held in Banjul, The Gambia from 6 to 20 November 2003. Both the respondent state and the complainants have presented their written arguments on admissibility of the communication.

31. Article 56 of the African Charter governs admissibility of communications brought before the African Commission in accordance with article 55 of the African Charter.

32. The respondent state contends that the requirements of article 56(5) have not been met by the complainants. Article 56(5) of the African Charter provides: 'Communications . . . received by the Commission, shall be considered if they are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged'. The rule requiring exhaustion of local remedies has been applied by international adjudicating bodies and is premised on the principle that the respondent state must first have an opportunity to redress by its own means and within the framework of its own domestic legal system, the wrong alleged to have been done to the individual.

33. The complainants submit that the circumstances that gave rise to this communication are peculiar. It is based on a suit that was instituted by a Judge of the High Court and a Judge of the Court of Appeal with the aim of defeating the rights of Kenyan citizens to contribute to the constitution making process in the country.

34. Therefore, the complainants claim that exhausting local remedies in this case would be impossible and inordinately convoluted because the judiciary is compromised and severely lacking in independence. Furthermore, the complainants argue that the said judges who instituted the matter are arguably representative of all the members of the judiciary and as such it would be virtually impossible to obtain a fair hearing from the same judiciary.

35. In applying the rule of exhausting domestic remedies, the African Commission often requires the complainant to provide information on attempts made to exhaust local remedies.[1]

36. While considering the file for seizure at its 33rd ordinary session, the African Commission realised that the complainants were bringing a matter that was evidently still before the High Court of Kenya. Consequently, the African Commission deferred being seized with the communication and sought clarification on developments that had taken place with respect to the whole constitutional review process upon which some aspects of this

[1] *Dumbuya v The Gambia* [(2000) AHRLR 103 (ACHPR 1995)].

communication was based. In addition, the African Commission sought information from the complainants as to whether or not they could not challenge the staying orders that had been granted by the High Court before a court of superior jurisdiction in Kenya.

37. In their response to the clarifications sought by the African Commission, the complainants argued that it would not be possible for them to be admitted as interested parties in the suit without leave of court. They stated that leave is granted at the discretion of the judge and under the circumstances they were apprehensive that leave would not be granted. Furthermore, they argued that they could not practically enforce any right of appeal against orders obtained in a suit in which the primary respondent/appellant had boycotted the court's jurisdiction; And even if the primary respondents had defended the suit, the complainants submitted that the likelihood of enforcing their rights as interested parties at Appeal Court would have been unsuccessful because the Court of Appeal through Justice Moijo ole Keiwua was itself a party to a suit in the nature of a class action.

38. The complainants argued further that the principle that they want the African Commission to settle is whether judges can hear matters that actually affect them.

39. In their subsequent submissions on admissibility the complainants informed the African Commission that indeed they went ahead together with other members of the civil society in Kenya to make an application moving court as 'ordinary citizens and taxpayers' to join them as interested parties in the suit against the CKRC and the Chair of the CKRC. Their 'application' to be joined as interested parties in the judicial review application was allowed.

40. Quite evidently from the situation described above, the complainants eventually approached the courts even though they believed that no member of the judiciary in Kenya would make a decision against the interests of their fellow two judges. However, such concerns should have been eliminated when the judges actually granted the application in their favour.

41. The African Commission is of the view that it is incumbent on the complainant to take all necessary steps to exhaust, or at least attempt the exhaustion of local remedies. It is not enough for the complainant to cast aspersion on the ability of the domestic remedies of the state due to isolated incidences. In this regard, the African Commission would like to refer to the decision of the Human Rights Committee in *A v Australia*[2] in which the Committee held that 'mere doubts about the

[2] Communication 560/1993, UN Doc CCPR/C/59/D/560/1993 (1997).

effectiveness of local remedies or the prospect of financial costs involved did not absolve an author from pursuing such remedies'.[3]

42. The African Commission would be setting a dangerous precedent if it were to admit a case based on a complainant's apprehension about the perceived lack of independence of a country's domestic institutions, in this case the judiciary. More so, where, as in this case, the complainants have not adduced ample evidence to demonstrate the validity of their apprehensions. Furthermore, the complainants have not even tested the principle that they wish the African Commission to settle before the domestic courts; and by so doing they are in essence asking the African Commission to take over the role of the domestic courts, a role which clearly does not belong to the African Commission as a treaty body.[4]

43. The respondent state has argued that the issues in the communication have been overtaken by events. Both justices Moijo ole Keiwua and Vitalis Juma are currently on suspension and are under investigation by a tribunal. They have also indicated that the application brought by justices Moijo ole Keiwua and Vitalis Juma against the Chair of the CKRC and the CKRC is for all intents and purposes dead because none of the parties have pursued it.

44. The African Commission has also been made aware that the respondent state has set up special investigative tribunals to investigate those members of the judiciary that have been implicated as having acted unethically in the performance of their functions. Presented with such information, the African Commission is of the view that the situation as it is now allows the complainants to approach the domestic courts in Kenya without any apprehension that there will be an unfair adjudication in the matter.

45. Therefore, since the complainants now have *locus standi* in the judicial review proceedings, they should exhaust the local remedies available and also seize this opportunity to challenge the court orders that were issued by the High Court before a superior court of jurisdiction in Kenya.

For these reasons, the African Commission:

Declares this communication inadmissible for non-exhaustion of local remedies.

[3] See also *Lúdvik Emil Kaaber v Iceland*, communication 674/1995. UN Doc CCPR/C/58/D/674/1995 (1996). See also *Ati Antoine Randolph v Togo*, communication 910/2000, UN Doc CCPR/C/79/D/910/2000 (2003).

[4] Communication 211/98, *Legal Resources Foundation v Zambia* [(2001) AHRLR 84 (ACHPR 2001)].

MAURITANIA

Rabah v Mauritania

(2004) AHRLR 78 (ACHPR 2004)

Communication 197/97, *Bah Ould Rabah v Mauritania*
Decided at the 35th ordinary session, June 2004, 17th Annual Activity Report
Rapporteurs: 22nd-25th sessions: Ondziel-Gnelenga; 26th-35th sessions: Rezag Bara

Slavery (29, 31)
Property (inheritance, 30, 31, 56)
Admissibility (submission of complaint within reasonable time, 41)

Summary of facts

1. In November 1975, four years after the death of his mother, Mr Bah Ould Rabah, a Mauritanian national (the plaintiff) and his family were forcefully expelled from their ancestral domicile by the man named Mohamed Moustapha Ould Bah on the grounds that the mother of the plaintiff, the late Aichetou Valle, was his slave and that subsequently, the house bequeathed to her descendants and the whole estate around it became legally the property of Mohamed O Bah, the alleged 'owner' of the deceased.

2. When the plaintiff approached them, the local authorities and the courts decided in favour of his opponent and the Supreme Court upheld this decision. The plaintiff wrote to the highest authorities, including the President of the Republic, to contest this decision which he qualifies as 'flagrant support of the government to the illegal institution of slavery'. To date, however, he has received no reply.

Complaint

3. The communication alleges violation of articles 2, 3, 4, 5, 6, 7, 9 and 11 of the African Charter.

Procedure

4. Communication 197/97 is dated 11 April 1997.

5. The African Commission assumed jurisdiction in the case during its 21st ordinary session held in Nouakchott, Mauritania, in April 1997.

6. On 7 July 1997, a *note verbale* of notification was sent to the govern-

ment concerned urging it to reply to the allegations contained in the communication.

7. On 7 July 1997, the plaintiff was informed of the decision of seizure.

8. During the 22nd ordinary session, the Commission deferred any decision on this communication pending the reception of the comments from the government of Mauritania on the report of the mission undertaken to that country.

9. The African Commission continued the process of exchanging information between the parties.

10. The African Commission considered this communication at its 35th ordinary session held in Banjul, The Gambia and decided to deliver its decision on the merits.

Law

Admissibility

11. Article 56(5) of the African Charter on Human and Peoples' Rights requires that communications received within the context of the provisions of article 55 should be submitted 'after exhaustion of all local remedies, if any, unless it is obvious that this procedure is unduly prolonged'.

12. In the case under consideration, the plaintiff filed court decisions attesting that he used and exhausted the remedies before the competent national courts with a view to obtaining compensation for the alleged violation of his rights.

13. The complainant furnished the African Commission with the judgment of the Boutilimitt District Court of 26 December 1998, the decision of the Rosso Regional Court of 11 March 1990 and the decision of the Supreme Court of Mauritania in Nouakchott of 11 November 1990.

14. The African Commission contacted the respondent state demanding for information with respect to exhaustion of local remedies and the respondent state responded by stating that local remedies had been exhausted.

15. It is therefore unquestionable that the complainant had met the provisions of article 56(5) of the African Charter.

16. On these grounds, the African Commission declares the communication admissible.

Merits

17. The complainant alleges a violation of the following articles of the African Charter: article 2: the right to enjoyment of the rights and freedoms recognised and guaranteed in the Charter, such as the right to property, without any distinction; article 3: the right to equality and to

equal protection of the law; article 4: the inviolability of the human being, the right to physical and moral integrity; article 5: the right to human dignity, recognition of his legal status, prohibition of all forms of exploitation and degradation, particularly slavery; article 6: the right to liberty and security; article 7: the right to have his cause heard (particularly paragraph 1(d), impartiality of the courts); article 8: the freedom of conscience; article 9: the right to information, freedom of opinion; article 11: the right to assemble freely with others.

18. The complainant states that in particular that his sisters, brothers and himself have been deprived of the inheritance of their parents, four years after the death of his mother, by Mr Bah Ould Mohamed, on the grounds that their late mother was his slave.

19. In order to get round the ban on slavery in force in Mauritania, Mohamed Moustapha made mention of a donation supposedly given to him by the late mother of the plaintiff.

20. In a letter of 7 April 1990 addressed to the Head of State by Bah Ould Rabah (the complainant) and copied to the case file, it is stated that to support his claims on the property of his late mother, Mohamed Moustapha (his opponent) had produced the certificate of occupancy 453 dated 24 November 1972.

21. This permit produced by Mohamed Moustapha had been prepared by the *Cadi* on the basis of evidence relating to the donation made by the late mother of the plaintiff to Mohamed Moustapha, his opponent.

22. The donation to Mohamed Moustapha was supposedly meant to render freedom to Ms Merien, daughter of the plaintiff's mother, his slave, but Mohamed Moustapha's submissions show no tangible evidence of the reason for his being the beneficiary of this donation.

23. The complainant alleges that some of the witnesses who supported the argument of donation to his opponent later retracted, and he made mention of names such as Imam Mohamed Hamed and others in the letter addressed to the Head of State.

24. The complainant further alleges, in the same letter, that in opposition to the certificate of occupancy produced by opponent, he had produced a certificate of occupancy 66 of 24 April 1971, issued in the name of his mother a few months before her death; that the said document dates before that produced by his opponent.

25. The complainant also pointed out serious procedural irregularities in the processing of the case in that he had requested the competent legal authorities in vain, to order an investigation which would have proved Mohamed Moustapha's allegations baseless and proved as a result, the pertinence of the said violations of article 14 of the African Charter relating to the guarantee of his and his family's right to property.

26. The government of the Islamic Republic of Mauritania provided an explanation, through the statement made by its delegation at the 29th ordinary session of the African Commission; this statement was confirmed and supplemented by a document dated 19 June 2001 filed in court. From these documents it would appear that where the respondent state is concerned:

- Communication 197/97 introduced against the state of Mauritania by Mr Bah Ould Rabah is based on a dispute relating to the ownership of a real estate which opposes two Mauritania citizens, Mr Bah Ould Rabah (the complainant) and Mr Mohamed Moustapha Ould Bah;
- This case is simply a classical dispute about real estate property between members of the same family in which the intervention of the *Cadi* is in keeping with the existing law and practice in Mauritania;
- It was on the request of Mr Bah Ould Rabah that the Mauritanian courts, had, within a reasonable period, passed judgment through the District Court of Boutilimitt on the 26 December 1998, the decision of the Regional Court of Rosso on the 11 March 1990 and the decision of the Supreme Court of Mauritania in Nouakchott on 11 November 1990;
- It would appear from his own submission that the plaintiff recognized that the courts seized had arrived at a final decision on the basis of facts derived from the documents presented by himself and his opponent (namely the certificates of occupancy), which is in conformity with the rules within their competence and thereby indicates that the dispute relates to the right to ownership of property and that the conflicting parties have enjoyed the conditions of a fair trial, with the participation of their lawyers in the proceedings and in the hearings;
- His allegations relative to slavery and the violation of his rights were baseless;
- The government of Mauritania admits that undoubtedly the consequences of slavery, against which it continues to fight, still linger on in the country. But this is not sufficient to justify the allegations of the complainant relative to the issue of slavery raised by Mohamed Bah (his opponent) before the Mauritanian courts, in violation of the African Charter and its provisions as mentioned above;
- Accordingly, Bah Ould Rabah (the complainant) should have all his claims dismissed.

27. The African Commission has noted that no document exists in the case file which clearly delineates the reason for the donation made to Mohamed Moustapha by the late mother of the complainant and also that there is no opposing statement to the effect that the witnesses named by the plaintiff had retracted their statements after having given evidence before the *Cadi* in support of Mohamed Moustapha.

28. The African Commission realises that Mr Bah Ould Rabah had enjoyed all the conditions of a fair trial and had thus exhausted all the local remedies. The fact that he had lost the case after exhausting the procedures he had initiated was due to a weak judicial system and not on the basis of the practice of slavery or slave like practices. In fact, slavery had been abolished (order 81.234 of 9 June 1981 and 1991 Constitution).

29. The African Commission further noted that from the information in its possession (report of the mission to Mauritania, statements made by NGOs and the delegates from Mauritania during the various sessions of the African Commission as well as from diverse documents from the government of the Republic of Mauritania), that the consequences of slavery still persist in Mauritania and that, for people to act as Mohamed Moustapha Ould Bah has done has become common practice in the country.

30. Furthermore in the African Commission's view, to accept that someone, and a mother for that matter, can deprive her own children of their inheritance for the benefit of a third party, with no specific reason as in this case, is not in conformity with the protection of the right to property (article 14 of the African Charter).

31. The African Commission thus calls upon all the public institutions in the Islamic Republic of Mauritania to persevere in their efforts so as to control and eliminate all the offshoots of slavery.

For these reasons, the African Commission:

- The African Commission considers that the dispossession of the plaintiff of part of his mother's heritage, through a donation without well-substantiated reasons, constitutes a violation of article 14 of the African Charter on Human and Peoples' Rights.
- The African Commission recommends to the government of the Islamic Republic of Mauritania to take the appropriate steps to restore the plaintiff his rights.

Dissenting opinion by Commissioner Yasir Sid Ahmad El Hassan, Vice-Chairperson of the African Commission on Human and Peoples' Rights

[In his references to the majority decision Commissioner El Hassan refers to another version of the majority decision than the official version reprinted above — eds.]

[**32.**] This is a dissenting opinion from the one that was adopted by a simple majority[1] of the members of the Commission on communication

[1] The decision on merits of the communication was taken in the absence of two Commissioners, including the one who was the second rapporteur on the case. A third Commissioner abstained from the process because he is a national of the respondent state. Two other Commissioners did not take part in the deliberations made in Pretoria, South Africa upon which the decision in this communication was taken by the Commission.

197/1997 during the 35th ordinary session of the African Commission on Human and Peoples' Rights held from 21 May to 4 June 2004. The present dissenting opinion is based on facts and arguments derived from the original documents[2] contained in the communication file.

[**33.**] Furthermore, most of the documents submitted by the parties to the communication were originally in Arabic and were never translated into English or French, the languages of the Commissioner, who was the first rapporteur or the legal officer working on the file at the Secretariat of the Commission. These documents contained the ruling of different local courts of the respondent state. So the Commissioners made a decision relying only on the short and inaccurate summary of file that was given to them.

[**34.**] The essence of facts of this communication as extracted from the file shows that it was a normal civil litigation between two members of the same family over a plot of land. The complainant, a banker born in 1949, filed in 1986, a lawsuit in local courts in which he claimed the full title over this real estate.

[**35.**] The complainant originally argued before courts that the disputed land belongs to his father, and that his mother has no separate title to dispose of the land. The respondent[3] claimed that the mother of the complainant has a separate property and transferred to himself and his sisters by the way of donation, this plot of land which constitutes part of her property. He further claimed that he was *de facto* in peaceful, continuous and uninterrupted possession of that land for 27 years consecutive before the claim of the complainant, which was brought before the courts only in 1986.

[**36.**] A decision of the District Court of Boutilimitt, the Court of Rosso, dated 26 December 1988, a decision of the Court of Appeal of Nouakchott dated 11 March 1990, and a decision of the Supreme Court dated 5 November 1990, ruled all in favour of the respondent on the grounds that the failure of the complainant to refute the strong evidence composed of antiquity of deeds and testimonies of reliable and credible witnesses as well as *de facto* possession of the disputed land. The final ruling from the Supreme Court was delivered on 5 November 1990.

[**37.**] On 11 April 1997, the complainant filed this communication 97/1997 against the Islamic Republic of Mauritania.

[2] The decision on this communication was taken on the basis of the deliberations that took place during the 31st session of the Commission in Pretoria, South Africa in May 2002. The Secretariat of the Commission was requested to provide the Commissioners with transcripts of the oral statements by Commissioners. However, the Secretariat failed to make available the transcripts of the deliberations made in Arabic because of its inability to address the matter in Arabic due to the fact that no staff of the Secretariat can work in Arabic.

[3] Mohamed bin Mohamed Almustaffa.

[**38.**] The complainant claimed before the Commission that in November 1975, that is four years after the death of his mother, he himself and his family were forcefully expelled from their ancestral home by Mohamed Ould Bah (his opponent) on the grounds that the complainant's mother, Aichetou Valle had been his slave and that, the house and the surrounding land therefore rightfully belonged to him.

[**39.**] The complainant further claimed that the courts of his country, which are state institutions, deprived him from his property and since then he wrote to the highest governmental authorities including the President of the Republic, protesting against this blatant governmental support for the illegal institution of slavery, but has received no reply as of this date.

[**40.**] Article 56(6) of the African Charter on Human and Peoples' Rights requires that communication should be submitted within a reasonable period from the time when local remedies have been exhausted or from the date the Commission is seized with the matter

[**41.**] The complainant resorted to local courts only in 1986 whereas he alleged that he had been forcefully expelled from his home in 1975. And again he took more than six years after the Supreme Court delivered its final decision to submit his communication to the Commission in April 1997. In my view, this can be considered as unreasonable period in term of article 56(6) of the African Charter, and accordingly the Commission ought to declare this communication inadmissible.

[**42.**] From the documents in the file, which contains the rulings of the Mauritanian courts at all levels and which were submitted to the Commission by both parties, it was not indicated anywhere that the recipient of the donation had claimed that the complainant's mother had donated the land because she was the slave of the recipient. On the contrary, the recipient indicated clearly that the complainant's mother donated the land to him because of the existence of good ties and relationship between the two of them. The complainant himself stated in his memo to the Court of Appeal of Nouakchott that his family is well-known for its good reputation and generosity.

[**43.**] The documents from the communication file also show that the claimant had neither raised these matters before the District Court of Boutilimitt, nor before the Court of Rosso or before the Court of Appeal.

[**44.**] The claimant has come up before the Commission with new arguments that he did not advance before the courts in Mauritania in the process of his case. Consequently, by bringing new elements which are neither raised nor disputed before national courts he wanted to use this Commission as a court of first instance. In my view, this is another reason for declaring this communication inadmissible.

[**45.**] The inability of the Secretariat of the Commission to work in Arabic

whereas the original documents of the communication file are in this language, inhibited the Commissioners ability to have first-hand information. This made the Commission to act only on the translated summary of part of the documents of the communication, which in my view, was not built on facts but on the mere allegations of the complainant; allegations, which were neither raised before national courts nor well substantiated before the Commission.

[**46.**] The Commission, in acting upon the assumption that those allegations are facts, wrongly decided that the Islamic Republic of Mauritania has violated article 14 of the African Charter on Human and Peoples' Rights.

[**47.**] The date of claim of donation (by opponent to the complainant) goes back to 1959 — according to complainant — or to 1975 when the complainant claims that the forceful eviction from disputed land took place.

[**48.**] One must note that the practice of slavery was legal in 1959 and 1975. Slavery was banned by the Mauritanian authorities in 1980. The recipient could therefore have easily based his claim of property over the disputed land on slavery. However, he did not do that. Instead, he claimed that the land was donated to him because the good relationship he had with the mother of the complainant.

[**49.**] The events in question took place before 1986 when Mauritania became a party to the African Charter on Human and Peoples' Rights; the admissibility of such a communication raises the question of the principle of retroactivity of laws which was not discussed by the Commission in this very case.

[**50.**] The erection of building permissions 453 dated 24 November 1972 and 66 of 24 April 1971 (and not certificate of occupancy as mentioned in paragraphs 46 and 50 of the Commission ruling) both discussed by courts and ruled over that the later does not relate to the same plot of land.

[**51.**] I do agree with the Commission's conclusion that there is no evidence brought before the Commission that the witnesses retracted from their statements made before the *Cadi* in support of donation as stated in the last part of paragraph 53 the communication decision. This part of the above-mentioned mentioned paragraph negates the complainant's allegations as stated in paragraph 49 of the same document, and contradicts the final findings of the Commission.

[**52.**] Paragraphs 51 of the decision of the Commission states that the plaintiff (complainant) requested an investigation to prove as a result, the pertinence of the said violations of article 14 of the African Charter on Human and Peoples' Rights. This paragraph does not reflect the accuracy that the complainant claimed the violation of article 14 of the Charter. The lengthy discussions by Commissioners, on whether the Commission could invoke article 14 of the charter that was not mentioned

by the complainant prove this. Moreover, paragraphs 3 and 43 of the decision did not mention article 14 of the Charter.

[**53.**] The Mauritanian courts cannot restrain the right or freedom of the claimant's mother to dispose part of her property by way of donation to a member of her family without a legal basis, neither do they have the right to compel the claimant's mother to explain the reasons why she donated such property to one of her family members, while she is sane, mature and not restrained from disposing her property by a court order.

[**54.**] Had the Mauritanian courts prevented the claimant's mother from disposing of part of her property by donating it to a relative and deprived her son of that portion of property, they would have violated article 14 of the African Charter on Human and Peoples' Rights, which related to the right to property and also embodies the rights to freely dispose of one's property.

[**55.**] The Mauritanian courts, by confirming the right of ownership of the claimant's mother and confirming her right to dispose of part of her property by the way of donation, confirmed that the claimant's mother's freedom to own her property and to dispose of it. By doing so, Mauritanian courts furthermore, proved that she was neither a slave nor a servant.

[**56.**] The Commission, by deciding that the Islamic Republic of Mauritania had contravened article 14 of the African Charter on Human and Peoples' Rights and recommending that the government should return the property to the claimant, had deprived the recipient from a property that was donated to him. The Commission has also, without a legal basis, restrained, the right and freedom of the claimant's mother to freely dispose of a part of her property in a manner she deemed fit. The Commission wanted to protect what it considered to be the right of a citizen (the complainant). However, in doing so it advised the government to do what constitutes a violation of the rights of two citizens: the mother of the complainant and the recipient.

[**57.**] For all the foregoing reasons, I believe that the Commission has erred in this communication, by deciding that the Islamic Republic of Mauritania had violated the provisions of article 14 of the African Charter on Human and Peoples' Rights.

* * *

Interights and Others v Mauritania

(2004) AHRLR 87 (ACHPR 2004)

Communication 242/2001, *Interights, Institute for Human Rights and Development in Africa, and Association Mauritanienne des Droits de l'Homme v Islamic Republic of Mauritania*
Decided at the 35th ordinary session, June 2004, 17th Annual Activity Report
Rapporteur: Rezag Bara

Admissibility (exhaustion of local remedies, 27-30)
Association (dissolution of political party, 49, 50, 80-84)
Limitations of rights (international obligations take precedence over national legislation, 77; public interest, 78; proportional and absolutely necessary, 79)
Expression (dissolution of political party, 80-84)

Summary of facts

1. The complaint was submitted by Interights, Institute for Human Rights and Development in Africa, and *Association Mauritanienne des Droits de l'Homme* (Mauritanian Human Rights Association), on behalf of Mr Ahmed Ould Daddah, Secretary General of *Union des Forces Démocratiques-Ere nouvelle* (UFD/EN, Union of Democratic Forces-New Era), a Mauritanian political party, which was established on 2 October 1991.

2. The complainants, mandated by Mr Ahmed Ould Daddah, allege the following facts. By Decree 2000/116/PM/MIPT, dated 28 October 2000, *Union des Forces Démocratiques/Ere nouvelle* (UFD/EN), the main opposition party in Mauritania, led by Mr Ahmed Ould Daddah was dissolved by the Prime Minister of the Islamic Republic of Mauritania, Mr Cheick El Avia Mohamed Khouna.

3. This measure, taken pursuant to Mauritanian law, (in particular articles 11 and 18 of the Mauritanian Constitution, and Ordinance 91.024 of 25 July 1991 which deals with political parties in articles 4, 25 and 26), was imposed, according to this senior official, following a series of actions and undertakings committed by the leaders of this political organisation, and which were damaging to the good image and interests of the country; incited Mauritanians to violence and intolerance; and led to demonstrations which compromised public order, peace and security.

4. On account of this, all the movable and immovable assets of the said political organisation were, *ipso jure,* seized.

5. A few weeks after the proscription of UFD/EN, the Mauritanian autho-

rities arrested several leaders of the party who had participated in a demonstration against the measure, which they considered illegal and illegitimate, for breach of public order.

6. The Secretary General of the party, Mr Ould Daddah, on arrival from a journey abroad, was himself arrested on 9 December 2000, at Nouakchott airport, and was only released a few days later.

7. On 25 December 2000, the leaders of UFD/EN filed a motion for the repeal of the government's measure before the Administrative Chamber of the Supreme Court, citing:

- Lack of a just cause for the dissolution Decree;
- The unjustified nature of the punishment of a political party due to the alleged machinations of its leaders;
- Lack of competence on the part of the authority by whom the Decree was signed; and
- Absence of any deliberation by the Council of Ministers on the matter of the dissolution, as foreseen by law.

8. On 14 January 2001, the Administrative Chamber of the Supreme Court, ruling as court of original and final jurisdiction, delivered its verdict (01/2001 of 14 January 2001 *UFD/EN v Prime Minister and Minister of Interior, Post and Telecommunications*), throwing out Mr Ahmed Ould Daddah's appeal, without really giving the grounds, stating that the claim lacked merit.

9. Since then, the principal leaders and activists of UFD/EN, who did not have the recourse of appealing the Supreme Court's judgment before any other Mauritanian court, have been subjected to a veritable witch-hunt, throughout the Mauritanian territory, and have suffered acts of intimidation and harassment by the security services.

10. They have also been excluded from participating, under the banner of their political organisation, in the various elections that have been organised in the country.

Complaint

11. The complainant claims that there has been a violation of the following provisions of the African Charter on Human and Peoples' Rights: Articles 1, 2, 7, 9(2), 10(1), 13 and 14.

Procedure

12. The communication was submitted on 25 April 2001, during the 29th ordinary session, held in Tripoli from 23 April to 7 May 2001.

13. The Secretariat acknowledged receipt of the communication on 2 May 2001.

14. At the 30th ordinary session, the African Commission considered the communication and decided to be seized of the case. Consideration of its merits was deferred until the next session and the Commission asked that the parties be informed accordingly.

15. The Secretariat informed the respondent state of the decision of the Commission in its *note verbale* of 15 November 2001 and the complainant was informed of the same decision in an official letter dated 19 November 2001.

16. On 22 January 2002, the Secretariat received the observations on the admissibility and merits of the case from the respondent state. Those observations were forwarded to the complainant.

17. The following documents in Arabic were attached to the observations of the respondent state:

- Petition dated 27 January 2001 of Mr Mohamed Oula Gowj requesting the review of the decision of the Supreme Court 01/2002 of 14 January 2001;
- Letter of the Assistant Secretary General of UDF/EN dated 24 January 2001;
- Letter of Mr Mohamed O Gowj cancelling his petition of 27 January 2001;
- Statement of no appeal issued by the Registrar of the Supreme Court dated 12 January 2001;
- Communiqué of UDF/EN to development partners; and
- Statement of general policy of UDF/EN.

18. On 25 March 2002, the complainants, comprising of Interights, *l'Association Mauritanienne des Droits de l'Homme* and *l'Institut pour les Droits Humains et le Développement*, presented the Secretariat of the Commission with their written observations on the admissibility of the complaint, in reply to the arguments on admissibility of the complaint as advanced by the respondent state.

19. At its 31st session, held from 2 to 16 May 2002 in Pretoria, South Africa, the African Commission declared the communication admissible and called on both parties to submit their observations on the merits of the case without undue delay.

20. By letter dated 29 May 2002, the Secretariat of the Commission informed both of the concerned parties of the Commission's decision.

21. On 7 August 2002, the Secretariat of the Commission acknowledged receipt of the written observations on the merits of the communication, received on 5 August 2002 from the complainant. A copy of these observations was forwarded to the respondent state.

22. At its 33rd ordinary session held in Niamey, Niger, the African Commission listened to the oral remarks of both parties and decided to defer its decision on the merits to the 34th ordinary session. The parties concerned were notified of the decision on 4 July 2003.

23. At its 35th ordinary session held from 21 May to 4 June 2004 in Banjul, The Gambia, the African Commission considered this communication and decided to deliver its decision on the merits.

Law

Admissibility

24. Article 56 of the African Charter on Human and Peoples' Rights sets out seven conditions, which, under normal circumstances, must be fulfilled for a communication to be admissible. Out of the seven conditions, the government raised the issue regarding the exhaustion of local remedies as provided under article 56(5) of the Charter, which stipulates: 'Communications . . . shall be considered if they are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged'.

25. In its submission of 7 January 2002, the respondent state requested that the African Commission: 'enquire whether the complainants had duly seized the African Commission . . .'. The respondent state also informed the African Commission that the rulings of the Administrative Chamber of the Supreme Court could not be appealed against. It however went on to say appeal is not the only legal remedy in Mauritanian law. [Requests for revision of the rulings of the Administrative Chamber] on the basis of article 197 and in accordance with the Civil Commercial and Administrative Procedure Code (CPCCA) [are often made]. The respondent state affirmed that applications for revision have [resulted in the Chamber reversing its decisions].

26. To support its line of reasoning, the respondent state indicated that one the lawyers of UDF/EN, Mohamed Ould Gowf, made a plea in the same vein on 27 January 2001 but withdrew it the same day. Based on the above facts and on article 56(5) of the African Charter, the respondent state requested that the communication be declared inadmissible due to the fact that the local remedies were not exhausted.

27. However, the fact remains that the generally accepted meaning of local remedies, which must be exhausted prior to any communication/ complaint procedure before the African Commission, are the ordinary remedies of common law that exist in jurisdictions and normally accessible to people seeking justice.

28. However, it is a known fact that the revision procedure is an extraordinary legal remedy that exists only if a number of conditions specifically stipulated by the law are fulfilled. In this regard, articles 197 and 198

CPCCA of the Republic of Mauritania do not allow access to revision unless it is proven that the legal decision taken was wrong or due to the fact that the other party is in possession of decisive evidence.

29. Furthermore, the fact that one of the lawyers of the complainants who was probably not empowered to do so, had indeed applied for a revision and withdrew it the same day, was a clear indication of the complainant's intention not to resort to such a remedy. In fact, this does not affect at all the [exceptional nature of such a remedy] as outlined above.

30. Consequently, it is a fact that the party that seized the African Commission had indeed exhausted, with regard to this particular case, the entire local remedies of common law that exist and can be resorted to before Mauritanian jurisdictions.

31. In view of the above-stated reasons, the African Commission declared the communication admissible.

Merits

32. The communication relative to the dissolution of the Mauritanian political party UFD/EN in accordance with established and legally confirmed regulations is attacked by the complainant before the African Commission for being in violation of articles 1, 2, 9(2), 10(1), 13 and 14 of the African Charter, on the basis of the following points:

- The non-conformity of the legal ruling ratifying the dissolution on the principles governing the right to a fair hearing; and
- The criticism levelled against the legality of the decision for dissolution in accordance with established regulations and illegal and unjustified lapses blamed on the political party UFD/EN.

On the principles governing the right to a fair trial

33. The complainant contends that the Mauritanian courts are in violation of the provisions of article 7(1)(a) of the African Charter which stipulates:

> Every individual shall have the right to have his cause heard. This comprises the right to an appeal to competent national organs against acts violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force.

34. The complainant alleges that the dissolution of the main Mauritanian opposition party UFD/EN, the seizing of its assets and the conditions in which the measure has been confirmed by the highest court in the land have violated the relevant provisions of the African Charter and other conventions to which the country is signatory.

35. The complainant contends that these violations are both procedural and substantial. Procedural, because the basic rules and principles of a fair hearing were not respected during the hearing. Substantial, because the dissolution of the UFD/EN party violated the right of association and free-

dom of expression of the members and leaders of this political party and violated the principles of democracy outlined in the African Charter.

36. The complainant alleges that the procedure before the Administrative Chamber of the Supreme Court did not respect the principles relative to the right to a fair hearing in particular that which is relative to two-tier proceedings. The complainant also alleges that from the investigation of the case up to the public hearing which decided on the destiny of the UFD/EN, the principle of [*audi alteram partem*] had not been respected and that the final ruling by the Judge did not contain pertinent legal arguments justifying the dissolution of the said party.

37. The respondent state emphasises that the judicial examples and arguments and all the documentation on the right to a fair hearing raised by the complainant are only applicable in a penal case. The respondent state imagines evidently that the accusations levelled against the UFD/EN may well have a penal qualification according to the law governing the activities of political parties, but this is not enough to give this case a penal character since no penal lawsuit had been brought against the leaders of the said party.

38. The respondent state indicates that concerning the respect for the principle of two-tier proceedings, which consists of bringing the entire dossier of the merits of a case before a differently composed higher legal authority for examination, it is established that it concerns a broad based rule which can be widely applied, notably in penal cases. This principle forms the basis of proper administration of justice and allows the well-intentioned applicant to obtain the guarantee of a correct application of the law.

39. The fact remains however that, as stipulated by article 7(1)(a) of the African Charter, every individual has the right to have his cause heard, which includes: 'The right to appeal to competent national organs . . .'.

40. In this particular case, and in conformity with article 26 of the Decree 91-024 of 25 July 1991 governing the activities of political parties, the respondent state underscores the fact that the competent legal authority to examine the legality and validity of a decree passed by the Prime Minister of the Islamic Republic of Mauritania is the Administrative Chamber of the Supreme Court, according to the procedure in force in this country. However, the Supreme Court is the highest authority in the Mauritanian legal system and in the matter of appeal against decisions taken by the administrative authorities; the existing procedure requires that annulment takes place as first and last resort.

41. Finally, it means that the Mauritanian legislator, like other similar legislations, has given exclusive authority to the highest legal body in the country due to the legal and political importance of the matter relative to the dissolution of a political party. It is before this high authority that the

entire Mauritanian legislative system is built and it is here that the uniform rules for applying the law in this country, in all fields, are established.

42. Concerning the respect for the principle of judgment after due hearing, the respondent state maintains that the complainant never mentioned in his written submissions, any opposition to or complaint against the holding of audiences, or of the quality of the representation and the defence of the political party which was dissolved before the Mauritanian legal authorities.

43. After having studied the comments made by the complainant and the respondent state, it is well established that the representatives of the UFD/EN received, in good time, all the notifications of the actions and documents relating to this litigation, and had had access to the entire dossier of the case to study all the points and make the relevant criticisms both in writing and by oral advocacy before the competent legal authority.

44. However, regarding this particular case, the parties before the Mauritanian Administrative Court are, on the one hand, the Minister of the Interior, representing the government and, on the other hand, the political party UFD/EN. As for the Government Commissioner, he carries out the functions of the representative of the Department of Public Prosecution ie representative of the public interest charged to ensure, on behalf of society, the sound application of the laws. In this regard, he can resort to methods of public nature that might not have been resorted to by the parties which might have escaped the vigilance of the reporting Judge.

45. Thus, the criticism levelled against the Government Commissioner, who is the representative of the Department of Public Prosecution, before the Administrative Division of the Supreme Court because of its so called 'collusion' with the ruling, seemed to lack merit due to the absence of hard facts and concrete material evidence to back such a value judgment.

46. In seeking to know if the decision of the Mauritanian highest court had been sufficiently justified or not, the report on the ruling by the Administrative Chamber of the Mauritanian Supreme Court amply covers all the arguments raised by the complainant's defense, as much in their written submissions as in their oral address before the audience and provides responses based on the provisions of the Mauritanian laws. From that moment it is not possible to support this grievance with regard to the aforementioned decision.

47. In this context, the African Commission does not find a violation of the provisions of article 7(1)(a) of the African Charter for it considers that Mr Ahmed Ould Daddah's case has been adequately heard by the Administrative Chamber.

On the legality of the Act governing dissolution and the illegal and unjustified lapses blamed on the political party UFD/Ere nouvelle.

48. Article 9(2) of the African Charter stipulates: 'Every individual shall

have the right to express and disseminate his opinions within the law'. Article 10(1) of the African Charter stipulates: 'Every individual shall have the right to free association provided that he abides by the law'; and article 13(1) of the Charter indicates: 'Every 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'.

49. The complainant alleges that by Decree 2000/116/PM/MITP dated 28 October 2000 and signed by the Prime Minister, the Mauritanian government dissolved UFD/EN, the main opposition party in the country. The same day, Mr Ahmed Ould Daddah, Secretary General of the said political party received, by letter (58/2000) from the Minister of the Interior, Posts and Telecommunications of the same date, notification of the measure that the political group's buildings and assets have been impounded.

50. According to the Decree governing the dissolution, the measure had been taken in application of the provisions of the Constitution of 20 July 1991 (articles 11 and 18) and Decree 91 024 of 25 July 1991 (articles 4, 25 and 26) which formally prohibited political parties from destroying the country's important image and interests, from inciting intolerance and violence and from organising demonstrations that are likely to compromise public order, peace and security.

51. The complainant contends that the acts by the leaders of the political parties mentioned in articles 4 and 5 of Decree 91–024 of 25 July 1991 relative to political parties and liable to lead to the dissolution of their organisation (inciting intolerance and violence, organising demonstrations likely to compromise public order, peace and security, setting up of military or paramilitary organisations, armed militia or combat groups) are already considered by articles 83 and others of the Mauritanian Criminal Code as offences or punishable crimes.

52. The complainant points out that the dissolution of the UFD/EN is justified by the inflammatory nature of a certain number of documents and expressions attributed to its leaders. In other words, it is the abuse of freedom of expression by the leaders of this party which gave rise to its expulsion from the Mauritanian political arena. The complainant specifies that such assertions are unacceptable in a state which is said to base its activities on the principles of democracy and on the principles of the African Charter. Indeed, there had been, not only prejudice to the freedom of expression, to the right of association and to the right of the leaders of the UFD/EN to participate in the management of public affairs in Mauritania, but also to the fundamental rights of the said party which, through this measure, has lost all its assets.

53. The complainant indicates that the notions of the right of association and of the freedom of expression are complementary in a democratic state, in the sense that the association or the political party is the means *par excellence* for the freedom of expression. It is well known that political

parties contribute greatly to the political debate of democratic states, notably through elections which are organised periodically to guarantee the freedom of choice of its leaders by the citizens.

54. In paying special attention to the terms used in the party's declarations, in the statements of its leaders and indeed to the context in which these had been published or delivered, the complainant voices his surprise to note that the authors of this measure were unaware that the activities for which the UFD/EN was being blamed had taken place in the context of 'training and the expression of the political will of its members' and in the context of Mauritanians enjoying their right to be differently informed about the political, economic and social situation of their country.

55. The complainant alleges that the contentious statements and publications had been made and/or distributed during a time when Mauritania was making pre-campaign preparations for the legislative and local elections for the year 2001. In such a context, each party was endeavouring, with due respect for democratic rules, to put its opponent in a position of weakness before the voters during the electoral campaign.

56. The complainant exposes that it is for this reason that the statement of 17 September 1998 had been drafted following the dissemination, by several reliable sources, of information relating to the discovery of a case of misappropriation of public funds, particularly of the aid received from development partners, of financial chaos and of the mismanagement of public affairs.[1]

57. According to the complainant, the objective of this document was, among other things, to remind Mauritania's partners that the Mauritanian citizen, in view of the total silence of the authorities on this issue 'has the right and the duty to ask for explanations and to know what happened to the money obtained in his name and which should be refunded'[2], that a happy outcome of this crisis which is threatening the existence of Mauritania, since more than 57 per cent of the population lived below the poverty threshold, could only be obtained through 'responsible, dispassionate and constructive dialogue the only means to realise consensual solutions to the major problems which exist'. The document also insisted on the need for the country to have a pluralist parliament resulting from transparent elections, an independent judiciary, a really free press, the opening of the public media for opposition debates and to give free access to airtime. And in conclusion, the authors of the statement affirmed that

[1] The complainant refers particularly to the article which appeared in the French daily *Le Monde*, which is generally well informed and which was intitled 'Mauritania plagued by affairism and a return to tribalism' and in which could be read the following 'the word deprivation is not strong enough (to describe the situation of the Mauritanian) and that to remain afloat the only solution available for the administration is to divert for its own benefit, part of the money given by the international community to finance development projects'.

[2] *Cf* Declaration made for the attention of Mauritania's development partners, 2.

> the UFD/EN, as a political force of major significance, whilst expressing its sincere gratitude to all of Mauritania's development partners for their large contributions to this country, and in expressing the hope to see this assistance increased, invites them to avoid, as much as possible, easy solutions and complacent attitudes which is costing Mauritania enormously for the past several years.[3]

58. Concerning the statement of 30 October 1999 made by the UFD/EN, the complainant argues that it had been published at the end of the party's second ordinary congress which had brought together some 15 African political parties. The text, a report of the three-day meeting of the party, had been divided in two sections, devoted respectively to the political, economic and social situation of the nation and to the party's internal activities.

59. The complainant claims that the first part of the document was a presentation of the major facts of life in the nation which had been examined by the participants at the Congress and ideas and solutions, outlined in the resolutions which had been advocated by the party as definitive solutions. These were obviously problems which the authorities did not wish and still do not wish to see exposed to the public view, such as the threats to national unity brought about by racist, slavelike, tribalistic and regionalistic practices; the maintenance of repressive texts which legalise the muzzling of the press, the violation of individual and collective freedoms and the regular and shameless rigging of elections; the economic bankruptcy resulting from the systematic looting of national resources and the diverting of national aid by the ruling clique, giving rise to the aggravation of social inequality, of unemployment, of impoverishment and the abandonment by the state of its essential functions of regulation, health, education and security; the diplomatic isolation of Mauritania from its natural arabo-african environment and its most spectacular action which was the elevation of Israel's diplomatic representation to the rank of ambassador.

60. The complainant notes that in these two documents, there is no passage that contains an insulting or outrageous word against the authorities or advocating violence and/or calling on the populations to rise against the leaders of the country. And in the two cases, the party was acting as an activist in the national political life and playing its natural and important role in drawing public attention to the facts outlined by the information disseminated by independent organisations, and all of this with due respect for the laws and regulations of the country, argues the complainant.

61. The complainant party recalls that in a democratic society, 'the authorities should tolerate criticism even where it can be considered as insulting or provocative'[4] and one of the characteristics of democracy is 'to allow

[3] *Cf* Declaration quoted above, 2.
[4] *Cf Ozgur Gundem v Turkey*, European Court of Human Rights, 16 March 2000, para 60.

the proposal and the discussion of diverse political projects even those which challenge the state's current mode of organising, so long as these do not cause prejudice to democracy itself'.[5] This is what the Mauritanian Constitution requires in its article 11.

62. As for the incriminating speech, the complainant continues, it had been delivered by Mr Ahmed Ould Daddah in his capacity as Secretary-General of the UFD/EN during one of the rare occasions when the party had obtained approval to hold a rally. The essence of his speech related, that day, to the respect which should be accorded by the Mauritanian authorities to the main opposition party of the country as its due. In his view, the party should no longer accept the harassment to which it was being subjected and if it should continue the changes being fervently called for by its militants would not come about in a peaceful manner for the UFD/EN would no longer leave the initiative to the authorities. He ended his speech by calling on all the members of the party to prepare for battle in the coming elections. The complainant alleges that nowhere in the speech was there use of a word to make people think that his party was, from henceforth, going to resort to violence. That was all the more important considering that at the end of the meeting the thousands of militants dispersed without any incident in spite of an impressive police presence.

63. The respondent state alleges that political pluralism in the Islamic Republic of Mauritania has its political basis in articles 11 and 18 of the 1991 Constitution and its legal basis in articles 4, 25 and 26 of the law of 25 July 1991 relative to political parties.

64. In this context, article 11 of the Constitution of the Islamic Republic of Mauritania stipulates:

> Political parties work towards the formation and the expression of political will. They form and exercise their activities freely on condition that they respect the democratic principles and do not jeopardise, either by object or by action, national sovereignty, territorial integrity and the unity of the nation and of the Republic. The law fixes the conditions for the creation, operation and dissolution of political parties.

65. Article 18 of the Constitution of the Islamic Republic of Mauritania puts down all offences committed, which are prejudicial to the security of the state.

66. Article 4 of Decree 91–024 of 25 July 1991 relative to political parties reads as follows:

> All propaganda against the principles of Islam by political parties is prohibited. Islam cannot be the exclusive prerogative of any political party. In their statutes, programmes, in their speeches and in their political activities, political parties are prohibited from: Any form of incitement to intolerance and to violence; Orga-

[5] *Cf Ibrahim Askoy v Turkey*, European Court of Human Rights, 10 January 2001, para 78.

nisation of demonstrations likely to compromise public order, peace and security; Any transformation aimed at establishing military or paramilitary organisations or armed militia or combat groups; Any propaganda with the objective of causing prejudice to territorial integrity or to the unity of the nation.

67. Article 25 of Decree 91–024 of 25 July 1991 relative to political parties makes it possible for a political party to be dissolved if the latter violates the rules, which govern it.

68. The respondent state argues that it is on the basis of these two texts that the political party UFD/EN received its legal sanctioning and was able to carry out its activities normally. These two texts, one of which has a constitutional value and the other an organic value, fix the framework for the activities of political parties as organs for participation in the democratisation of public life and determine the modalities of the sanctions to be imposed in case of transgression of the constitutional requirements and the legal rules governing the activities of political parties in the Islamic Republic of Mauritania.

69. Pertaining to the dissolution of the UFD/EN, the respondent state alleges that the lack of direction and extremism of this party was such that the dissolution was not only justified but also necessary in view of the danger that it represented for the state and for social peace.

70. The respondent state insists that the UFD/EN, because of its radicalism, constituted a grave threat to public order and seriously threatened the rules of the democratic game. In this context it was quite legitimate for the state, in order to avoid a drifting to unforeseeable consequences, to take all the requisite measures to safeguard the general interest of the country and to preserve the social fabric as well as to maintain public order and security in a democratic society, and this in conformity with the relevant provisions of the decree for the creation and dissolution of political parties.

71. The authorities clearly defined the legal causes and bases of this measure. On the causes relating to the dissolution, the respondent state noted as follows:

1. The activities carried out both inside and outside the country to discredit and destroy the interests of Mauritania. In this regard, the respondent state cites the communiqué by the UFD/EN dated 17 September 1998 addressed to Mauritania's development partners with the objective of convincing the donor countries to arrest all economic assistance to Mauritania and the orchestrated disinformation campaign against the country relating to the dumping in the national territory of nuclear waste from Israel;
2. The fact that the UFD/EN had advocated violence as an instrument of its political activities. It also mentioned the party's general political statement of the 30 October 1999 certain passages of which, notably those speaking of the marginalisation and ignorance of the rights of black africans, are seen by the respondent as trying to re-ignite ethnic and racial upheavals in a pluriethnic country, disturbances against public law and order blamed on this party and declarations attributed to certain leaders of this party who are reported to have said that they would no longer organise peaceful demonstrations.

72. With regard to the legality of the measure, the respondent state affirms that this legality is based in article 11 of the Constitution which governs the principle of the freedom to set up political parties, on condition that they respect the democratic principles and do not cause prejudice either by objective or by their actions to national sovereignty, to the territorial integrity, to the unity of the nation and of the Republic and articles 4, 25 and 26 of Decree 91-024 of 25 July 1991 relative to political parties which prohibits any action that may incite intolerance and violence and any effort to organise demonstrations that may compromise public order, peace and security.

73. The respondent state reiterates that factual evidence existed whereby the UFD/EN was advocating violence, was carrying out subversive activities which were prejudicial to national unity and was training dangerous hooligans who were likely to jeopardise the lives and property of peaceful citizens.

74. This factual evidence, continues the respondent state, fully justifies the regulatory measure taken against the UFD/EN decided by the Council of Ministers since the threat against order, peace and security was evident.

75. The respondent state advances several arguments against the authors of the communication to justify the basis of the decision to dissolve the UFD/EN, in particular:

> The fact that the activities of and positions taken by the leaders of this party constituted a threat to the fundamental interests and image of the country; The fact that certain actions and declarations by the party appear to be meant to incite Mauritanians to intolerance and violence; The fact that some of its members were involved in activities geared towards pushing people to disobedience and disorder thereby endangering public peace and security.

76. According to the interpretation given by the African Commission to freedom of expression and to the right of association as defined in the African Charter, states have the right to regulate, through their national legislation, the exercise of these two rights. Articles 9(2), 10(1) and 13(1) of the African Charter all specifically refer to the need to respect the provisions of national legislation in the implementation and enjoyment of such rights. In this particular case, the relevant provisions of Mauritanian laws that had been applied are articles 11 and 18 of the Constitution and articles 4, 25 and 26 of Decree 91-024 of 25 July 1991 relative to political parties.

77. However these regulations should be compatible with the obligations of states as outlined in the African Charter.[6] In the specific case of the freedom of expression that the African Commission considers as a 'fundamental human right, essential to an individual's personal development, political consciousness and participation in the public affairs of his coun-

[6] *Cf* Resolution on the right to freedom of association, para 3.

try.'[7], a recent decision[8] clearly delineated that the right of states to restrain, through national legislation, the expression of opinions did not mean that national legislation could push aside entirely the right to expression and the right to express one's opinion. This, in the Commission's view, would make the protection of this right inoperable. To allow national legislation to take precedence over the Charter would result in wiping out the importance and impact of the rights and freedoms provided for under the Charter. International obligations should always have precedence over national legislation, and any restriction of the rights guaranteed by the Charter should be in conformity with the provisions of the latter.

78. For the African Commission the only legitimate reasons for restricting the rights and freedoms contained in the Charter are those stipulated in article 27(2), namely that the rights 'shall be exercised with due regard to the rights of others, collective security, morality and common interest'.[9] And even in this case the restrictions should 'be founded in a legitimate state interest and the evils of limitations of rights must be strictly proportionate with and absolutely necessary for the advantages which are to be obtained.'[10]

79. Furthermore, the African Commission requires that for a restriction imposed by the legislators to conform to the provisions of the African Charter, it should be done 'with due regard to the rights of others, collective security, morality and common interest',[11] that it should be based on a legitimate public interest and should be 'strictly proportionate with and absolutely necessary' to the sought after objective.[12] And more over, the law in question should be in conformity with the obligations to which the state has subscribed in ratifying the African Charter[13] and should not render the right itself an illusion.[14]

80. It is worthy of note that the freedom of expression and the right to association are closely linked because the protection of opinions and the right to express them freely constitute one of the objectives of the right of association. And this amalgamation of the two norms is even clearer in the case of political parties, considering their essential role for the maintenance of pluralism and the proper functioning of democracy. A political group should therefore not be hounded for the simple reason of wanting to hold public debates, with due respect for democratic rules, on a certain number of issues of national interest.

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[7] *Amnesty International v Zambia* [(2000) AHRLR 325 (ACHPR 1999)], para 46.
[8] *Media Rights Agenda and Others v Nigeria* [(2000) AHRLR 200 (ACHPR 1998)], para 66
[9] As above, para 68.
[10] As above, para 69.
[11] *Cf Constitutional Rights Project and Others v Nigeria* [(2000) AHRLR 227 (ACHPR 1999)] para 41.
[12] As above, para 42.
[13] *Cf Jawara v The Gambia* [(2000) AHRLR 107 (ACHPR 2000)] para 59.
[14] *Cf Constitutional Rights Project and Others v Nigeria* [(2000) AHRLR 227 (ACHPR 1999)] para 42.

81. In this particular case it is obvious that the dissolution of the UFD/EN had the main objective of preventing the party leaders from continuing to be responsible for actions for declarations or for the adoption of positions which, according to the Mauritanian government, caused public disorder and seriously threatened the credit, social cohesion and public order in the country.

82. Nonetheless, and without wanting to pre-empt the judgment of the Mauritanian authorities, it appears to the African Commission that the said authorities had a whole gamut of sanctions which they could have used without having to resort to the dissolution of this party. It would appear in fact that if the respondent state wished to end the verbal 'drifting' of the UFD/EN party and to avoid the repetition by this same party of its behaviour prohibited by the law, the respondent state could have used a large number of measures enabling it, since the first escapade of this political party, to contain this 'grave threat to public order'.

83. Decree 91-024 had in effect made provision for other sanctions in order to deal with 'slips' of political parties. Furthermore, the African Commission finds that the dissolution of UFD/EN was in conformity with the provisions of the Decree relating to the political parties.

84. The African Commission observes that the UFD/EN party transformed itself legally into RFD [*Rassemblement des Forces Démocratiques*] retaining its recognised representatives on the basis of its political statement and its programmes of action. The African Commission also calls on all the republican political forces in the Islamic Republic of Mauritania to work, within the framework of the Constitution, towards the reinforcement of healthy pluralist and democratic practice which would preserve social unity and public peace.

85. The African Commission notes that the respondent state contends rightly that the attitudes or declarations of the leaders of the dissolved party could indeed have violated the rights of individuals, the collective security of the Mauritanians and the common interest, but the disputed dissolution measure was 'not strictly proportional' to the nature of the breaches and offences committed by the UFD/EN.

For these reasons, the African Commission:

Finds that the dissolution of *UFD/Ere nouvelle* political party by the respondent state was not proportional to the nature of the breaches and offences committed by the political party and is therefore in violation of the provisions of article 10(1) of the African Charter.

NIGERIA

Interights and Another v Nigeria

(2004) AHRLR 102 (ACHPR 2004)

Communication 248/2002, *Interights and World Organisation Against Torture v Nigeria*
Decided at the 35th ordinary session, June 2004, 17th Annual Activity Report
Rapporteur: Dankwa

Admissibility (loss of contact with complainant, 16)

Summary of facts

1. The complaint is filed by Interights and the World Organisation Against Torture/*Organisation Mondiale Contre la Torture* on behalf of individuals who requested anonymity as permitted under article 56(1) of the African Charter.

2. In their complaint, the complainants allege that between May 1999 and March 2002, the Federal Republic of Nigeria has engaged in extra-judicial executions, state-sponsored violence and impunity.

3. The complainants allege that during the said period, the Federal Republic of Nigeria has directly, through its armed forces, members of its law enforcement agencies and similar officials of the state, participated or been complicit or implicated in the extra-judicial execution of cumulatively over ten thousand persons at different locations in Nigeria.

4. They allege that the Federal Republic of Nigeria has directly, through its armed forces, members of its law enforcement agencies and similar officials of the state, participated or been complicit or implicated in the verifiable and forcible internal displacement of over one million persons in Nigeria.

5. They allege that the Federal Republic of Nigeria has systematically and deliberately in all the cases of extra-judicial execution and forcible displacement, denied the victims access to remedies in violation of its obligations under the African Charter. It has, by reason of all these violations over a period of more than two and a half years, committed systematic, serious and massive violations of human and peoples' rights recognised by the African Charter on Human and Peoples' Rights which is domestic law in Nigeria.

6. The authors of the complaint allege that they have independently verified the allegations described in the complaint. They assert that the epidemiology of the violations described in the complaint precluded the requirement to exhaust domestic remedies in Nigeria. They cited the decision of the Commission on admissibility in *Free Legal Assistance Group and Others v Zaire* [(2000) AHRLR 74 (ACHPR 1995)] wherein the Commission held that the requirement of exhaustion of local remedies need not be applied literally in cases where it is impractical or undesirable for the individual complainant to seize domestic courts in the cases of each individual complainant. This is the case where there are a large number of individual victims. Due to the seriousness of the human rights situation as well as the great numbers of people involved, such remedies as might theoretically exist in the domestic courts are, as a practical matter, unavailable or, in the words of the Charter, unduly prolonged.

Complaint

7. The complainant alleges violation of articles 1, 2, 3, 4, 5, 7(1), 12 (1), 13(1), 13(2), 14, 15, 16, 17(1), 17(2), 18, 25 and 26 of the African Charter on Human and Peoples' Rights.

8. In their prayers for redress, the complainants request the Commission to:

- Undertake an independent investigation and verification of the violations being complained of;
- Request, pending its decision on this communication, its special rapporteurs on human rights of women, on summary, arbitrary and extra-judicial executions, and on prisons to undertake a joint investigation of violence, extra-judicial executions and related violations in Nigeria and to request the government to accede to the conduct of such an investigation;
- Request the government to verify the number and manner of death of all victims of extra-judicial executions during the period covered by the communication;
- Request the government to provide adequate and appropriate remedies to the victims of violations alleged in this communication, including, in particular, the prosecution of all persons implicated in the violations;
- Request the government to adopt and implement such measures as may be indicated by the Commission to prevent recurrence of the violations complained of in this communication; and
- Request the government to report periodically to the Commission on steps taken by it to comply with the finding and remedies indicated by the Commission.

Procedure

9. The complaint, dated April 2002, was sent on 4 April 2002, and received at the Secretariat on 5 April 2002.

10. At its 31st ordinary session held from 2 to 16 May 2002 in Pretoria, South Africa, the African Commission considered the complaint and decided to be seized thereof.

11. On 28 May 2002, the Secretariat wrote to the complainants and respondent state to inform them of this decision and requested them to forward their submissions on admissibility before the 32nd ordinary session of the Commission.

12. At its 32nd, 33rd and 34th ordinary sessions, the communication was deferred to enable the parties make submissions on admissibility.

13. At its 35th ordinary session held from 21 May to 4 June 2004 in Banjul, The Gambia, the African Commission considered this communication and declared it inadmissible.

Law

Admissibility

14. Article 56(5) of the African Charter requires that 'communications shall be considered if they are sent after exhausting of local remedies, if any, unless it is obvious that this procedure is unduly prolonged'.

15. The complainants claim that theirs is a special case in which they assert that, by the jurisprudence of the African Commission, the epidemiology of the violations described precluded the requirement to exhaust domestic remedies. Despite this, however, the African Commission decided, at its 32nd, 33rd and 34th ordinary sessions, that both parties should forward their written submissions on admissibility.

16. Despite several reminders, the complainants, in particular, have not furnished their written submissions on admissibility. Consequently, the African Commission holds that the complainants have not shown whether they have exhausted local remedies as required by the African Charter.

For these reasons, the African Commission:

Declares this communication inadmissible due to non-exhaustion of local remedies.

RWANDA

See *Democratic Republic of the Congo v Burundi, Rwanda and Uganda* (2004) AHRLR (ACHPR 2004) reported under 'Burundi'

SOUTH AFRICA

Prince v South Africa

(2004) AHRLR 105 (ACHPR 2004)

Communication 255/2002, *Garreth Anver Prince v South Africa*
Decided at the 36th ordinary session, December 2004, not yet reported in an official Activity Report (see editorial)
Rapporteur: Chigovera

R**eligion** (limitations, 41-44)
Interpretation (international standards, 42)
Limitations of rights (43, 44, 48; margin of appreciation, 50-53)
Work (occupational choice, 45, 46)

Summary of facts

1. The complaint is filed by Mr Garreth Anver Prince, a South African citizen of 32 years old, against the Republic of South Africa.

2. The complainant alleges that, despite his completion of the academic requirements for admission as an attorney in terms of the Attorney's Act 53 of 1979, and despite his willingness to register for a contract of community service for a period of one year, which is a requirement under the said Act, the Law Society of the Cape of Good Hope (the Law Society) declined to register his contract of community service.

3. The complainant alleges that the Law Society's refusal to register him was based on his disclosure, made in his application with the Law Society, that he had two previous convictions for possession of cannabis under section 4(b) of the Drugs and Drug Trafficking Act and his expressed intention to continue using cannabis. The complainant stated that the use of cannabis was inspired and required by his Rastafari religion. The Law Society held that such a person was not a fit and proper person to be admitted as an attorney.

4. The complainant alleges that reasoning and meditation are essential elements of the religion. The use of cannabis is central to these essential practices of the religion that serve as a form of communion. He alleges that the use of cannabis was believed to open one's mind and helped Rastafari gain access to the inspiration provided by Jah Rastafari, the Living God. He further alleges that the use of cannabis in Rastafari religion was the most sacred act surrounded by very strict discipline and elaborate protocol. The

use of the herb, as it is commonly known, is to create unity and assist in establishing the eternal relationship with the Creator.

Complaint

5. The complainant alleges violations of articles 5, 8, 15 and 17(2) of the African Charter on Human and Peoples' Rights.

6. The complainant prays that he be entitled to an exemption for the sacramental use of cannabis reasonably accommodating him to manifest his beliefs in accordance with his Rastafari religion.

Procedure

7. The undated complaint was received at the Secretariat on 12 August 2002.

8. On 16 August 2002, the Secretariat wrote to the complainant acknowledging receipt of the complaint, and informing him that his complaint has been registered and scheduled for consideration at the Commission's 32nd ordinary session.

9. At its 32nd ordinary session held from 17 to 23 October 2002 in Banjul, The Gambia, the African Commission considered the complaint and decided to be seized thereof.

10. On 4 November 2002, the Secretariat wrote to the complainant and respondent state to inform them of this decision and requested them to forward their submissions on admissibility before the 33rd ordinary session of the Commission.

11. On 19 December 2002, the Secretariat received the complainant's written submissions on admissibility of the communication, which was forwarded to the respondent state on 17 February 2003. In the same letter, the Secretariat reminded the respondent state to forward its written submissions on the admissibility of the communication before the 33rd ordinary session.

12. By a *note verbale* of 31 March 2003, which was not received in a legible print-out form, the respondent state confirmed receipt of the Commission's correspondences and requested the Commission to extend the deadline for the submission of its response on the admissibility of the complaint for another three months.

13. On 8 April 2003, the Secretariat wrote to the respondent state confirming receipt of their correspondence and requesting them to resend the said request to it as the same did not reach the Secretariat in a legible print-out form.

14. By a fax of 5 May 2003, the respondent state confirmed its request for more time to enable it prepare and forward its written submissions on admissibility of the communication to the Commission.

15. At its 33rd ordinary session held in Niamey, Niger from 15 to 29 May 2003, the African Commission examined the communication and postponed its decision on admissibility to its 34th ordinary session granting the respondent state more time as per its request.

16. On 12 June 2003, the Secretariat wrote to the complainant and the respondent state informing them of this decision and further reminding the latter to forward its written submissions on admissibility of the same before the 34th ordinary session of the Commission.

17. On 12 September 2003, the Secretariat of the African Commission received the written submissions on admissibility of the respondent state. This was forwarded to the complainant on 23 September 2003.

18. At its 34th ordinary session held in Banjul, The Gambia from 6 to 20 November 2003, the African Commission examined the complaint and declared it admissible.

19. On 10 December 2003, the Secretariat wrote to the parties informing them of this decision and further requesting them to forward to the African Commission their respective written submissions on the merits of the communication before the 35th ordinary session.

20. On 12 March 2004, the respondent state forwarded its written submissions on the merits of the communication and expressed its wish to lead oral arguments on the matter during the 35th ordinary session of the African Commission, receipt which the Secretariat acknowledged on 17 March 2004. A similar request to address the African Commission orally was sent to the African Commission by the complainant on 11 and 23 March 2004.

21. On 17 March 2004, the Secretariat of the African Commission forwarded a copy of the respondent state's written submissions on the merits to the complainant.

22. By a *note verbale* of 21 May 2004, the respondent state informed the Secretariat that the parties in the matter have consulted on the date for the hearing of the communication by the African Commission and kindly requested the latter to consider the same on 29 May 2004, which date would be most suitable for them to appear.

23. The parties have concluded their exchange of submissions on the merits. They are now both requesting the African Commission to allow them to lead oral arguments to complement their submissions on the same. The African commission granted them audience as requested to enable them to complement their written submissions and to enable the African Commission to engage the parties during their presentations.

24. At its 35th ordinary session held in Banjul, The Gambia, from 21 May to 4 June 2004, the African Commission examined the complaint and decided to defer its decision on the merits to the 36th ordinary session.

25. On 17 June 2004, the Secretariat informed both parties of this decision.

26. At its 36th ordinary session that took place from 23 November to 7 December 2004, the African Commission considered the communication and took a decision on merits thereto.

Law

Admissibility

27. Since both parties have not contested the issue of admissibility of this communication, and since the complaint complies with the requirements under article 56 of the African Charter, the African Commission decided, unanimously, to declare it admissible at its 34th ordinary session held in Banjul, The Gambia from 6 to 20 November 2003.

Decision on merits

28. As per the original complaint, the complainant is a 32 years old man who wishes to become an attorney in the courts of South Africa. Having satisfied all the academic requirements of the South African Attorney's Act (the Act), he applies to register a contract of community service with the Law Society of the Cape of Good Hope (the Law Society). Under the same Act, registering articles of clerkship or performing community service, as Mr Prince wished to do, is another requirement that an applicant should fulfil before he/she could be admitted as an attorney to practice before the High Court. Per the provisions of the Act, the applicant, such as Mr Prince, should serve for a period of one year. Before serving so, however, the Act requires that the applicant should provide proof to the satisfaction of the Law Society that he/she is 'fit and proper person'. In his application to the Society, and as part of the legal requirement, Mr Prince disclosed not only that he had two previous convictions for possession of cannabis under the Drugs and Drug Trafficking Act (the Drugs Act), but that he intended to continue using cannabis as inspired and required by his Rastafarian religion.

29. The Law Society declined to register Mr Prince's contract of community service taking the view that a person who, while having two previous convictions for possession of cannabis, declares his intention to continue using the substance, is not a 'fit and proper person' to be admitted as an attorney. Mr Prince alleged that the Law Society's refusal to register meant that as long as he adhered to the requirements of his Rastafari faith, he would never be admitted as an attorney. Accordingly, Mr Prince brought this complaint alleging violation of articles 5, 8, 15, and 17(2) of the African Charter. In his prayers to the African Commission, the complainant requested the African Commission to find the respondent in violation of the said articles, and that he be entitled to an exemption for the sacra-

mental use of cannabis reasonably accommodating him to manifest his beliefs in accordance with his Rastafari religion.

30. In elucidating his claims, the complainant cites two South African statutes as having an impact on the practice of the Rastafarian religion: the Drugs Act and the Medicines and Related Substances Act (the Medicines Act). The former lists cannabis as an undesirable dependence-producing substance and prohibits its use and possession, in line with the stated purpose of the Act: to prohibit the use and possession of dependence-producing substances and dealing in such substances. It, however, exempts the use or possession of this substance in certain circumstances such as for medicinal purposes, subject to the provisions of the Medicines Act, which in turn regulates the registration of medicines and substances. The latter Act, however, prohibits the use or possession of cannabis except for research and analytical purposes. The complainant alleges that the purposes of the prohibitions contained in these two Acts coincided and hence both statutes proscribed the sacramental use of cannabis and therefore impacted upon the religious practices of Rastafari. The proscriptions are unlimited in terms that they also encompassed the use or possession of cannabis by Rastafari for *bona fide* religious purposes failing to distinguish between Rastafari and drug abusers thereby grouping genuine religious observation with criminality. He alleges that the respondent state thus violated his right to dignity (article 5), his right to freedom of religion (article 8), his right to occupational choice (article 15), and his right to a cultural life (article 17(2)).

31. The complainant, in requesting for an exemption for sacramental use of cannabis, further explains that he does not ask for the overall decriminalisation of cannabis, rather for a reasonable accommodation to manifest his beliefs in accordance with his Rastafari religion. Such reasonable accommodation ensures a religiously pluralistic society that is an important principle of any democratic society. He adds that Rastafari is a minority and vulnerable group, a political minority not able to use political power to secure favourable legislations for themselves.

32. In its initial response of 5 September 2003, the respondent state argues that attorneys are obliged to uphold the law and wilful defiance of the law suggests that such a person is not fit and proper to be admitted as an attorney. This is so even if the person applying for admission believes that a law or a provision thereof contravenes his or her fundamental rights. Until such time that a law or a provision thereof has been declared unconstitutional or has been changed by legislative or other means, everyone has duty to obey the law or provision in question.

33. The respondent state further argues that any religious practices must be conducted within the framework of the law and must, if necessary, be adapted to comply with the law as failure to do so will result in anarchy. Rastafari is a genuine religion protected by the South African Constitution. The recognition of and the right to practice a religion and engage in

associated activities may not be exercised in a manner which is inconsistent with the Bill of Rights and the rule of law under which no one would be punished except for a distinct breach of law to which everyone is subject. Religious practices and the freedom to practice a religion must be conducted strictly in accordance with the law, which must be obeyed.

34. Contrary to the complainant's allegation, the respondent state avers that the fact that reasonable limitations are placed on the practice of a religion in the interests of society does not negate the essential right to freedom of religion. The Constitution permits limitation of rights without which the rights of others may be infringed with unintended consequences. The prohibition on the use of cannabis is a reasonable and permissible limitation on the freedom of religion. The legal restrictions placed on the use of cannabis do not erode the necessity to ensure religious pluralism, are rational and legitimate and do not invade the right any further than it needs.

35. The respondent state further avers that lawyers have a duty, at all times, to uphold the Constitution and the rule of law, which includes adhering to the law, adapting ones religious practices to confirm with the law and generally setting an example to others. The complainant's professional difficulties are due to his refusal to accept and adhere to the relevant laws and that the worship of the Creator is possible without cannabis. The impugned provisions of the law do not compel Rastafari to desist from taking part in an aspect of the cultural life of their community.

36. In conclusion, the respondent state admits that the impugned provisions do prohibit the use or possession of cannabis for *bona fide* religious purposes but they are not overbroad and that the Constitutional Court has upheld the restrictions placed on the use of cannabis.

37. In its further written submissions on the merits, the respondent state raised the following points:

> That the matter has been carefully considered by the South African courts which found that while the legislations in question did limit Mr Prince's constitutional rights, specifically the right to freedom of religion, such limitations were justifiable under the South African Constitution which allows limitations only in terms of law of general application to the extent that such limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom. Limitations may also take place taking into account all relevant factors, including: The nature of the right; The importance of the purpose of the limitation; The nature and extent of the limitation; The relation between the limitation and its purpose; and the less restrictive means to achieve the purpose. That in considering the matter, the South African Constitutional Court made a careful analysis of the Bill of Rights and struck a careful balance between competing interests in society, while remaining acutely aware of the historical context and unique feature of the South African society of which it is the highest judicial body.
>
> That the African Commission should apply extreme care in considering this

matter as a determination that will in effect contradict the decision of an esteemed judicial body will inevitably carry seeds of possible conflict between domestic and international legal systems, and will upset the careful balances struck within the young and developing human rights system of member states of the AU.

That the South African courts, in denying Mr Prince's application, and in striking a balance between his rights and the interests of the wider society, did not only do so with South African domestic law in mind, but in the process also took into account the widest possible scope of international law, both customary international law and treaty law, including the African Charter. By using the same international law sources as the South African courts, the African Commission should come to the same conclusions as that of the South African domestic courts.

That, in order to allow the domestic legal system of South Africa co-exist with the African Charter without undue tension, the African Commission should apply the following two methods of interpretation:

The principle of subsidiarity which delimits or distributes powers, functions and responsibilities between the state on the one hand, and individuals and groups within the jurisdiction of the state, on the other. Equally, this can be applied to distribute powers between national authorities of state parties to the African Charter and the African Charter itself. The national authorities should have the initial responsibility to guarantee rights and freedoms within the domestic legal orders of the respective states, and in discharging this duty, should be able to decide on appropriate means of implementation. The African Commission should therefore construct its role as subsidiary, as a narrower and supervisory competence in subsequently reviewing a state's choice of action against the standards set by the provisions of the African Charter. In terms of this construction, the African Commission should not substitute for domestic institutions in the interpretation and application of national law.

The margin of appreciation doctrine, which is the logical result of the application of the principle of subsidiary. It's a discretion that a state's authority is allowed in the implementation and application of domestic human rights norms and standards. This discretion that the state is allowed, rests on its direct and continuous knowledge of its society, its needs, resources, economic and political situation, legal practices, and the fine balance that need to be struck between the competing and sometimes conflicting forces that shape a society. Accordingly, the African Commission, in considering the matter, has to take into account the legal and factual situation in South Africa. It should not view this communication *in abstracto,* but in the light of the specific circumstances pertaining in the respondent state. The South African Constitutional Court did take into account such specific circumstances: the *ratio* for the decision to limit the right to freedom of religion in terms of the Constitution was that the use of cannabis by Rastafari could not be sanctioned without impairing the state's ability to enforce its drug legislation in the interest of the public at large.

38. The respondent state finally avers that the African Charter does not prescribe how state parties should achieve the protection of the rights enshrined within the domestic jurisdiction, but leaves the way in which such protection is to be achieved to the discretion of state parties.

39. The African Commission has examined the complaint and the various documents thereto and decides as follows.

Violation of the right to freedom of religion: Article 8 of the African Charter

40. The complainant alleges violation of this article due to the respondent state's alleged proscription of the sacramental use of cannabis and for failure to provide a religious exemption for Rastafari. The crux of his argument is that manifestation of Rastafari religious belief, which involves the sacramental use of cannabis, places the Rastafari in conflict with the law and puts them at risk of arrest, prosecution and conviction for the offence of possession or use of cannabis. While admitting the prohibition serves a rational and legitimate purpose, he nonetheless holds that this prohibition is disproportionate as it included within its scope the sacramental use of cannabis by Rastafari.

41. Although the freedom to manifest one's religion or belief cannot be realised if there are legal restrictions preventing a person from performing actions dictated by his or her convictions, it should be noted that such a freedom does not in itself include a general right of the individual to act in accordance with his or her belief. While the right to hold religious beliefs should be absolute, the right to act on those beliefs should not. As such, the right to practice one's religion must yield to the interests of society in some circumstances. A parent's right to refuse medical treatment for a sick child, for instance, may be subordinate to the state's interest in protecting the health, safety, and welfare of its minor children.

42. In the present case, thus, the Commission upholds the respondent state's restriction, which is general and happens to affect Rastafari incidentally (*de facto*), along the lines of the UN Human Rights Committee, which, in the case *K Singh Bhinder v Canada* (communication 208/1986) upheld restrictions against the manner of manifestation of one's religious practice. That case concerned the dismissal of the complainant from his post as maintenance electrician of the government-owned Canadian National Railway Company. He had insisted on wearing a turban (as per the edicts of his Sikh religion) instead of safety headgear at his work, which led to the termination of his labour contract. The UN Human Rights Committee held:

> If the requirement that a hard hat be worn is seen as a discrimination *de facto* against persons of the Sikh religion under article 26, then, applying criteria now well established in the jurisprudence of the Committee, the legislation requiring that workers in federal employment be protected from injury and electric shock by wearing of hard hats is to be regarded as reasonable and directed towards objective purpose that are compatible with the Covenant.

43. The African Commission considers that the restrictions in the two South African legislations on the use and possession of cannabis are similarly reasonable as they serve a general purpose and that the Charter's protection of freedom of religion is not absolute. The only legitimate limitations to the rights and freedoms contained in the African Charter are found in article 27(2); ie that the rights in the African Charter 'shall be exercised with due regard to the rights of others, collective security, mor-

ality, and common interest'. The limitation is inspired by well-established principle that all human and peoples' rights are subject to the general rule that no one has the right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognised elsewhere. The reasons for possible limitations must be founded in a legitimate state interest and the evils of limitations of rights must be strictly proportionate with and absolutely necessary for the advantages, which are to be obtained. It is noted that the respondent state's interest to do away with the use of cannabis and its abuse/trafficking stems from the fact that, and this is also admitted by the complainant, cannabis is an undesirable dependence-producing substance. For all intents and purposes, this constitutes a legitimate limitation on the exercise of the right to freedom of religion within the spirit of article 27(2) *cum* article 8.

44. Besides, the limitations so visited upon the complainant and his fellow Rastafari fall squarely under article 2 of the African Charter which requires states to ensure equal protection of the law. As the limitations are of general application, without singling out the complainant and his fellow Rastafari but applying to all across the board, they cannot be said discriminatory so as to curtail the complainant's free exercise of his religious rights.

Violation of the right to occupational choice: Article 15 of the African Charter

45. The complainant has alleged that because of his religious beliefs, the Law Society refused to register his contract of community service, thereby violating his right to occupational choice. He argued that the effect of the legal restrictions on cannabis in effect denied the Rastafari access to a profession.

46. One purpose of this Charter provision is to ensure that states respect and protect the right of everyone to have access to the labour market without discrimination. The protection should be construed to allow certain restrictions depending on the type of employment and the requirements thereof. Given the legitimate interest the state has in restricting the use and possession of cannabis as shown above, it is held that the complainant's occupational challenge can be done away with should he chose to accommodate these restrictions. Although he has the right to choose his occupational call, the Commission should not give him or any one a leeway to bypass restrictions legitimately laid down for the interest of the whole society. There is no violation, thus, of his right to choose his occupation as he himself chose instead to disqualify himself from inclusion by choosing to confront the legitimate restrictions.

Violation of the right to dignity and cultural life: Articles 5 and 17(2) of the Charter

47. The complainant lists down the main characteristics for identifying the Rastafari way of life (culture): hairstyle, dress code, dietary code, usage of cannabis, the worship of Jah Rastafari, the Living God, and others. He

further states that the critical form of social interaction amongst the followers of this religion is the worship of the Creator, which is not possible without cannabis, and to which the respondent state argues to the contrary.

48. The Commission notes that the participation in one's culture should not be at the expense of the overall good of the society. Minorities like the Rastafari may freely choose to exercise their culture, yet, that should not grant them unfettered power to violate the norms that keep the whole nation together. Otherwise, as the respondent state alleged, the result would be anarchy, which may defeat everything altogether. Given the outweighing balance in favour of the whole society as opposed to a restricted practice of Rastafari culture, the Commission should hold that the respondent state violated no cultural rights of the complainant.

49. With respect to the alleged violation of the right to human dignity, the Commission holds that the complainant's treatment by the respondent state does not constitute unfair treatment so as to result in his loss of self-worth and integrity. As he or his fellow Rastafari are not the only one's being proscribed from the use or possession of cannabis, the complainant has no grounds to feel devalued, marginalised, and ignored. Thus, the Commission should find no violation of the right to dignity.

With respect to the arguments of the respondent state invoking the inter-related principle of subsidiarity and the margin of appreciation doctrine

50. The African Commission notes the meaning attached to these doctrines by the respondent state as outlined in its submissions to the former. The principle of subsidiarity indeed informs the African Charter, like any other international and/or regional human rights instrument does to its respective supervisory body established under it, in that the African Commission could not substitute itself for internal/domestic procedures found in the respondent state that strive to give effect to the promotion and protection of human and peoples' rights enshrined under the African Charter.

51. Similarly, the margin of appreciation doctrine informs the African Charter in that it recognises the respondent state in being better disposed in adopting national rules, policies and guidelines in promoting and protecting human and peoples' rights as it indeed has direct and continuous knowledge of its society, its needs, resources, economic and political situation, legal practices, and the fine balance that need to be struck between the competing and sometimes conflicting forces that shape its society.

52. Both doctrines establish the primary competence and duty of the respondent state to promote and protect human and peoples' rights within its domestic order. That is why, for instance, the African Charter, among others, requires complainants to exhaust local remedies under its article 56. It also gives member states the required latitude under specific articles in allowing them to introduce limitations. The African Commission

is aware of the fact that it is a regional body and cannot, in all fairness, claim to be better situated than local courts in advancing human and peoples' rights in member states.

53. That underscored, however, the African Commission does not agree with the respondent state's implied restrictive construction of these two doctrines relating to the role of the African Commission, which, if not set straight, would be tantamount to ousting the African Commission's mandate to monitor and oversee the implementation of the African Charter. Whatever discretion these two doctrines may allow member states in promoting and protecting human and peoples' rights domestically, they do not deny the African Commission's mandate to guide, assist, supervise and insist upon member states on better promotion and protection standards should it find domestic practices wanting. They do allow member states to primarily take charge of the implementation of the African Charter in their respective countries. In doing so, they are informed by the trust the African Charter has on member states to fully recognise and give effect to the rights enshrined therein. What the African Commission would not allow, however, is a restrictive reading of these doctrines, like that of the respondent state, which advocates for the hands-off approach by the African Commission on the mere assertion that its domestic procedures meet more than the minimum requirements of the African Charter.

For these reasons, the African Commission:

Finds no violation of the complainant's rights as alleged.

TANZANIA

Women's Legal Aid Center (on behalf of Moto) v Tanzania

(2004) AHRLR 116 (ACHPR 2004)

Communication 243/2001, *Women's Legal Aid Center (on behalf of Sophia Moto) v Tanzania*
Decided at the 36th ordinary session, December 2004, not yet reported in an official Activity Report (see editorial)
Rapporteur: El Hassan

Fair trial (right to be heard, 44; appeal, 47)

Summary of facts

1. The complaint is filed by Women's Legal Centre, Tanzania, on behalf of Sophia Moto, an unemployed Tanzanian woman of 40 years old.

2. The complainant alleges that she petitioned to the magistrate of Dar es Salaam in 1995 and appealed to the High Court of Tanzania in 1997 for the dissolution of her marriage to one Anthony Lazima, division of matrimonial assets, and damages from an illicit cohabitation of the latter with one Bertha Athanas. She claims that the High Court, which is part of the Tanzanian judiciary, dismissed her appeal on the ground of her non-appearance on the date set for the hearing.

3. The complainant states that she had applied to the same High Court for a review of the said decision, but the High Court overruled the application. Under the laws of Tanzania, such an exercise of applying for review before the same High Court bars one from appealing against the decision of the same to the Court of Appeal of Tanzania. The complainant alleges that she could not thus seize the highest court in the country.

4. She, therefore, alleges that the High Court, in so dismissing her appeal without having issued summons or notice to her notifying her of the date for the hearing of the appeal, violated her rights to fair trial and hearing. The same decision also resulted in the wrongful denial of her right to the matrimonial property.

5. The complainant claims that she has exhausted all the national remedies available to pursue her rights and that the present claim has not been or is not being considered by any other human rights treaty monitoring body.

Complaint

6. The complainant alleges violation of articles 7 and 14 of the African Charter on Human and Peoples' Rights.

7. The complainant prays for a declaration that the respondent state provides her with appropriate remedies in accordance with the laws of Tanzania, and for any other relief the Commission deems just and fit.

Procedure

8. The complaint was dated 10 October 2001 and received at the Secretariat on 7 December 2001.

9. On 24 January 2002, the Secretariat wrote to the complainant acknowledging receipt of the complaint, informing her of the entering of the same in the Commission's register, its number in the latter, and its having been scheduled for consideration by the Commission at its 31st ordinary session taking place from 2 to 16 May 2002.

10. At its 31st ordinary session held from 2 to 16 May 2002 in Pretoria, South Africa, the African Commission considered the complaint and decided to be seized thereof.

11. On 28 May 2002, the Secretariat wrote to the complainant and the respondent state of this decision and requested them to forward their submissions on admissibility before the 32nd ordinary session of the Commission.

12. On 9 September 2002, the complainant requested further time for submission of further information on the issue.

13. At its 32nd ordinary session held from 17 to 23 October 2002 in Banjul, The Gambia, the African Commission examined the complaint and decided to defer its consideration on admissibility to the 33rd ordinary session.

14. On 7 November 2002, the Secretariat wrote to the complainants and respondent state to inform them of this decision and further remind them to forward their submissions on admissibility of the same before the 33rd ordinary session of the Commission.

15. On 3 April 2003, the Secretariat of the African Commission wrote to the parties informing them that it still awaited their submissions on the admissibility of the complaint and further reminded them to forward the same before the 33rd ordinary session of the Commission.

16. At its 33rd ordinary session held in Niamey, Niger from 15 to 29 May 2003, the African Commission considered the communication and declared it admissible.

17. On 12 June 2003, the Secretariat wrote to the complainant and respondent state informing them of this decision and further reminding

them to forward their written submissions on merits of the same before the 34th ordinary session of the Commission.

18. A similar reminder was resent to the respondent state on 3 July 2003 and to both parties on 6 August 2003.

19. On 3 October 2003, the Secretariat received the respondent state's written submissions to the communication, which was forwarded to the complainant on 6 October 2003, which was received, per DHL's online Global Tracking facility, on 13 October 2003.

20. At its 34th ordinary session held in Banjul, The Gambia from 6 to 20 November 2003, the African Commission examined the complaint and decided to defer its consideration on merits to the 35th ordinary session.

21. On 8 and 9 December 2003, the Secretariat wrote to the complainant and the respondent state respectively informing them of this decision and further requesting the latter to forward to the African Commission a copy of the country's civil procedure code and the former its response to the written submissions of the respondent state before the 35th ordinary session.

22. On 13 January 2004, the complainant sent its written submissions accordingly, which were forwarded to the respondent state on 11 February 2004.

23. On 17 February 2004, the respondent state forwarded a copy of the country's civil procedure code through the African Union's office in Addis Ababa.

24. At its 35th ordinary session held in Banjul, The Gambia from 21 May to 4 June 2004, the African Commission examined the complaint and decided to defer its decision on the merits to the 36th ordinary session.

25. On 17 June 2004, the Secretariat informed both parties of this decision.

26. At its 36th ordinary session held from 23 November to 7 December 2004, in Dakar, Senegal, the African Commission considered the communication and took a decision on the merits.

Law

Admissibility

27. Article 56 of the African Charter governs admissibility of communications brought before the African Commission. In this regard, the African Commission notes that the respondent state's only challenge on the admissibility of this communication concerned itself with article 56(5) under which it claimed that the dismissal of the application for review was done by a court of competent jurisdiction and in accordance with its laws. For the purposes of the said sub-article, however, this claim does not refute

the complainant's claim that she could not seize the highest court in Tanzania for the reason that she opted to apply for a review of the decision of the High Court that dismissed her application.

28. For this reason, the African Commission decided to declare this communication admissible at its 33rd ordinary session held in Niamey, Niger from 15 to 29 May 2003.

Merits

29. As can be seen in paragraph 2 above, the complaint arose out of the Tanzanian High Court's decision to dismiss the complainant's civil case appeal for the dissolution of marriage on the ground that she failed to appear on the date set for the hearing irrespective of the fact that she was not served with summons or notice notifying her of the date for the same. In seizing the African Commission, she alleged that the Court's decision, an institution of the respondent state, denied her right to fair trial, and (as the original case before the Lower Magistrate Court related to dissolution of property as well) her right to the matrimonial property.

30. The complainant further alleges, in her memorial to the African Commission of 9 September 2004, that it was her counsel and not her who was reportedly present and aware of the date on which her case was slated before the High Court which dismissed it altogether for non-appearance. She further alleged that there was no evidence presented showing that her counsel (on whose expertise she, as a lay person, relied on) communicated the information about the date for the hearing of her appeal. By dismissing her appeal, the High Court improperly punished her while the proper person to be punished for 'negligence or recklessness', if any, was her counsel.

31. In requesting that the African Commission dismiss the complaint in its entirety, the respondent state submitted, on 21 August 2003, its response to the same. In its response, the respondent state disputed the allegation that it violated article 7 of the African Charter in that the complainant was indeed granted an opportunity to be heard but chose not to exercise it by failing to appear on the hearing date. The respondent state annexed a copy of the proceedings of the High Court in question and further argued that although the judiciary is an institution of the respondent state, the latter could not be at fault for the Court's dismissing the appeal as the complainant's advocate was present on the first date for the hearing and was aware of the date when the hearing was adjourned to, and that despite this knowledge, both the complainant and her counsel failed to appear on the scheduled date.

32. The respondent state further argued that there was no violation of article 14 of the African Charter as the decision to dismiss by the High Court in question was in accordance with Order IX, rule 8 of the country's Civil Procedure Code of 1966. The complainant failed to adduce evidence

to prove her right to property, which right was recognised by the government. It argued that the matter had been completely dealt with by the respondent state's courts of law and hence the complaint before the Commission was an abuse of process of law. The respondent state concluded that the appeal was dismissed by the High Court because of the gross misconduct of the complainant's advocate and hence she should proceed against her counsel for professional misconduct.

33. By a rejoinder of 23 October 2003, the complainant maintained that there was no evidence whatsoever to show that she was duly served or notified of the date set for the hearing by the High Court that dismissed the appeal, and hence the dismissal was contrary to the cardinal principle of natural justice, the right to be heard. She insisted that she did not have knowledge of the hearing date as the records show that she was absent when the matter was adjourned.

34. She further averred that her main prayers as laid before the Magistrate's Court, dissolution of marriage and division of matrimonial property, remained undecided to date as the High Court's dismissal order erroneously based itself on the Law of Limitations Act of 1971. She claimed that even if she were absent on the date the matter was called for hearing, which fact she denied, the High Court was wrong to dismiss her appeal as it was not mandatory under the law (Order XXXIX rule 11(1) of the Civil Procedure Code of 1966) that non appearance of the appellant shall result in dismissal of the appeal.

35. The complainant followed this by a further submission, dated 13 January 2004, addressing the contents of the copy of the proceedings before the High Court that dismissed her appeal for non-appearance. In that, she alleged that the matter concerned matrimonial issue, which required determination for purposes of giving rights to each party, exacting special care due to its nature relating to divorce, custody of children, and division of property. The counsel for the appellant that appeared before the High Court was a human being and anything might have happened to her and as such her non-appearance on the hearing date ought to have been given excuse. Besides, the complainant further alleged, the non-appearance was a first default and the trial Judge should have adjourned the matter and order for the parties to be notified to appear on another date. She maintained that the dismissals failed to consider the interest of both parties as far as married life was concerned, which, together with the rights of each party, had to be determined.

36. A look at both parties' submissions and documentary evidence adduced before the African Commission showed that an important fact, that neither the complainant nor her counsel appeared before the High Court on the date her appeal was slated to be heard, was correct. As summarised above, however, the complainant held that the dismissal that ensued was not justified as she had not been notified of the date for the hearing, and that, among others, the dismissal was contrary to

natural justice denying her right to equitable share of the matrimonial property. She maintained that it was her counsel's fault that resulted in her present situation and that should anyone be punished, it should have been her counsel not her. She further advocated that the decision by the High Court did not determine her marital status or the partition of matrimonial property, including child custodial issues. It merely disposed of the matter on the superficial reason that procedure had not been complied with.

37. The respondent state, on the other hand, insisted that it shall not be held responsible for the complainant's failure to follow procedure in enforcing her rights. It even suggested that the complainant rather proceed against her own counsel for failure to appear which resulted in the dismissal of the case by the High Court.

38. The African Commission notes that civil procedure concerns itself with enabling parties enforce their substantive rights before the courts as guaranteed by substantive laws. It is not disputed that the present complainant failed to do so by failing to appear on the date for hearing of the matter. What is disputed is the fairness of the dismissal of the matter in its entirety, which the respondent state claimed was proper.

39. The respondent state claimed that the High Court's decision based itself on Order IX rule 8 of the country's Civil Procedure Code of 1966, which read:

> Where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the court shall make an order that the suit be dismissed unless the defendant admits the claim, or part thereof, in which case the court shall pass a decree against the defendant upon such admission and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder.

40. The subsequent rule 9(1) under the same Order IX, however, introduced an important exception to rule 8 above in providing the plaintiff an opportunity to have the dismissal set aside. It states that the plaintiff

> may apply for an order to set the dismissal aside, and if he satisfies the court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the court shall make an order setting aside the dismissal and shall appoint a day for proceeding with the suit.

41. The African Commission does not wish to pre-empt the understanding and interpretation of these rules by Tanzanian courts. Yet, the combined reading of these two rules clearly shows that the dismissal of the suit by the High Court is not unassailable and that as long as the plaintiff can show sufficient cause for her non-appearance, the Court should allow the complainant to proceed with the suit. The High Court may exercise discretion, on a case by case basis, in deciding whether the cause shown before it to have the dismissal set aside is sufficient or not.

42. The courts are provided with further discretionary power under Order

XXXIX rule 11(2) of the same Procedure Code when they decide upon the appeals before them. This rule reads:

> If on the day fixed or any other day to which the hearing may be adjourned the appellant does not appear when the appeal is called on for hearing, the court may make an order that the appeal be dismissed.

43. The emphasis here is on 'may make an order that the appeal be dismissed'. This is a clear discretion left to the Court to decide as it deems fit. Again, the African Commission does not wish to delve into the interpretation of this or any other laws of Tanzania. Yet, the effect of their application, should it run contrary to the natural justice principle underlying article 7(1)(a) of the African Charter, can be a proper subject before the African Commission.

44. The facts as presented by the parties and not contested indicate that there were no proceedings held justifying the closure of the complainant's case without further hearings. In such circumstances, the African Commission can not but agree with the complainant's claim that the option the Court followed in dismissing her appeal without giving her an opportunity to be heard and without considering the consequences that may have on her claims to property and child custody (which could have been taken care of by a favourable exercise of discretion by the courts) does not conform with the requirements of the African Charter and the principle of natural justice. The Court's decision to simply dismiss the complainant's petition ushered in uncertainty as to the status of the marriage itself, the partition of matrimonial property, and custodial issues.

45. The African Commission holds that substantive rights enshrined in the African Charter rely on procedural rules for their effective enjoyment. The application of these procedural rules giving effect to the enjoyment these rights should be checked since, like in the present case, their application may negate the very substantive rights, resulting in their curtailment or deprivation. Member states have committed themselves to give effect to rights contained in the African Charter. The African Commission holds that the application of these procedures domestically put in place with a view to implement the African Charter should not result in frustrating the very obligations the member states undertook in committing themselves under the African Charter.

46. The African Commission further notes that although the provisions of the Tanzanian Civil Procedure Code form part of the procedural laws giving effect to the substantive laws elsewhere in their laws, their application in cases such as the present could result in the curtailment of citizens to enjoy their basic rights. It is not being disputed that the substantive laws of Tanzania guarantee the right to property, family life and child custodian rights. Yet, the establishment of such rights must be followed by the diligence on the part of the state to ensure that everyone enjoys them, which means the just application of procedures meant to give effect to the rights. It is noted that it is not the place of the African Commission, nor

does it fall under its mandate, to prescribe legislation for member states with a view to give effect to the rights and duties enshrined in the African Charter domestically. However, it is the duty of the African Commission to check the application of domestic procedures enacted by member states implementing the African Charter. Accordingly, Tanzanian authorities may enact the procedures governing the exercise of rights and duties; while the African Commission retains its supervisory role over the application of those procedures enabling the implementation of the African Charter, making sure that the application of procedures does not indeed deny the enjoyment of the rights themselves.

47. It is noted that the complainant was given only one chance to appeal. She was faced with making a procedural choice to enforce her rights. Eventually, her case was dismissed on mere grounds of procedural rules, the application of which was at times discretionary (as shown in paragraphs 38-42 above). Even the review procedure allowing the same High Court Judge to preside over appeals and their review, the application of which led to the dismissal of the complainant's claim, does not tone with the general requirements of fair trial.

For these reasons, the African Commission:

- Finds the Republic of Tanzania in violation of article 7(1)(a);
- Further, the African Commission urges the government of the Republic of Tanzania to ensure that its courts apply its rules of procedure without fear or favour;
- Urges the government of the Republic of Tanzania to allow the complainant to be heard on her appeal.

UGANDA

See *Democratic Republic of the Congo v Burundi, Rwanda and Uganda* (2004) AHRLR (ACHPR 2004) reported under 'Burundi'

DOMESTIC DECISIONS

BENIN

Review of constitutionality of family legislation

(2004) AHRLR 127 (BeCC 2002)

Constitutional Court, decision DCC 02-144, 23 December 2002
Judges: Ouinsou, Sebo, Boukari, Glélé-Ahanhanzo, Hountondji, Mayaba, Medegan-Nougbode
Translated from French. Extracts; full text on www.chr.up.ac.za

Equality, non-discrimination (discrimination on the grounds of sex, polygamy, 10)

The Constitutional Court

[**1.**] With whom a request was lodged on 20 June 2002 and registered with its Secretariat on the same date under number 031-C/079/REC, by virtue of which the President of the Republic, in accordance with articles 117 and 121 of the Constitution, submitted Law 2002-07 on the Code of Individuals and Family, passed by the National Assembly on 7 June 2002, to be tested for compliance with the Constitution;

[**2.**] To whom also an appeal was made in a letter dated 24 June 2002, registered with its Secretariat on the same date under 1402/082/REC, in which Ms H Rosine Vieyra-Soglo, member of the National Assembly and leader of the parliamentary group 'RB', referred for unconstitutionality articles 126,143, 168, 185 and 335 of the same law to the High Court;

. . .

[**3.**] Considering that Ms H Rosine Vieyra-Soglo reproaches the National Assembly for having deleted paragraph 3 of article 126 as worded in the Bill and for thus having violated the Constitution by 'omission'; that she develops as follows 'any religious marriage must meet a minimum of legal conditions: majority age and consent exempt from any pressure on the future married couple. The law must impose this minimum control on ministers of religion';

[**4.**] Considering that she maintains moreover that article 143 of the referred law is discriminatory and violates 'the principle of equality between man and woman' in that 'whereas this clause allows a man to marry more than one woman, it does not allow a woman to marry more than one man'; that the applicant alleges moreover that the clauses of articles 185, 168 second bullet, which establish in common law the rule of division of

property instead of that of communal estate comprising only property acquired after marriage, 'violate not only the principle of equality but are in contradiction with other clauses of the code such as articles 143, 74 (third bullet), etc . . .'; that finally, she affirms that according to article 335 of the law under scrutiny: 'The suit to establish paternity is not open, therefore not admissible for any alleged child, on having attained his/her majority, in order to regain his/her human dignity, in violation of fundamental human rights';

[**5.**] Considering that she consequently appeals to the Court to kindly declare that articles 126, 143, 168, 185 and 335 of the referred law are not compliant with article 26 of the Constitution, with its Preamble and with articles 2, 3 and 5 of the African Charter of Human and Peoples' Rights;

. . .

Argument based on the violation of article 143

[**6.**] Considering that according to the applicant, article 143 violates the principle of equality between man and woman; that the said article states: 'Both forms of marriage monogamic or polygamic are recognised. However, the future couple must choose one option before the marriage is celebrated';

[**7.**] Considering that in terms of article 26 paragraphs 1 and 2 of the Constitution: 'The state ensures for all equality before the law without distinction . . . of gender . . . Men and women have equal rights . . .' That in view of the affirmation of this constitutional rule, there is unequal treatment between men and women in that the option for which provision is made in paragraph 2 of article 143 allows men to be polygamous while women can only be monogamous; that, in fact, article 1032 of the law under scrutiny decrees: 'Customs no longer have force of law in all matters regulated by the present Code' with the exception of transitory measures provided for notably in article 1023 paragraph 1 according to which: 'Marriages contracted in accordance with custom, before the date on which the present code came into force, remain subject for their validity to the conditions of content and form that were in force when the matrimonial bond was formed . . .'; that it ensues from the above that article 143 under scrutiny is contrary to the Constitution;

. . .

On the whole of the law

. . .

Concerning the clauses that are not compliant with the Constitution

[**8.**] Considering that the scrutiny of the text of the law has revealed that certain of its clauses are contrary to the Constitution in that:

[**9.**] Article 12, paragraph 1: this clause does not allow a wife to keep her maiden name following the example of her husband. This clause is thus contrary to article 26 of the Constitution. Moreover, it is not consistent with the clauses contained in Chapter V (articles 154 and following of the law under scrutiny). As marriage should not make a married woman lose her identity, she must be able to keep her maiden name to which she adds her husband's name.

[**10.**] Article 74: in the terms of the clauses of article 26, paragraphs 1 and 2 of the Constitution: 'The state ensures all of equality before the law without distinction . . . of gender . . . Men and women have equal rights . . .'. In view of the affirmation of this constitutional rule, there is unequal treatment between men and women in that the option for which provision is made in the 5th bullet of article 74 allows men to be polygamous, whereas women can only be monogamous; in any event, article 1032 of the law under scrutiny decrees: 'Customs no longer have force of law in all matters regulated by the present code' with the exception of transitory measures provided for notably in article 1023 paragraph 1 according to which: 'Marriages contracted in accordance with custom, before the date on which the present code came into force, remain subject for their validity to the conditions of content and form that were in force when the matrimonial bond was formed'. It ensues from the above that article 74 under scrutiny is contrary to the Constitution.

[**11.**] Articles 125, 127 4th bullet, 137, 141, 143, 144, 149, 150 and 154 paragraph 2: same observations as under article 74.

[**12.**] Article 128: same observations as under article 74 regarding the date and form of the union previously contracted.

[**13.**] Article 155: same observations as under article 74 regarding the reference to polygamic marriage.

[**14.**] Article 171: same observations as under article 74 regarding the phrase: '. . . in the case of monogamic marriage'.

[**15.**] Article 383 last paragraph: same observations as under article 74 in that the presence of other wives implies polygamy declared contrary to the Constitution.

[**16.**] Articles 605 and 614: same observations as under article 74.

Sub-section 4 of Chapter III of Title 1 of Book Three, articles 631, 633, 634, 635 and 636: same observations as under article 74 regarding the plurality of surviving spouses and widows.

[**17.**] Articles 732, 767, 768 paragraphs 1 and 2, 769, 770 and 784: same observations as under article 74 regarding the reference to the plurality of spouses.

[**18.**] Articles 813 and 820: same observations as under article 74.

[**19.**] Article 1023 paragraph 2, 1st bullet: same observations as under article 74 because reference is made there to two forms of marriage. Make provision, however, regarding polygamic marriages contracted prior to the promulgation of this code, for transitory clauses to settle the effects.

Concerning the clauses that are compliant with the Constitution

[**20.**] Considering that all the clauses of all the other articles of the law under scrutiny are compliant with the Constitution;

Decides

. . .

[**21.**] Are contrary to the Constitution: Articles 12 paragraph 1; 74; 125; 127, 4th bullet; 128; 137; 141; 143; 144; 149; 150; 154 paragraph 2; 155; 171; 383 last paragraph; 605 and 614; sub-section 4 of Chapter III of Title 1 of Book Three; 631, 633, 634, 635 and 636, 732, 767, 768 paragraphs 1 and 2, 769, 770 and 784; 813 and 820; 1023 paragraph 2, 1st bullet of Law 2002-07 passed on 7 June 2002 by the National Assembly.

BOTSWANA

Moatswi and Another v Fencing Centre (Pty) Ltd

(2004) AHRLR 131 (BwIC 2002)

Gadifele Moatswi and Mmametsi Kgaswane v Fencing Centre (Pty) Ltd
Industrial Court, Gaborone, 7 March 2002
Judge: Ebrahim-Carstens
Previously reported: 2002 (1) BLR 262 (IC)

Work (termination of employment, 6, 7; fair procedure, 7, 8, 38-40)
Interpretation (international standards, 6, 12, 20-24)
Equality, non-discrimination (discrimination on the grounds of sex, 10, 13, 28, 37, 38-40; direct discrimination, 15; indirect discrimination, 16; permissible discrimination 29-31, 34-36)

Ebrahim-Carstens J

[**1.**] The applicants in this case, Gadifele Moatswi and Mmametsi Kgaswane, were two of the last in a group of four women to be dismissed by the respondent following a series of dismissals of various groups of women employees on diverse dates. The women were all dismissed on the same written grounds, as were the two applicants who were handed termination letters on 29 November 1999 as follows:

> We have realised that all our work in each department is very heavy and is not recommended for women. They cannot load or work late night shift. So we have no alternative but to terminate your service. You are given two (2) weeks notice starting from 29.11.99 to 10.12.99. Thank you. Yours faithfully R Barnes Managing Director

[**2.**] The respondent's statement of defence as well stipulates as follows:

> We have always employed a small number of ladies at our business and we have made a trial to increase the number of female employees. This we did in good faith and they worked for us for some length of time. Unfortunately we discovered that the situation was not suitable — not for the ladies, neither for ourselves. On many occasions we needed extra hands to load trucks and we could not use ladies to do this. Other times we had to work late into the evening to finish a particular order, and we could not allow the ladies to work late being wives and mothers. We have kept the original number of female employees that worked from the beginning of the operation. All new ladies have been given written notice, paid leave and notice pay and paid-off.

[**3.**] The applicants testified that there were two shifts operational: the first shift was 7 am to 3 pm; and the second shift was from 3 pm to 11 pm.

They said they had only ever worked the night shift on one occasion for a week, they had no complaints regarding working night shift. With regard to loading the vehicles, the applicants testified that they were not in the loading section. They said that they weaved and bundled fencing gates and the men would take them for painting and loading. They were never requested to assist with the loading.

[**4.**] The applicants testified that they were never consulted prior to the termination of their contracts of employment. They were simply handed the termination letters by one Monica who worked in the office. They were never given the option to make the choice between dismissal or loading and working night shift. They said the employer unilaterally decided that they were unable to work on its own grounds.

[**5.**] Mr A Mogotsi, the human resources manager, appeared for the respondent. He advised the Court that the respondent was not calling any witnesses or placing any evidence before the Court. He was unfamiliar with the facts as he had only recently joined the company. His instructions were to the effect that the contracts of employment of the women had been terminated for operational reasons when the women were retrenched.

Substantive and procedural fairness

[**6.**] The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker, or based on the operational requirements of the employer. (See article 4 of the Termination of Employment Convention, ILO Convention 158 of 1982.) Before the employment of a worker is terminated for reasons related to her conduct or performance, she must be provided with an opportunity to defend herself against allegations made. (See article 7 of the aforesaid ILO Convention 158 of 1982.) Furthermore, when an employer contemplates termination for operational reasons of an economic, technological structural or similar nature, the employer must engage in consultations with the workers or the workers representatives. (See article 13 of the Termination of Employment Convention 158 of 1982.)

[**7.**] This means that there must be a valid reason for the termination of the contract of employment of an employee, and that a fair procedure must be followed prior to such termination.

[**8.**] On hearing the evidence, Mr Mogotsi readily conceded that the applicants had no say in the decision made by management and that there was no procedural fairness regarding the termination of the contracts of employment of the two applicants. The Court accepts that there was no hearing or consultation prior to the termination of the contracts of employment. The termination of the applicants' contracts of employment was therefore procedurally unfair.

[**9.**] Even though the respondent did not follow the correct procedure, was

it justified in terminating the contracts of employment of the applicants for the reasons stated in the termination letters and the respondent's statement of defence? Since there is no evidence from the respondent, the findings and determination of this Court are based solely on the evidence of the applicants and the documentary evidence before the Court. From this, it appears that the respondent dismissed the applicants for reasons of alleged incapacity related to their gender and / or for operational reasons. The respondent contends that the termination was necessitated for operational reasons on the grounds that 'the situation was not suitable — nor for the ladies neither for ourselves'.

[**10.**] The Court finds that the respondent is skirting the issue as there is no evidence to support the contention that the terminations were based on the operational requirements of the respondent. In the absence of any testimony from the respondent, the Court finds that there is nothing to justify that the situation was economically or otherwise not suitable for the company. In the circumstances, the Court rejects outright the submission that the applicants were retrenched. The applicants were dismissed for their alleged incapacity or disability to perform the loading of the trucks and to work late night shifts simply because they are females.

Discrimination

[**11.**] The respondent avers that the termination of the contracts of employment was not *mala fide* and was necessary on the grounds of the incapacity or disability of the applicants because of their gender. Mr Kesiilwe on behalf of the applicants submitted that this was tantamount to discrimination because the applicants had been discriminated against on the basis of their gender.

[**12.**] In days of yore, in terms of the common law principle of freedom of contract, an employer was free to employ or refuse to employ anyone for whatever reason he wished, including reasons based on the sex or race of that person. Such a proposition nowadays is no longer considered good dogma and offends most people's sense of fairness. The law has intervened to exclude the employer from exercising these common law rights. Much of the impetus for the change in legislation in this area derives from international law. The Universal Declaration of Human Rights 1948 stated that everyone is entitled to the same rights and freedoms 'without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or status'. Such statements are reiterated in international conventions and treaties, the ILO conventions and the domestic legislation of many states. Section 3 of Botswana's Constitution confers the fundamental rights and freedom on every person regardless of race, place of origin, political opinions, colour, creed or sex.

[**13.**] Discrimination means affording different treatment to different persons whereby persons of a particular description are subjected to disabil-

ities or restrictions to which others are not made subject to; or are accorded privileges or advantages which are not accorded to other persons (see section 15 of the Constitution of Botswana and the case of *Attorney-General v Dow* [1992] BLR 119, CA (Full Bench). The *Dow* case settled the issue that the fundamental rights expressly conferred by section 3 of our Constitution could not be abridged by section 15 merely because the word 'sex' was omitted from the definition of 'discrimination' in section 15.

[**14.**] Discrimination is also described as '[t]o fail to treat other human beings as individuals. It is to assign to them characteristics which are generalised assumptions about groups of people' (see Bourne & Whitmore *Race and Sex Discrimination* (1993)).

[**15.**] In most legislation, a distinction is made between direct and indirect discrimination. Direct discrimination is the most blatant form of discrimination, and occurs where a differentiation or distinction is clearly and expressly based on one or more listed grounds. It is generally intentional or explicit (*de jure*); for example, a job advertisement which specifies 'men only'. It occurs where an employer treats a woman less favourably than a man in the same position simply because she is a woman. It is not always based on one ground; direct discrimination may be based on sex, marital status and family responsibility. For example, discrimination was said to be unfair where a policy provided that female teachers were not entitled to housing subsidies unless their spouses were permanently and medically unfit for employment. This exclusion, since the policy did not apply to male teachers, was said to be based on sex and marital status: See the case of *Association of Professional Teachers v Minister of Education* (1995) 16 ILJ 1048 (IC).

[**16.**] Indirect discrimination is harder to identify. It occurs where an employer applies a rule which ostensibly applies neutrally to all employees; but the application of the rule has a disproportionate negative effect on one group. It may occur by way of occupational segregation whereby women are concentrated in sectors which are 'traditionally' female and that are less well paid. It may occur by way of the provision of a 'head of household' allowance or benefit, when 'head of household' is defined as men in the relevant legislation or policy. It may manifest when ostensibly neutral criteria are required for a vacancy or promotion. For example, in *Dothard v Rawlinson* 433 US 321 (1977) an American court held that Ms Rawlinson was unfairly indirectly discriminated against by the Alabama Board of Corrections which required applicants for the post of prison guard to be five feet two inches tall and 120 pounds heavy, when she failed to meet the weight requirement. Evidence produced in court showed that the combined height and weight requirement excluded 41,3% of the female population to only 1% of the male population. In other words, considerably more women than men were excluded from applying for the post.

[**17.**] In the famous, or infamous, English case of *Peake v Automotive Products* [1979] QB 233, it was suggested that trivial differences in treatment are not discriminatory. In that case a Mr Peake claimed discrimination on the grounds that the women in the factory left five minutes earlier than the men. The employer rationalised that the women would be trampled in the rush if they did not leave at a different time to the men. The English Court of Appeal appeared to require a hostile motive on the part of the employer. The Court held that there was no discrimination on three grounds: Firstly, rules for safety and good administration could not be discriminatory. Secondly, 'it would be very wrong if this statute were thought to obliterate the differences between men and women and to do away with the chivalry and courtesy which we expect mankind to give to womankind'. Thirdly, on the grounds of the *de minimis* principle; ie that the difference in treatment (five minutes less work per day), was *de minimis*.

[**18.**] Later critics of the *Peake* judgment found that the first reason was unsuitable since it suggested that motive was a valid consideration in deciding whether discrimination had occurred. This was clearly against the legislation current at the time. The second reason advanced wipes out the whole purpose of anti-discriminatory provisions. In the subsequent judgment of *Ministry of Defence v Jeremiah* (1980) ICR 13, Denning MR admitted he may have gone too far in the *Peake* decision but still supported the decision on the grounds of the *de minimis* principle.

[**19.**] In the *Jeremiah* case, the male applicants were employed in an ordinance factory where working voluntary overtime necessitated working in very dirty conditions in the 'colour bursting shop' where paint shells used in artillery practice were produced. Women did not have to do this partly because it was thought that such conditions would affect their hair. The Court of Appeal upheld the men's claim for unfair discrimination. The aforesaid decisions were of course based on the current sex discrimination legislation existing in England at the time.

[**20.**] Although Botswana has ratified two ILO anti-discrimination conventions and is a party to the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), there is no specialised domestic sex discrimination legislation in Botswana. In the United Kingdom, the Sex Discrimination Act 1986 and the Equal Pay Act provide a code to prevent discrimination, and EC Directives require the implementation of the principle of equal treatment for men and women in all aspects of employment. In South Africa the Labour Relations Act, the Employment Equity Act and the Constitution, all prohibit direct and indirect discrimination.

[**21.**] On 5 June 1997, Botswana ratified the ILO Equal Remuneration Convention 100 of 1951, and the Discrimination (Employment and Occupation) Convention 111 of 1958.

[**22.**] The former prohibits wage discrimination based on sex, race, creed, etc; whilst the latter prohibits any form of discrimination in employment

practices or occupations on the grounds of sex, race, creed etc. These conventions have not yet been incorporated into our domestic labour legislation (but see section 23 of the Employment Act discussed below). Convention 111 at article 8 states that it 'shall be binding only upon those members of the International Labour Organisation whose ratifications have been registered with the Director-General'.

[**23.**] In the case of *Attorney-General v Dow*, *supra* at 171, the Court, per Aguda JA said as follows:

> If an international convention, agreement treaty, protocol, or obligation has been incorporated into domestic law, there seems to me to be no problem since such convention, agreement, and so on will be treated as part of the domestic law for purposes of adjudication in a domestic court. If it has merely been signed but not incorporated into domestic law, a domestic court must accept the position that the legislature or the executive will not act contrary to the undertaking given on behalf of the country by the executive in the convention, agreement, treaty, protocol or other obligation. However where the country has not in terms become party to an international convention, agreement, treaty, protocol or obligation it may only serve as an aid to the interpretation of a domestic law, or the construction of the Constitution if such international convention, agreement, treaty, protocol, etc purports to or by necessary implication, creates an international regime within international law recognised by the vast majority of states . . .

[**24.**] Botswana being a member of the International Labour Organisation, and the Industrial Court, being a court of equity, the Court follows international labour standards and applies the conventions and recommendations of the ILO. It also looks to other jurisdictions for guidance on matters.

Termination on the grounds of gender

[**25.**] In the Discrimination (Employment and Occupation) Convention 111, the terms 'employment' and 'occupation' include access to vocational training, access to employment and to particular occupations, and terms and conditions of employment. 'Terms and conditions' of employment includes protection from discrimination in respect of termination of employment — see article 1(3) of Convention 111.

[**26.**] Article 5 of the ILO's Termination of Employment Convention 158 of 1982 stipulates as follows:

> The following, *inter alia*, shall not constitute valid reasons for termination: (a) union membership or participation in union activities outside working hours or, with the consent of the employer, within working hours; (b) seeking office as, or acting or having acted in the capacity of, a worker's representative; (c) the filing of a complaint or the participation in proceedings against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities; (d) race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin; (e) absence from work during maternity leave.

[**27.**] The aforesaid article 5 is incorporated into our Employment Act

although it is more encompassing and wider than section 23 of our Act which provides as follows:

> Notwithstanding anything contained in a contract of employment, an employer shall not terminate the contract of employment on the grounds of (a) the employee's membership of a registered trade union or participation in any activities connected with a registered trade union outside working hours or, with the consent of the employer, within working hours; (b) the employee seeking office as or acting or having acted in the capacity of an employees' representative; (c) the employee making, in good faith, a complaint or participating in proceedings against the employer involving the alleged violation of any law; or (d) the employee's race, tribe, place of origin, national extraction, social origin, marital status, political opinions, sex, colour or creed.

Fair or unfair discrimination?

[**28.**] In the instant case, the respondent is therefore in violation of section 23(d) of the Employment Act because the terminations were based on the sex or gender of the applicants. The respondent has attempted to justify the terminations on the basis that the nature of the work required was such that it was not suitable for women. It also is the respondent's rather paternalistic contention that their exclusion from loading and from working late was for the own good of the women.

[**29.**] Not all forms of discrimination are unfair. In some countries, affirmative action policies in line with the purposes of the legislation will not be unfair. See also article 5(2) of Convention 111. In other instances an employer may raise the defence that discrimination is justified by the inherent requirements of the job: see the case of *Whitehead v Woolworths* (2000) 21 ILJ 571 (LAC).

[**30.**] There is no doubt that in day to day life, a job may need to be held by a member of a particular sex, for example that of toilet attendants. As Grogan puts it:

> The word 'inherent' suggests that the possession of a particular personal characteristic (eg being male or female, speaking a particular language, or being free of a disability) must be necessary for effectively carrying out the duties attached to a particular position.

See *Workplace Law* (6th ed) at 226. Article 1(2) of ILO Convention 111 states that: 'Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination'.

[**31.**] The English legislation too recognises that in some cases a job must be done by a particular sex and that this would provide a defence to an employer. These 'genuine occupational qualifications' are found in section 7 of the Sex Discrimination Act and in these situations sex or gender is deemed to be a necessary requirement for the job. Even in these situations, where the essential nature of the job calls for a man for reasons of physiology, strength and stamina are excluded as criteria (see section 7 of

the Sex Discrimination Act). This Act, for purposes of establishing whether discrimination relates to inherent requirements or jobs, includes criteria which relate to the authenticity of the job, the need to preserve privacy and decency, and the nature of the establishment where the work is done.

[**32.**] In the English case of *Batasha v Say* (1977) IRLR 6, a woman was turned down for a job as a cave guide because 'it was a man's job'. It was held that an act of discrimination had been committed. In the later case of *Greig v Community Industries* (1979) IRLR 158 the applicant was withdrawn from a painting and decorating work experience scheme for 'her own good' when the only other girl left. It was held that the motive behind the action was irrelevant and that the applicant had suffered discrimination. In the case of *Skyrail Oceanic v Coleman* (1981) IRLR 398 a woman was dismissed when she became engaged to an employee of a rival firm. Between them, the two employers decided that given that the woman's husband would be the bread winner, she should be the one to loose the job. The English Court of Appeal held that the reason for her dismissal was primarily an assumption based on her sex and that she had therefore suffered discrimination.

[**33.**] Women in Botswana have come a long way from being drawers of water and hewers of wood. A cursory glance at our Parliament, the private business sector, the professions, any construction site or roadside trench digging are proof of that legacy.

[**34.**] However, in Botswana too it is recognised that a regulation or rule of law which provides for women alone is not necessarily discriminatory on the ground of sex: see the Court of Appeal decision of *Students' Representative Council of Molepopole College of Education v Attorney-General* [1995] BLR 178, CA.

[**35.**] In the *Dow* case too it was recognised that whilst discrimination based on sex is repugnant to sections 3 and 15 of the Constitution; there might be a need to regulate the lives or affairs of one gender in a manner which was inapplicable to the other.

[**36.**] Per Amissah JP at 195 of *SRC Molpopole v Attorney-General, supra*:

> But when such a situation occurs, the law or regulation under consideration must be reasonable and fair, made for the benefit of the welfare of the gender, without prejudice to the other; it must not be punitive to the gender in question. As I said earlier, the bare statement by the party responsible for the enactment of the legislation or regulation that it is for the benefit of the person affected is not sufficient for acceptance or endorsement by the Court. The law or regulation must be examined.

[**37.**] In the matter of *Tsumake and Others v Fencing Centre* (IC 8/2001), unreported, dated 12 October 2001, the Judge President of the Industrial Court, Legwaila JP at p 3 of the typed judgment states as follows:

> The respondent may well have had the best of intentions. But in law those intentions leading to the employer's unilateral decision on what is good for

> women count as patronage, if not male chauvinism. Employees, irrespective of sex, have to be consulted on what is or is not good for them on matters of gainful employment. To deprive any employee of a source of livelihood on the ground that one is being helpful to the employee can hardly be a welcome gesture.

[**38.**] The respondent in this case has failed to place any evidence before the Court that there were any constraints on the women performing the functions at the required hours, and apparently reserved for the sole preserve of the male gender. Moreover, the applicants were not even consulted on any inherent difficulties that may have existed in relation to the performance of these functions by females.

[**39.**] The applicants lost their employment on the respondents unilateral assumption and say so that the situation was 'not suitable' for them. This was an unfair and unreasonable assumption which was highly prejudicial to the applicants since they ultimately lost their jobs.

[**40.**] In all circumstances, the Court finds that the respondent's unilateral assumption was not a valid reason for the termination of the contracts of employment of the two applicants. The reasons advanced by the respondent for the dismissal of the applicants were discriminatory and do not amount to a valid reason. A termination of employment on the grounds of gender or sex is contrary to the provisions of section 23 of the Employment Act as being automatically without just cause. The termination of the applicants' contracts of employment was therefore substantively unfair.

Compensation

[**41.**] Having found that the dismissal of the two applicants was both procedurally and substantively unfair, they are entitled to compensation in terms of the Trade Disputes Act (Cap 48:02). Section 24(2) of the Trade Disputes Act permits and empowers the Court to take various factors into account in determining the amount of compensation. The Court will set out each factor and the impact thereof on the assessment of compensation for each applicant.

(a) 'The actual and future loss likely to be suffered by an employee as a result of a wrongful dismissal': The first applicant testified that there were not many employers in Ramotswa and despite diligent search she has been unable to find any employment since her dismissal. The second applicant has found a part-time job cleaning a shop in the mornings. Both applicants have suffered loss of earnings.
(b) 'The age of employee': According to their testimony the applicants are 37 and 55 years old respectively.
(c) 'The prospects of the employee in finding other equivalent employment': The applicants are unqualified and live in Ramotswa which is designated as a village. Together with their advancing age, the prospects of future permanent employment are dim.
(d) 'The circumstances of the dismissal': This factor together with the

previous three is in favour of the applicants as the respondent failed to comply with the substantive and procedural fairness requirements.

(e) This factor concerns the reinstatement of the employee and is not relevant here.

(f) 'Whether or not there has been any contravention of the terms of any collective agreement or of any law relating to employment by the employer or the employee': This factor also again operates in favour of the applicants since respondent was in direct violation of section 23 of the Employment Act.

(g) 'The employer's ability to pay': There is no evidence before the Court that the respondent is in any financial difficulty to make payment of any award of compensation that may be granted.

[**42.**] In view of the fact that all the aforesaid relevant factors operate in favour of the applicants, the Court finds that the maximum award of six months' monetary wages as compensation to each applicant is appropriate. Both applicants were earning the sum of P 342.00 per month. They are therefore awarded the sum of P 2 052 compensation each (P 342 x 6).

Determination

[**43.**] On the premises the Court makes the following determination:

1. The termination of the contracts of employment of the applicants Gadifele Moatswi and Mmametsi Kgaswe by the respondent on 10 December 1999, on the grounds of their gender was discriminatory, contrary to section 23 of the Employment Act, and substantively unfair.
2. The termination of the contracts of employment of the two applicants was also procedurally unfair.
3. In terms of section 24(1) of the Trade Disputes Act, the respondent is hereby directed to pay to each of the applicants the amount of P 2 052 (P 342 x 6), being six months' monetary wages, as compensation.
4. The respondent is hereby further directed to pay the aforesaid sum to each of the applicants through the office of the registrar of this Court on or before Friday 29 March 2002.
5. There is no order as to costs.

GHANA

The Republic v Gorman and Others

(2004) AHRLR 141 (GhSC 2004)

The Republic v Kevin Dinsdale Gorman, Mohammed Ibrahim Kamil, John David Logan, Frank David Laverick, Alan William Hodgson, Seven Leonhard Herb
Supreme Court of Ghana, 7 July 2004, Criminal appeal J/3/3/2004
Judges: Akuffo, Wood, Twum. Date-Bah, Ocran

Constitutional supremacy (6)
Fair trial (bail, 8, 9; trial within reasonable time, 21, 23; defence, 39, 40)
Personal liberty (bail, 9-12, 25, 30, 34, 43, 50)
Limitations of rights (public interest, 37)
Interpretation (international standard, 38, 50)
Stare decisis (41, 42)

Modibo Ocran JSC

[**1.**] This Court gave its ruling on this case on 11 June 2004 and reserved its reasons for the ruling for today, 7 July 2004. We now proceed to give the reasons for our earlier ruling.

[**2.**] This is an appeal against the refusal of the Court of Appeal to grant an application for bail to the appellants. The six accused persons were arraigned before the Greater Accra Regional Tribunal on 28 January 2004 on narcotics-related charges based on sections 56(c), 1(1) and 2 of the Narcotic Drugs (Control, Enforcement and Sanctions) Law 1990 (PNDC 236). The Tribunal as trial court granted bail on 3 February 2004 to all the accused on specified conditions. The Attorney-General's office appealed against the grant of bail to the Court of Appeal, which delivered a ruling on 3 March 2004 upholding the appeal and thereby rescinding the grant of bail in respect of all the accused. This matter came before us on further appeal by all but one of the accused persons, namely, the second accused.

[**3.**] The grounds of appeal were set out in their respective notices of appeal as follows. For the first accused, that:

i. The decision by the Court of Appeal to allow the appeal against the grant of bail to 1st accused/appellant was unreasonable having regard to all the circumstances of the case.
ii. The decision by the Court of Appeal to allow the appeal against the grant of

bail to 1st accused/appellant resulted in a gross miscarriage of justice to 1st accused/appellant, the reason being that the basis of the appeal before the Court of Appeal and the reasons given by the said Court for the revocation of the bail granted to 1st accused/appellant warranted, at the very least, a review of the conditions upon which 1st accused/appellant was granted bail and not an outright refusal of same.

iii. The Court of Appeal erred in its interpretation of the applicable provisions of the Criminal Code 1960 (Act 30) as against the relevant provisions of the Constitution 1992 of the Republic of Ghana on the grant of bail to accused persons, the reasons being that it downplayed the constitutional provisions providing for the pre-trial release of an accused person on bail in favour of the guiding (not mandatory) principles governing the grant of bail as contained in section 96 of Act 30.

For the third, fourth and fifth accused, that:

3.1. The judgment of the Court of Appeal rescinding the order for the grant of bail to the 3rd, 4th, and 5th accused/applicants/respondents/appellants by the Greater Accra Regional Tribunal is unreasonable and cannot be supported having regard to the evidence placed before the Court.

3.2. The Court of Appeal erred when it failed to adequately consider the evidence before it that the 3rd, 4th, and 5th accused/applicants/respondents/appellants are international businessmen who at the material time had fixed places of abode within the jurisdiction and rather found, contrary to the evidence before the Court, that they had no fixed places of abode, particularly when the Republic/respondent/appellant/respondent did not challenge the assertions of the 3rd, 4th, and 5th accused/applicants/respondents/appellants at the trial Court and also the evidence presented at the appellate Court that they had fixed places of abode and thereby occasioned a substantial miscarriage of justice.

3.3. The Court of Appeal erred in law in rescinding the Order for the grant of bail by the Greater Accra Regional Tribunal when it made a finding, based on speculation and contrary to the evidence before it, that the 3rd, 4th, and 5th accused/applicants/respondents/appellants as international businessmen and all gainfully employed, will not appear to stand trial when there was no such real evidence to this effect before the Court.

3.4. The Court of Appeal erred in law in rescinding the bail granted to the accused/applicants/respondents/appellants when it failed to consider adequately the import of the provisions of article 19(2)(c) of the 1992 Constitution in relation to s 96(1)(2)(3)(4) and (5) and section 96(6) of the Criminal Procedure Code 1960 Act 30, as amended, with respect to the grant of bail and thereby occasioned a substantial miscarriage of justice.

3.5. The Court of Appeal erred in rescinding the Order for the grant of bail by the Greater Accra Regional Tribunal to the 3rd, 4th, and 5th accused/applicants/respondents/appellants and misdirected itself when it sought to rely on article 14(4) of the 1992 Constitution even though there was no evidence before it that the trial Court had relied on article 14(4) of the 1992 Constitution in granting bail to the 3rd, 4th, and 5th accused/applicants/respondents/appellants.

3.6. The Court of Appeal erred in law in rescinding the bail granted the 3rd, 4th, and 5th accused/applicants/respondents/appellants when it failed to follow the mandatory constitutional provisions as enshrined in article 129(3) and article 136(5) of the 1992 Constitution in relation to its judgments and more specifically in relation to the judgment appealed against herein in as much as they

were bound, per the aforesaid provisions, to have followed the Supreme Court decision and its own decision in the case of the *Republic v Court of Appeal: Ex parte Attorney General* (*Frank Benneh* Case) 1998-1999 SC GLR 559, which was cited to them and thereby occasioned a substantial miscarriage of justice . . .

For the sixth accused, that:

1. The judgment of the Court of Appeal rescinding the bail granted to the 6th accused/respondent/appellant by the Greater Accra Regional Tribunal occasioned substantial miscarriage of justice.
2. The judgment of the Court of Appeal rescinding the bail granted by the Greater Accra Regional Tribunal to the 6th accused/respondent/appellant was unreasonable in view of the evidence on record before the Court of Appeal.
3. The learned Judges of the Court of Appeal . . . erred in law when they resorted to article 14(4) of the 1992 Constitution to rescind the bail granted to the 6th accused/respondent/appellant, instead of relying on article 19(2)(c) and (e) of the 1992 Constitution vis-à-vis section 96(7) of the Criminal Procedure Code, 1960, as amended, to affirm the bail granted the 6th accused person and, if need be, on the Appeal Court's own terms and conditions.
4. The learned Judges of the Court of Appeal . . . erred in law as they rescinded the bail granted to the 6th accused/respondent/appellant in contravention of articles 129(3) and 136(5) of the 1992 Constitution, in view of the Supreme Court decision in the *Republic v Court of Appeal: Ex parte Attorney General* (*Frank Benneh* Case) (1998-1999) SC GLR 559.
5. The learned Judges of the Court of Appeal . . . erred in law in rescinding the bail granted to the 6th accused/respondent/appellant, in view of the finding by the learned Judges of the Court of Appeal that the 6th accused/respondent/appellant has his fixed place of abode within the jurisdiction, coupled with the failure of the Court of Appeal Judges to consider the willingness of the 6th accused/respondent/appellant to provide persons with good character to serve as his sureties and to provide substantial securities to ensure his attendance in court for his trial, in addition to ignoring the fact that the 6th accused/respondent/appellant is married to a Ghanaian with 2 very young children — as borne out by the evidence on record before the Court of Appeal . . .

[**4.**] We dismissed these appeals and thereby upheld the revocation by the Court of Appeal of the bail granted to the accused by the regional tribunal. Meanwhile, the trial of the accused on the substantive charges has commenced.

Applicable law and policy

[**5.**] The written submissions of the appellants and the respondent raise certain fundamental issues in respect of criminal procedure and constitutional law. The Court will therefore deal with these matters in general terms, before assigning more specific reasons for refusal of bail in respect of each of the appellants. In this manner, we expect to clarify and enunciate the general policy, principles and rules of law governing the grant or refusal of bail in our legal system, spelling out the interface between and among the relevant rules of criminal procedure, case law, and the Constitution of 1992.

[**6.**] Undergirding our principles for decision on applications for bail is the

effective enforcement of our criminal law guided by due process considerations, which constitute the procedural aspects of our commitment to protect the liberty of the individual. A true system of criminal justice must indeed reflect both aspects of criminal jurisprudence. If not, one of two consequences will follow: either the law enforcement agencies of the state ride roughshod over the rights of the accused; or criminals would have a field day in the system as they roam the streets in full liberty and with contempt for the efficacy of our criminal enactments. A good starting point of analysis is the Ghana Constitution of 1992; for, in the final analysis, all our laws and procedures, whether predating or postdating this document, and whether embodied in statutes or case law, must be consistent with the Constitution. Counsel for the first accused/appellant is right in asserting that the Criminal Procedure Code of 1960, as amended, continues to be valid only in so far as it is consistent with the 1992 Constitution. The continued validity of all norms predating the Constitution, including the Criminal Procedure Code, can be established only if one can demonstrate that they were in a legal-formalist sense, 're-created', 'continued in effect', 'adopted', or 'saved' expressly or impliedly by the 1992 Constitution. In any event, they must all be consistent with that Constitution. Indeed, Chapter four, article 11(6) expressly provides that:

> The existing law shall be construed with any modifications, adaptations, qualifications and exceptions necessary to bring it into conformity with the provisions of this Constitution, or otherwise to give effect to, or enable effect to be given to, any changes effected by this Constitution.

[**7.**] The 1992 Constitution contains unequivocal protection for accused persons in the pre-trial and trial stages of the criminal process. Article 19(2)(c) enunciates the age-old common law presumption of the innocence of the accused. It has been argued by counsel for some of the appellants in this case that this provision implies a further presumption in favour of the grant of bail; and that the denial of bail for their clients thus flies in the face of article 19(2)(c). In this connection, counsel referred to *The Republic v Court of Appeal: Ex parte The Attorney General* [1998-1999], SC GLR 559 — better known as the *Benneh* case — which will be discussed at greater length *infra*. For the moment, it is enough to point out that article 19(2)(c) of the Constitution is meant to be enjoyed equally by the accused held in pre-trial detention as well as the accused granted bail. For, as Coleridge said in *R v Scaife* [1841] 5 JP 406, at 406:

> I conceive that the principle on which parties are committed to prison by magistrates, previous to trial, is for the purpose of ensuring the certainty of their appearing to take the trial ... it is not a question as to the guilt or innocence of the person.

[**8.**] Since the presumption holds for both the accused in custody and his counterpart on bail, there are no self-contained criteria for sifting between the two categories of accused persons. In that sense, the presumption of innocence is necessary but not a sufficient ground for the grant of bail. This is not surprising. The issue of bail primarily addresses the freedom, or

lack thereof, of the accused 'to walk the streets' after being charged with an offence; it is principally associated with the pre-trial phase, although it has obvious consequences for the liberty of the accused during the trial as well. By contrast, the presumption of innocence primarily addresses the due process issue of burden of proof or of persuasion once the trial commences. Thus the strong derivation of a presumption of the grant of bail from a presumption of innocence appears too sanguine.

[**9.**] While one might attempt to derive a presumption of grant of bail from the constitutional presumption of innocence, as Wiredu JSC (as he then was) sought to do in the *Benneh* case (*supra*), a stronger basis for a presumption of grant of bail under our Constitution might be found in article 14. Indeed, article 14(4) embodies a direct duty to grant bail in a specific situation, ie when a person is not tried within a reasonable time. But this provision does not exhaust the grounds upon which bail is granted. We must also consider the cumulative effect of article 14(1) and 14(3), which work on the premise that every person is generally entitled to his liberty except in specified cases, and that even where his liberty is so restricted under one or more of those cases, he must be produced before a court within forty-eight hours, or regain his liberty.

[**10.**] Basing ourselves on article 14(1), 14(3), and to some extent on article 19(2)(c), of the 1992 Constitution, we hold that there is a derivative constitutional presumption of grant of bail in the areas falling outside the courts' direct duty to grant bail under article 14(4). However, this by itself is not dispositive of the legal problem of bails, for it seems clear that this presumption is rebuttable. Any other reading of the Constitution would lead to the untenable conclusion that every accused person has an automatic right to bail under our Constitution. This presumption is, for example, rebutted in cases where a statute specifically disallows bail based on the nature of the offence, such as the situations outlined in section 96(7) of the Criminal Procedure Code.

[**11.**] Outside article 14(4) of the Constitution and section 96(7) of the Criminal Procedure Code (Act 30), the presumption of the grant of bail retains judicial discretion in the matter of bails. However, the exercise of this discretion remains fettered by other relevant provisions of our law. This is where the other provisions of section 96(1) of the Code fall into place. They serve the purpose of clarifying the manner in which this discretion may be exercised, including the factors that should be taken into account in granting or rejecting a plea for bail. Because of our rejection of the notion that the constitutional presumption of innocence calls for an automatic enjoyment of bail, we hold further that there is no *prima facie* inconsistency between the general provisions of section 96 of the Criminal Procedure Code and the Constitution of 1992.

[**12.**] Thus section 96 of the Code provides for judicial discretion in the matter of bail, but should always be read in light of the constitutional presumption of grant of bail as well as the direct constitutional duty to

grant bail. This section embodies both a positive right and a negative duty for the courts. In the exercise of their judicial discretion as constitutionally circumscribed, courts are accorded under section 96(1) the general right to grant bail as long as the accused person is prepared to give bail or enter into a bond. The section impliedly grants the right to refuse bail as well. It should also noted that this provision does not list any specific grounds for the grant of bail; and one would surmise that any reasonable ground, such as the deterioration of the health of the accused while in detention, would suffice as a proper ground for the grant of bail. But it is made subject to other provisions of the section. The second aspect, embodied in section 96(5), states a general duty to refuse bail in certain situations, including the likelihood that the defendant may not appear to stand trial. This is followed by section 96(6), which lists the factors the courts should take into account in assessing the likelihood of the defendant's non-appearance for trial. These code provisions dovetail neatly into articles 14 and 19 of the 1992 Constitution.

[**13.**] In a trilogy of cases decided in the 1970s and 1980, Taylor J (as he then was) made a serious and concerted effort to analyse and synthesise the law of bails in Ghana, and, in particular, to clarify section 96 of the Criminal Procedure Code in relation to the Constitution of Ghana predating the 1992 Constitution. This Court picks up the case law of bails where Justice Taylor left off.

[**14.**] In the first of these cases, *Okoe v Republic* [1976] 1 GLR 80, Taylor J (as he then was), seized the opportunity to trace the history of the power of our courts to grant bail, beginning from the English roots of our legal history, through the establishment in 1876 of the Gold Coast Supreme Court, and culminating in the consolidation of the rules on bail in the Criminal Procedure Code (as amended) and article 15(3) and (4) of the 1969 Constitution. Section 96(7) has been introduced into the Code in 1975 by the Criminal Procedure Code (Amendment) Decree, 1975 (NRCD 309).

[**15.**] *Okoe* involved a charge of forcible entry unto land with violence by the acting head of an Accra traditional family. Having been denied bail by the circuit Court, he applied to the High Court for bail on the grounds that he was prepared to provide substantial sureties, and that his imprisonment would affect his health, given his age and physical condition.

[**16.**] In arriving at his decision to grant bail, Taylor J cited with approval Lord Russell of Killowen CJ in the case of *R v Spilsbury* (1898 2 QB 615 at 620) where Lord Russell, as summarised by Taylor J intimated that 'a court of record has power to grant bail to any person committed or remanded in custody by an inferior court except of course in cases where the power is expressly taken away by statute . . .'. Relating this opinion to our own Criminal Procedure Code, Taylor J points out that section 96(1) merely restated the power of the courts to grant bail; and that 96(2) simply consolidated the common law discretionary power which the High Court,

as a court of record, had: 'This provision has nothing to do with delay in the trial, which is covered by article 15(4) of the [1969] constitutional provisions.'

[**17.**] On the specific issue of the relationship between section 96 of the Code and article 15(4) of the Constitution of 1969, Taylor stated at 95-96 that:

> Once there is an unreasonable delay in prosecuting the case, then section 96 of Act 30 [as amended] is in my view inapplicable, and article 15(3)(b) and (4) of the Constitution, 1969, becomes applicable and in such a situation, bail in all cases must be given subject only to the conditions prescribed in the articles.

[**18.**] In other words, the Code provisions did not override the 1969 constitutional rule that bail was to be granted if the trial was not held within a reasonable time. In other respects, the grant of bail remained within the discretion of the Court, as he had previously argued.

[**19.**] *Okoe*, however, did not involve murder or any of the other offences stipulated in section 19(7) of the Code. Thus in *Dogbe v The Republic* [1976] 2 GLR 82, Justice Taylor had occasion to pick up another aspect of section 96, namely, the relationship between section 96(7) of the Criminal Procedure Code and article 15(4) of the 1969 Constitution. Dogbe and sixteen others had been committed to the High Court on charges of murder and abetment of murder on 31 January 1974. The High Court twice denied the plea for bail in spite of the averment of their counsel that 'four of the accused persons were aged 65 and were very ill and needed immediate medical attention . . . and they had even had to be carried to court.' In denying bail, Taylor J drew attention to section 96(7) of the Criminal Procedure Code, which mandated the refusal of bail in murder, treason, etc. But he was at pains to point out that even this section is trumped by article 15(4) of the 1969 Constitution. He wrote on 96:

> A careful reading of article 15(4) shows clearly that *in all cases*, murder cases included, if an accused person in custody is not tried 'within a reasonable time', then he is entitled to be released. The most important matter for consideration is whether he is 'not tried within a reasonable time', and the meaning of the expression 'within a reasonable time' becomes necessary for a decision. (Emphasis supplied).

[**20.**] In the third case, *Brefor v The Republic* [1980] GLR 679, the applicant for bail had been charged with murder for allegedly firing an arrow into one of the two persons who had apparently stolen his goat. The victim of the shooting later died from his wounds, and in April 1976 the applicant was taken into police custody, where he was held for over three years pending his trial. It should be remembered that by the time of this application, Ghana had witnessed the overthrow, not only of the 1969 Constitution, but the 1979 Constitution as well. Taylor disposed of the legal implications of these events by ruling that both the National Redemption Council (Establishment) Proclamation, 1972, and the Armed Forces Revolutionary Council (Establishment) Proclamation 1979 made a saving re-

spectively for articles 15(4) of the 1969 Constitution and 21(4) of the 1979 Constitution.

[**21.**] Having disposed of this important but preliminary matter, Taylor then tackled the main issue in that case, namely, whether the Code provision in section 96(7) stipulating mandatory refusal of bail in murder and certain other offences survived the 1969 constitutional entitlement to bail in trials which had experienced unreasonable delays. The learned Judge stated: 'Upon consideration of all the principles of interpretation I have canvassed in this ruling, it is my firm view that article 15(3)(b) and (4) of the Constitution, 1969, are subsisting provisions in no way repealed by section 96(7) of Act 30'. Taylor continued: 'the law immediately before the Constitution, 1979, and after it, is that a court is to refuse bail in murder cases, etc, except in the cases of unreasonable delay in trial as provided in article 21(4)(a) of the Constitution, 1979.' Taylor in this specific case denied bail because he did not think the delay was unreasonable, but his basic holding remained intact. His position is consistent with our own holding that the analogous provision in the 1992 Constitution, article 14(4), mandates the grant of bail when the accused is not tried within a reasonable time.

[**22.**] However, section 96 of the Criminal Procedure Code has been attacked from yet another angle. Counsel for some of the accused/appellants argue, in effect, that while that section in general terms may not be inconsistent with, and has indeed survived, the 1992 Constitution, some of the factors listed in section 96(6) of the Code are no longer compatible with that Constitution. In particular, it is asserted that the 'nature of the accusation' and the 'severity of the punishment' as factors relevant to the decision to refuse bail are not mentioned anywhere in the relevant provisions of the Constitution. To buttress this argument, counsel cites *Brefor v the Republic* [1980] GLR 679, in which Taylor J (as he then was), might be fairly interpreted as holding that the 1969 and 1979 Constitutions, unlike section 96(6) of the Criminal Procedure Code (1960), did not make distinctions in the nature of offence as regards the availability of bail. Indeed, that statement would also be true of article 14(4) of the 1992 Constitution, which is similar in language to the analogous provision of the two earlier Constitutions, referred to above.

[**23.**] But it is important not to misrepresent Justice Taylor's statement here. Article 15(4) of the 1969 Constitution, like article 14(4) of the 1992 Constitution, dealt with the question of bail in the specific situation where the person arrested or detained is not tried within a reasonable time. The duty to grant bail arising in such a situation remains applicable irrespective of the nature of the offence. Thus, even in the case of offences mentioned in section 96(7) of the Criminal Procedure Code, bail must be granted if there is no trial within a reasonable time. Justice Brobbey, in his *Practice & Procedure in the Trial Courts & Tribunals of Ghana* (vol I, 2000, 468), writes:

> Since the Constitution is the fundamental law of the land, to the extent that article 14(3) and (4) mandate bail for 'all' offences while Act 30 s 96(7) excepts the grant of bail in murder cases, etc, the latter is deemed to have been repealed by the former by reason of the inconsistency. This was the view taken in *Dogbe v The Republic* [1976 2 GLR 82] and *Brefor v The Republic* [1980 GLR 679]. There is no doubt that the latter view backed by the two cases is more accurate.

[**24.**] This Court is in entire agreement with Justice Brobbey's opinion. However, this viewpoint leaves untouched the problem of bail in those other situations where a trial is commenced within a reasonable time. Herein lies the continued relevance of sections 96(5) and (6) of the Criminal Procedure Code.

[**25.**] In those situations falling outside article 14(4), distinctions as to the 'nature of the accusation' and 'the severity of the punishment' remain not only valid but most useful. The Court of Appeal, in its judgment in the case presently before us, stated that 'the tribunal in granting bail should have considered adequately that the offences were serious and grave'. Counsel for the first accused/appellant makes much of the unfortunate use of the epithet 'grave' and insists that the gravity of an offence cannot be a factor in the decision to refuse bail because it is not mentioned in the Criminal Procedure Code. However, he does not deny that the nature of the accusation retains its place among the statutory factors listed for consideration. While the epithet 'grave' and its corresponding noun, 'gravity', are not found in the relevant provisions of the Code, the formulation of the legal position as articulated by the Court of Appeal has occasioned no miscarriage of justice nor introduced a fundamentally erroneous proposition of law.

[**26.**] As a matter of logic and linguistic analysis, the gravity of an offence may legitimately inform our assessment of the nature of that offence. In other words, the gravity of an offence may serve as a possible index of the nature of an accusation. Coleridge J, commenting on the English Criminal Procedure Act, 1848, in *R v Robinson* [1854] 23 LJQB 286, suggested that such a consideration in the study of the nature of an accusation was not out of place. He wrote:

> When you want to know whether a party is likely to take his trial, you . . . must be governed by the answers to three general questions. The first is, *what is the nature of the crime,? Is it grave or trifling? . . .* The second question is, what is the probability of conviction? . . . The third question is, is the man liable to a severe punishment? (Emphasis supplied).

[**27.**] Counsel for the first accused/appellant decries the mention of the gravity of an offence in the discussion of bail as a 'moralistic proposition' which has no place in our criminal jurisprudence. A derogatory reference to a moralistic proposition may simply amount to a rejection of a valid relationship between criminal law and morality. More likely, it is an articulation of the view that, while there is an established relationship between criminal law and morality, a particular moral norm or set of norms has not

yet been transformed into a legal norm under the 'rules of recognition' of our legal system, in the sense in which Professor HLA Hart of Oxford used that term in his seminal book, *The Concept of Law*.

[**28.**] However, morality as a historical or material source of criminal law has been with us since the Laws of Draco and the Codes of Justinian, the last of the Roman emperors. On the other hand, if counsel's discomfiture with the term 'gravity of the offence' relates to an assumed failure of the rules of recognition in our legal system, we have already noted that gravity is simply one index of 'the nature of the accusation', a phrase which is expressly provided for in the Criminal Procedure Code, 1960 (Act 30).

[**29.**] The continued relevance of the severity of the punishment as a factor in the decision not to grant bail has also been attacked in some of the statements of cases submitted by counsel. Unlike the gravity of the offence, the severity of the punishment is specifically provided for in section 96(6) of the Criminal Procedure Code. Justice Amissah, in his *Criminal Procedure in Ghana* (1982) 183, has stated that 'the more serious the offence with which he is charged and the heavier the penalty, the more likely it is that the accused will not when granted bail appear to stand the trial.' However, it was submitted by counsel that since the grant of bail is not ruled out in offences such as defrauding by false pretences, which could potentially attract punishment as high as 25 years imprisonment, the relevance of this subsection appears to be seriously undermined.

[**30.**] This submission is without merit. It overlooks the fact that the severity of the punishment is but one of many factors utilized in arriving at a more basic decision expressed in section 96(5); namely, the likelihood of the defendant not appearing to stand trial. Thus bail may be granted even in the face of the severity of an offence if there are other considerations in the mix of stipulated factors that satisfy the Court that the defendant is likely to appear to stand trial.

[**31.**] Nonetheless, counsel for the appellants invoke this Court's decision in *The Republic v Court of Appeal: Ex parte The Attorney General* — the *Benneh* case — to press their submission that bail must be granted. This case also involved narcotics-related offences under the Narcotic Drugs (Control, Enforcement and Sanctions Law 1990 (PNDC 236). The penalties provided under the statute were severe, and included imprisonment for not less than ten years as well as forfeiture of drug-related property. The Greater Accra Regional Tribunal as the trial Court refused the application of the accused for bail pending trial. However, the Court of Appeal allowed an appeal for bail, which was later upheld by the Supreme Court. Counsel for appellants in the case currently before us cite our decision in *Benneh* to demonstrate that bails are available even in the case of offences involving severity of punishment, including dealings in narcotics. It is clear from our analysis in the immediately preceding paragraph that we are in agreement with counsel on this point. But this admission does not take us very far in our analysis.

[**32.**] In the first place, the gravamen of the complaint by the Attorney-General in the *Benneh* case clearly centred on the claimed lack of jurisdiction of the Court of Appeal in entertaining an appeal from the regional tribunal in the face of alleged procedural irregularities in the record and service of proceedings. The Attorney General complained, *inter alia*, that the Court of Appeal heard a purported petition of appeal for bail filed in the registry of the regional tribunal which had not been properly forwarded to the Court or listed for hearing by the registry of the Court of Appeal, and consequently asked that the proceedings, rulings and orders, including the grant of bail, be quashed. Wiredu JSC (as he then was) wrote that 'the main issue raised for consideration in the present application is whether the Court of Appeal was competently seized with the appeal brought on behalf of the accused to justify the Court dealing with it.' [1998-99] SC GLR 566.

[**33.**] While the Supreme Court did uphold the proceedings and ruling of the Court of Appeal, including the grant of bail, the case did not dwell on the legal question of the proper grant or denial of bail. Wiredu JSC, delivering the judgment for the majority, devoted only a portion of a paragraph to this question. In that respect he sought to draw a relationship between the constitutional presumption of innocence and the right to bail, but was also quick to mention the relevance of the particular circumstances of each case. He wrote: 'the accused is presumed to be innocent until it is otherwise established. It would therefore be unjust to deprive him of his right to enjoy his freedom in the absence of any law prohibiting the grant of bail to him under the circumstances as established by the facts of this case.' By this statement, the learned justice could not be taken to mean that, outside the areas of prohibited bail, the courts are under an obligation to grant bail on account of the constitutional presumption of innocence. Thus, the *Benneh* case does not, and cannot, stand for the proposition that bail must be granted in all narcotics cases because they are not among the offences in which bails are statutorily unavailable.

[**34.**] We are back to the continuing relevance of judicial discretion in the matter of bails, and the proper exercise of such discretion. There will be narcotics cases in which bail will be granted; and other narcotics cases in which bail will be denied. There will be non-narcotics cases involving severity of punishment in which bail will be granted; and cases of the same genre in which bail will be denied. There is no logical incoherence or inconsistency in such a judicial phenomenon; for the mix of factors embedded in section 96(5) and (6) of the Criminal Procedure Code will hardly be the same in all such cases. What we ought to guard against in this respect is the arbitrary exercise of judicial discretion when called into play, rather than the denial of judicial discretion as such.

[**35.**] In the *Benneh* case, it would appear from the record that there were circumstances that might have weighed upon the Court of Appeal and the Supreme Court to grant bail. One such circumstance was the health of the

accused. Among the Court of Appeal records was an affidavit dated 14 July, 1998, filed by Benneh and supported by reports from a doctor and the police, in which the accused swore that 'I have been in and out of the hospital since I was brought down from Geneva'. (See Motion on notice for an order to be admitted to pending bail, in the Superior Court of Judicature, in the Court of Appeal, Accra AD 1998, filed 29-7-98, exhibits KQ-1&2.) Serious medical conditions while the accused is in detention may indeed be taken into account in the exercise of the Court's permissive discretion under section 96(1) of Act 30.

[**36.**] The constitutional validity of the continued application of the rules on bail embodied in section 96 of the Code has been challenged on more general human rights grounds. It has been suggested by some of the counsel in this case that the refusal to grant bail is in some sense a violation of the fundamental human rights enshrined in the 1992 Constitution. We have already dealt with the constitutional guarantee of bail in article 14(4), which arises from the fact that arrest and detention constitute a form of deprivation of personal liberty which needs to be constitutionally justified. We have also constructed a presumption in favour of grant of bail premised on the general tenor of articles 14 and 19(2). All these provisions fall under Chapter five of the Constitution entitled 'Fundamental Human Rights and Freedoms'.

[**37.**] However, we must always guard against a sweeping invocation of fundamental human rights as a catch-all defence of the rights of defendants. People tend to overlook the fact that the Constitution adopts the view of human rights that seek to balance the rights of the individual as against the legitimate interests of the community. While the balance is decidedly tilted in favour of the individual, the public interest and the protection of the general public are very much part of the discourse on human rights in our Constitution. Thus article 14(1)(d) makes it clear that the liberty of certain individuals, including drug addicts, may be curtailed not only for the purpose of their own care and treatment, but also 'for the protection of the community'. Article 14(1)(g) sanctions the deprivation of an individual's liberty upon reasonable suspicion of the commission of an offence under the laws of Ghana ostensibly for the protection of the community and the body politic. Article 21(4)(c) further authorises the imposition of restrictions in the interest of public safety and public health, among other concerns.

[**38.**] Moreover, it is important to read the Constitution as a holistic document, that is, one in which all the various parts fall into place and have meaning assigned to them. The Directive Principles of State Policy (Chapter six) constitute an important statement of the vision of the framers of the Constitution. In the specific subject-matter before us — the problem of narcotics importation and their possible transhipment — article 40(c) is instructive. Under this article, the promotion of respect for treaty obligations and for international law in general is viewed as a principle of state

policy. Thus Ghana, as a party to the United Nations Convention on Narcotic Drugs and Psychotropic Substances, shoulders a constitutional exultation to enforce this Convention, while at the same time protecting the constitutional presumption of innocence of all accused persons.

[**39.**] Reference has been made by counsel for the first accused/appellant to article 19(2)(e) of the Constitution, which provides that an accused person be given adequate time and facilities for his/her defence. Counsel points out, quite rightly, that these facilities include the right to consult with his lawyers. But then counsel proceeds to make the submission that the accused is entitled to bail by virtue of this provision and the consequential right of consultation. This argument is completely untenable as a matter of logic and criminal justice policy; for it would mean that whenever an alleged criminal is arrested, he/she must be granted bail upon informing the authorities that he or she needed or wanted to consult with lawyers. There is no reason why the accused person cannot consult with his counsel while in detention; indeed, consultation under such conditions is an established practice. Moreover, the denial of such consultation would be a clear infringement of the Constitution, for which the accused person may petition for a remedy.

[**40.**] Counsel for the first accused cites the American case of *Kinney v Lenon* 425 F 2d 209 (9th cir 1970) in support of his submission on the right to bail based on the need to consult with lawyers. But counsel loses sight of 'the peculiar circumstances' of this case so soon after amply setting them out in his statement of case. This involved a situation in which it appeared reasonable to release the accused so that he could get back into the community to physically identify potential witnesses. The accused was a black man residing in a black community; the potential witnesses were black; and it was felt that the physical identification of such witnesses in such a community possibly by his white attorneys would be fraught with great practical difficulty. Under the circumstances, the Court ruled that 'failure to permit the appellant's release for the purpose of aiding the preparation of his defence unconstitutionally interfered with his due process right to a fair trial'. In the case before us, there are no such peculiar circumstances. Thus there is no obvious violation of due process rights of the accused by their continued detention, provided always that they are assured of reasonable facilities to consult with their lawyers in the course of their trial.

[**41.**] A submission based on the status of judicial precedent in our Constitution has been raised in the statements of cases by counsel for the first and sixth accused. Article 136(5) provides that the Court of Appeal shall be bound by its own previous decisions. This is made subject to article 129(3), which enjoins the Court of Appeal to follow the decisions of the Supreme Court. This same section states that the Supreme Court should ordinarily treat its own previous decisions as binding, but is entitled to depart from them 'when it appears right to do so'. Thus the Constitution imposes the

stare decisis version of judicial precedent on the Court of Appeal, but adopts only a deferential view of precedent for the Supreme Court as regards its own rulings. Incidentally, while this deferential view may be described as a 'weak form' of precedent, there is a strong policy justification for maintaining it in respect of courts of last instance; or else the development and adaptation of the law to evolving cultural and historic phases of the society might very well fall into atrophy. Nonetheless, from the provisions of articles 129(3) and 136(5), Counsel seek to make the submission that the 'refusal' of the Court of Appeal to follow not only its own earlier decision but also the decision of the Supreme Court in the *Benneh* case is unconstitutional. However, the duty to follow a 'decision' in this constitutional context refers to the *ratio decidendi* of the case, that is, the reason for the decision, or the holding or proposition of law emerging from the case, not to the specific result of the case, that is, the actual decision to acquit or convict, or to find for one party rather than the other. Thus the holding of an earlier case as applied to a subsequent case might actually lead to a different result or judgment because the facts or circumstances of the two cases are different in some significant sense.

[**42.**] To follow the decision in the *Benneh* case in which bail was granted in narcotics-related charges is not to say that the later decision must also lead to a grant of bail, without regard for the potentially different circumstances of the later case. Moreover, it cannot be said that a lower court has refused to follow the 'decision' of a higher court without reference to a clear and correct statement of the holding of the case as disposed of in the higher court. As explained in earlier paragraphs, the *Benneh* case did not hold that bail must be granted in every case of narcotics-related charges; it merely demonstrates that bail is not ruled out even in narcotics cases. Thus we hold that the Court of Appeal decision of 3 March 2004 in the present case of *Gorman and Others* did not violate the Constitution; and we further hold that in making its ruling in this case on 7 June, 2004, the Supreme Court did not depart from the holding in the *Benneh* case as properly understood. There are appreciable factual differences between this case and that of the *Benneh* case to warrant a departure from the specific result reached in the latter case.

[**43.**] Drawing on our general analysis of the law above, we summarize our holdings as follows:

1. The constitutional presumption of innocence embedded in article 19(2)(c) of the 1992 Constitution does not import an automatic right to bail.
2. The constitutional duty of the Court under article 14(4) of the Constitution, to grant bail to the accused if he is not tried within a reasonable time, is applicable irrespective of the nature of the accusation or the severity of the punishment upon conviction.
3. In the cases falling outside the direct duty to grant bail under 14(4), there is a constitutional presumption of grant of bail drawn from the

spirit of the language of articles 14(1) and (3), and 19(2)(c), in further protection of persons charged with offences in situations which do not mandate the grant of bail.

4. The said constitutional presumption of grant of bail is rebuttable; and it is in fact rebutted by a statutory provision that expressly disallows bail, such as the circumstances outlined in section 96(7) of the Criminal Procedure Code.
5. Outside the strictures of section 96(7) of the Code and article 14(4) of the Constitution, the presumption of the grant of bail is still extant, and is exercised under judicial discretion which is itself fettered by other provisions of section 96.
6. There is no *prima facie* inconsistency between the relevant provisions of the Code and the 1992 Constitution.
7. Considerations of the nature of an accusation and the severity of punishment upon conviction, as part of the decision not to grant bail under section 96(5) and (6), are constitutional; and that the gravity of an offence may be viewed as an aid in understanding and categorizing the nature of an accusation.
8. The Court of Appeal, in arriving at its judgment of 3 March, 2004 to rescind bail in this matter, at variance with the judgment in the *Benneh* case to grant bail, did not violate the constitutional provision on *stare decisis*; and
9. The Supreme Court is not bound by the specific result of the *Benneh* case since the factual contexts are distinguishable.

Application of analysis to the accused/appellants

[**44.**] We now apply the result of these holdings to the circumstances of each of the appellants. The second accused, a Ghanaian national, did not appeal the quashing of his bail. We therefore made no ruling on him, and give no further consideration to his case.

[**45.**] In respect of the first accused/appellant, an American and British dual national, we are persuaded that he has a fixed place of abode in Ghana: he owns a house in Tema, is married to a Ghanaian woman, and has five children in all with Ghanaian women. Among the accused, he probably has the strongest ties to Ghana. However, the presence of a fixed place of abode is not dispositive of the matter. The nature of the accusation and the severity of the punishment upon conviction is such that even a native-born Ghanaian resident in Ghana, owning multiple homes in Ghana, and capable of claiming an unbroken family lineage in Ghana stretching over the past 500 years, might well be persuaded to flee the jurisdiction and avoid the trial. What makes the case against bail even stronger in respect of the first accused is that the narcotics in question were allegedly found in his home. Thus the fear that he would flee from the jurisdiction is not unreasonable.

[**46.**] The third accused/appellant, a British national, does not appear to have strong ties to Ghana, even though he is said to have lived here for around 10 years as an employee of business interests or as an independent

businessman. His partial equitable ownership of an oil tanker berthed in Nigeria has no relevance to the determination of a fixed place of abode in Ghana. There is a legitimate question whether he had a fixed place of abode in Ghana at the time of his arrest. The Court of Appeal was of the opinion that he did not have such an abode; and we have no reason to contradict that finding. It is important to emphasize that the notion of a fixed place of abode connotes more than having a roof over one's head. The fear that he would probably flee from the jurisdiction is not unreasonable.

[**47.**] The fourth accused/appellant, a British national, had never really lived in Ghana, but paid regular visits here. He is described as an international businessman, with an equitable interest in an oil tanker which was once refurbished at the Tema shipyards and drydock. None of these facts seriously suggest the presence of a fixed place of abode for him. We agree with the Court of Appeal that he has no place of abode in Ghana. The likelihood of flight from the jurisdiction is very real.

[**48.**] The fifth accused/appellant, a British national, stays with the first accused while on visits to Ghana. It is evident, as the Court of Appeal correctly pointed out, that he has no fixed place of abode in Ghana. The likelihood of flight from the jurisdiction is very real.

[**49.**] The sixth accused/appellant, a German national, has a legally rented dwelling place in Tema. Even though the premises are rented, unlike the case of the first accused, there appears to be such relative stability in residence as to qualify it as a fixed place of abode. He is married to a Ghanaian woman, with whom he has two children. However, like the case of the first accused, the mere establishment of a fixed place abode does not dispose of the problem. The likelihood of flight from jurisdiction is real.

[**50.**] Moreover, in respect of each of the accused/appellants, public interest considerations focused on the societal problems of drug addiction, and the need to abide by the treaty obligations of Ghana in the enforcement of anti-narcotics laws, weigh heavily against the grant of bail. In short, this case is deeply affected with the public interest; and the courts below are entitled to take such factors into consideration in the exercise of their discretionary power under section 19(1) of the Criminal Procedure Code, Act 30.

Decision

[**51.**] The quashing of the grant of bail by the Court of Appeal in respect of all the accused persons has occasioned no miscarriage of justice. There was no abuse of judicial discretion in its decision to quash the bail outright rather than simply to review or set fresh conditions for the grant of bail. There has been no unreasonable delay in bringing the case to trial; indeed the trial is currently going on. We conclude that there is no need to interfere with the judgment of the Court of Appeal in this case; and we hereby uphold the decision to refuse bail.

KENYA

Njoya and Others v Attorney-General and Others

(2004) AHRLR 157 (KeHC 2004)

Rev Dr Timothy M Njoya, Kepta Ombati, Joseph Wambugu Gaita, Peter Gitahi, Sophie O Ochieng, Muchemi Gitahi, Ndung'u Wainaina v The Hon Attorney General, the Constitution of Kenya Review Commission, Kiriro Wa Ngugi, Koitamet Ole Kina
High Court of Kenya at Nairobi, 25 March 2004
Judges: Ringera, Kubo, Kasango
Previously reported: [2004] 1 EA 194 (HCK)
Extract: Judgment of Ringera. Full text on www.chr.up.ac.za

Constitutional supremacy (18, 59; peoples' constituent power, 21, 29, 30)
Interpretation (constitutional interpretation should be broad, liberal and purposive, 18, 29; guided by foreign case law, 18, 61)
Democracy (peoples' constituent power, 21, 29, 30, 59, 60, 69; right to referendum on new Constitution, 31, 32)
Equality, non-discrimination (representation in national constitutional conference, 38, 39, 43)
Locus standi (victim requirement, 44, 45)

Ringera J

Background

[**1.**] In 1997, the government of Kenya yielded to persistent and, at times, violent pressure by the political opposition, the civil society, the church and social movements for comprehensive changes to the Constitution. The government published a Bill to facilitate the participation of the people of Kenya in the process of Constitutional Reform. That Bill was enacted as the Constitution of Kenya Review Commission Act of 1997. It was subsequently amended four times as a result of negotiations by interested stakeholders with a view to making the process all-inclusive and 'people driven'. The end result was the Constitution of Kenya Review Act, Cap 3A of the Laws of Kenya (the Act).

[**2.**] The long title of the Act indicated that it was an act of Parliament to facilitate the comprehensive review of the Constitution by the people of Kenya, and for connected purposes. Section 3 of the Act sets out the

object and purpose of Constitutional Review as to secure provisions therein:

> (a) Guaranteeing peace, national unity and integrity of the Republic of Kenya in order to safeguard the well being of the people of Kenya;
> (b) Establishing a free and democratic system of government that enshrines good governance, constitutionalism, the rule of law, human rights and gender equity;
> (c) Recognising and demarcating divisions of responsibility among the various states organs including the executive, the legislature and the judiciary so as to create checks and balances between them and to ensure accountability of the government and its officers to the people of Kenya;
> (d) Promoting the peoples' participation in the governance of the country through democratic, free and fair elections and the devolution and exercise of power;
> (e) Respecting ethnic and regional diversity and communal rights including the right of communities to organize and participate in cultural activities and the expression of their identities;
> (f) Ensuring the provision of basic needs of all Kenyans through an establishment of an equitable frame-work for economic growth and equitable access to national resources;
> (g) Promoting and facilitating regional and international cooperation to ensure economic development, peace and stability and to support democracy and human rights;
> (h) Strengthening national integration and unity;
> (i) Creating conditions conducive to a free exchange of ideas;
> (j) Ensuring the full participation of people in the management of public affairs; and
> (k) Enabling Kenyans to resolve national issues on the basis of consensus.

[**3.**] Section 4 of the Act provided that the organs through which the review process was to be conducted were: (a) the Commission (that is to say, the Constitution of Kenya Review Commission (CKRC) established under section 6 of the Act); (b) the Constituency Constitutional Forums established in accordance with section 20 of the Act; (c) the National Constitutional Conference (NCC) referred to in section 27(1)(c) of the Act; (d) the Referendum; and (e) the National Assembly. The main function of the CKRC was

> to collect and collate the views of the people of Kenya on proposals to alter the Constitution and on the basis thereof, to draft a Bill to alter the Constitution for presentation to the National Assembly. (See section 17(b)).

[**4.**] The Commission was given a period of 24 months (extendable by Parliament on the strict basis of demonstrated necessity) to complete its work (section 26(1) and (3)). The work of the Commission was stated to be visiting all the constituencies in Kenya, compiling reports of the constituency forums, the NCC, conducting and recording the decisions of the referendum referred to in section 27(6) and on the basis thereof drafting a Bill for presentation to Parliament for enactment (section 26(2)). Subsection (7) of section 26 provided that the Commission shall compile its report together with a summary of its recommendations and on the basis

thereof, draft a Bill to alter the Constitution. Thereafter the process of review was to proceed as provided in section 27 and 28, which in material parts provide as follows:

> 27(1) The Commission shall: (a) Upon compilation of its report and preparation of the draft Bill referred to in section 26 — (i) Publish the same for the information of the public in the manner specified in section 22, for a period of thirty days; and (ii) Ensure that the report and the draft Bill are made available to the persons or groups of persons conducting civic education; (b) Upon the expiry of the period specified in paragraph (a)(i) — convene a National Constitutional Conference for discussion, debate, amendment and adoption of its report and draft Bill.
>
> (2) The National Constitutional Conference shall consist of — (a) The commissioners who shall be *ex officio* members without the right to vote; (b) All members of the National Assembly; (c) Three representatives of each district, at least one of whom shall be a woman, and only one of whom may be a councillor, all of who shall be elected by the respective county council in accordance with such rules as may be prescribed by the Commission; (d) One representative from each political party registered at the commencement of this Act, not being a Member of Parliament or a councillor; (e) Such number of representatives of religious organizations, professional bodies, women's organizations, trade unions and non governmental organizations registered at the commencement of this Act and of such other interest groups as the Commission may determine; Provided that: (i) The members under paragraph (e) shall not exceed twenty-five per cent of the membership of the National Constitutional Conference under paragraphs (a), (b) and (d); and (ii) The Commission shall consult with and make regulations governing the distribution of representation among, the various categories of representatives set out in paragraph (e).
>
> (3) The Chairperson of the Commission shall be the chairperson of the National Constitutional Conference.
>
> (4) The quorum of the National Conference shall be one half of the members.
>
> (5) All questions before the National Constitutional Conference shall be determined by consensus, but in the absence of consensus, such decisions shall be determined by a simple majority of the members present and voting: Provided that: (i) In the case of any question concerning a proposal for inclusion in the Constitution, the decision of the National Constitutional Conference shall be carried by at least two thirds of the members of the National Constitutional Conference present and voting and (ii) If on taking a vote for the purpose of subsection 5(i), the proposal is not supported by two thirds vote, but is not opposed by one third or more of all the members of the National Constitutional Conference, present and voting then, subject to such limitations and conditions as may be prescribed by the Commission in the regulations, a further vote may be taken, and (iii) If on taking a further vote under paragraph (ii), any question on a proposal for inclusion in the Constitution is not determined, the National Constitutional Conference may, by a resolution supported by at least two thirds of the voting members present, determine that the question be submitted to the people for determination through a referendum.
>
> (6) The Commission shall record the decision taken by the National Constitutional Conference on the report and the draft Bill pursuant to its powers under subsection 1(c) and shall submit the question or questions supported by a resolution under subsection 5(iii) to the people for determination through a referendum.

(7) A national referendum under subsection (6) shall be held within one month of the National Constitutional Conference.

28(1) The Commission shall, on the basis of the decision of the people at the referendum and the draft Bill as adopted by the National Constitutional Conference, prepare the final report and draft Bill.

(2) The Commission shall submit the final report and the draft Bill to the Attorney-General for presentation to the National Assembly.

(3) The Attorney-General shall, within seven days of the receipt of the draft Bill, publish the same in the form of a Bill to alter the Constitution.

(4) At the expiry of a further period of seven days of the publication of the Bill to alter the Constitution, the Attorney-General shall table the same together with the final report of the Commission before the National Assembly for enactment within seven days.

[**5.**] The CKRC did as directed by Parliament. It organised constituency constitutional forums and facilitated numerous other forums at which all persons who were so minded gave their views on the review process; it collected and collated the views of Kenyans and compiled a report together with a summary of its recommendations for discussion and adoption by the NCC, it afforded opportunity for intense public discussion and critique of the said report, and it prepared a draft Bill for debate and adoption by the NCC. The Commission also convened the NCC as required by Parliament. The Conference which acquired the nickname of 'Bomas' — the same referring to the location of the venue at a place called 'the Bomas of Kenya' in the Langata area of Nairobi — started its work of debating the Commission's report and draft Bill in April 2003. That debate was a very general one. Consideration of the details of the draft Bill began in phase III of the Bomas process in January this year. During that last phase, the process encountered a legal challenge. The nature of the challenge is next outlined.

The legal challenge to the constitutional review process

[**6.**] By an originating summons dated 27 January 2004 and amended on 17 February 2004 which was expressed to be taken out under sections 1A, 3, 47, 84 and 123 of the Constitution and 3A of the Civil Procedure Act the Reverend Doctor Timothy Njoya, Munir M Mazrui, Kepta Ombati, Joseph Wambugu Giata, Peter Gitahi, Sophie O Ochieng, Muchemi Gitahi and Ndung'u Wainaina (the applicants) sought from this Court the following orders:

1. That, a declaration be and is hereby issued declaring that section 26(7) and 27(1)(b) of the Constitution of Kenya Review Act transgresses, dilutes and vitiates the constituent power of the people of Kenya including the applicants to adopt a new Constitution which is embodied in section 3 of the Constitution of Kenya Review Act.

2. That, a declaration be and is hereby issued declaring that section 27(5) of the Constitution of Kenya Review Act is unconstitutional to the extent that it permits the National Constitutional Conference to discuss, debate, amend and adopt a draft Bill to alter the Constitution through two thirds of the members present and voting at a meeting of the National Conference.

3. That, a declaration be and is hereby issued declaring that subsection (5), (6) and (7) of section 27 are unconstitutional to the extent that they convert the applicants' right to have a referendum as one of the organs of reviewing the Kenyan Constitution into a hollow right and privilege dependent on the absolute discretion of the delegates of the National Conference.

4. That, sub sections (5), (6) and (7) of section 27 be and are hereby struck-down as unconstitutional.

5. That, a declaration be and is hereby issued declaring that the National Constitutional Conference has carried out its mandate contrary to and in excess of its powers under section 27(1)(b).

6. That, a declaration be and is hereby issued declaring that district representatives namely delegates number 224—434 have participated and continue to participate in the National Conference unlawfully.

7. That, a declaration be and is hereby issued declaring that section 27(2)(c) and (d) infringes on the applicant's rights not to be discriminated against and their right to equal protection of the law embodied in sections 1A, 70, 78, 79, 80 and 82 of the Constitution.

8. That, section 27(2)(c) and (d) of the Constitution of Kenya Review Act be and is hereby struck down for being null and void and inconsistent with section 82 of the Constitution of Kenya.

9. That, a declaration be and is hereby issued declaring that section 28(3) and (4) of the Constitution of Kenya Review Act is inconsistent with section 47 of the Constitution and therefore null and void.

10. That, a declaration be and is hereby issued declaring that the first and second respondents and the National Constitutional Conference have managed and carried out their respective functions contrary to the (i), (ii), (iii), and (vii) principles for a democratic and secure process for the review of the Constitution enumerated in the Third Schedule of the Constitution of Kenya Review Act.

11. That, a declaration be and is hereby issued declaring that the draft Bill to alter the Constitution drafted by the second respondent under section 26(7) does not faithfully reflect the views and wishes of Kenyans as contemplated in section 5 of the Constitution of Kenya Review Act.

12. That, a declaration be and is hereby issued declaring that the Constitution gives every person in Kenya an equal right to review the Constitution which rights embodies the right to participate in writing and ratifying the Constitution through a constituent assembly or national referendum.

13. That, a declaration be and is hereby issued declaring that the National Constitution Conference is unconstitutionally and statutorily obligated to conduct its business fairly and democratically.

14. That, a declaration be and is hereby issued declaring that article 21 of the Universal Declaration of Human Rights (UDHR) 1948, which is embodied and implied in section 82 of the Constitution bars the respondents from constituting the Constitutional Conference in a discriminatory manner.

15. That, the second respondent be and is hereby ordered to recommend amendments to section 47 of the Constitution and the Constitution of Kenya Review Act that have now become necessary in order to ensure the fulfillment of the objects of the review process and its strict compliance with the Constitution and the principles enumerated in the Third Schedule of the Constitution of Kenya Review Act.

16. That, a declaration be and is hereby issued declaring that the first respondent has failed, refused or neglected to advise the government and the people of Kenya that the Constitution review process under the Act does not comply with section 47 of the Constitution and fundamental principles of democracy.

17. That, the National Conference at Bomas of Kenya be and is hereby stopped for a period of six months pending compliance of the review process with the Constitution and rectification of the defects in the Constitution of Kenya Review Act (Chapter 3A).

18. That, a declaration be and is hereby issued declaring that the Constitution of Kenya Review Act (Chapter 3A) or the rules made under section 34 thereof do not confer sovereign power, privileges, immunities or authority upon the National Constitutional Conference.

19. That, the first respondent be and is hereby ordered to pay the applicants' costs in any event.

[7.] The said orders were sought on the grounds:

(a) Whereas Parliament enacted the Constitution of Kenya Review Act Chapter 3A of the Laws of Kenya to provide an institutional mechanism and framework for the people of Kenya to exercise their constituent power to make and adopt a new Constitution, the said Act is fraught with weaknesses, contradictions and ambiguities that impede the realization of that noble goal.

(b) The effects of sections 26(7) and 27(1) of the Act is to neuter, marginalize and alienate the views of Kenyan people not captured in the draft constitutional Bill prepared by the second respondent.

(c) The applicants right in common with other Kenyans to actively, freely and meaningfully participate in generating and debating proposals to alter the Constitution provided for in section 5 of the Act was and remains curtailed and compromised by the amendment of section 27 of the Act in 2002 which lowered the majority required for decisions in the National Conference in the absence of consensus by delegates.

(d) The applicant's constituent right in common with other Kenyans to adopt and ratify a new Constitution through a national referendum is the centre-piece of a people-driven constitutional review process and fundamental to realization of comprehensive review of the Constitution by the people of Kenya.

(e) As a result of the 2002 amendments to the Act the Constitution of Kenya Review Act has become a powerful machine which gives political actors enjoying the support of majority of members of the National Constitutional Conference an unconditional licence to reconstitute the country's constitutional order irrespective of the views collected and collated by the second respondent.

(f) The Act contains a myriad of systemic rigidities whose ultimate consequence is to alienate the view of people, like the applicants herein, who fundamentally object to the structure of government proposed by the draft Constitution prepared by the second respondent and to deprive them of a democratic or any meaningful forum to express their disapproval or conversely to lobby for consideration and inclusion of their political preferences in the proposed Constitution. The said rigidities not only makes it difficult for decision making by consensus but also reward the non-compromise attitude of the superficial majority at Bomas generally in support of the draft Constitutional Bill prepared by the second respondent.

(g) The National Constitutional Conference does not have powers or mandate to fragment and balkanize the Republic of Kenya into ethnic mini-states since the applicants and other Kenyans did not express views on the model of devolution proposed by the National Constitutional Conference. Moreover, even if the National Conference had powers to carry out the said fragmentation of the Kenyan nation, which is denied by the applicants, the decision as to which

regions each Kenyan wishes to live in can only be made by direct consultation of the applicants and other Kenyans.
(h) The procedure set out under section 28 of the Act for enactment of a Bill to alter the Constitution is inconsistent with section 47 of the Constitution in that it purports to take away the power of Parliament to alter the Constitution under the said section 47. Further the procedure set out by section 28 gives the National Assembly leeway to reject or change the views of the people contained in a draft Bill that would result from the review process.
(i) The respondents have discharged their respective obligations respecting the constitutional review process contrary to the following four principles enumerated in the Third Schedule of the Act: '(i) Recognise the importance of confidence building, engendering trust and developing a national consensus for the review process; (ii) Agree to avoid violence or threats of violence or other acts of provocation during the review process; (iii) Undertake not to deny or interfere with anyone's right to hold or attend public meetings or assemblies, the right to personal liberty, and the freedoms of expression and conscience during the review process, save in accordance with the law; (iv) Desist from any political or administrative action which will adversely affect the operation or success of the review process'.
(j) The intolerance towards views other than those contained in the draft Bill to amend the Constitution and the unwillingness by the NCC to discuss any other interpretation of the views submitted to the second respondent have, contrary to the said principles in the Third Schedule of the Act, destroyed confidence and trust in the review process on the part of the applicants and other Kenyans who believe the draft Bill presently being debated at Bomas is not a good reflection of the views given by the Kenyan people to the second respondent and that the said rejection of alternative views amounts to political and administrative actions that have and will continue to adversely affect the operation or success of the review process.
(k) Delegates number 224—434 of the National Conference at Bomas of Kenya have no mandate to represent their purported districts in that the electoral mandate of the county councils that elected them had expired at the time when the National Conference first convened in April 2003.
(l) The applicants are aggrieved by the gross under-representation of the districts and provinces with majority of residents who share views on constitutional matters. As a case in point Nakuru District with 1 187 039 people by the last census is represented by three delegates the same as Keiyo District with 143 865. Similarly, both Machakos District with 906 644 people and Lamu District with 72 686 are represented by three delegates each. The magnitude of inequality in representation is so blatantly unconstitutional.
(m) It is grossly unfair, undemocratic and unconstitutional for Nairobi Province with 2 143 254 residents to be deemed and treated as a county council by the Act to justify its representation by only three delegates at the National Conference whilst North Eastern Province with a population of 962 153 has twelve delegates.
(n) Section 26(4) of the Constitution of Kenya Review Act empowers the second respondent to recommend, where circumstances demand, minimum amendments to the Constitution or any other law as may be necessary towards fulfilment of any of the objects of the review process. Among others the following circumstances have arisen to justify the second respondent to recommend amendments contemplated by section 26(4): '(i) The Draft Constitution that comes out of Bomas of Kenya will clearly need ratification by all Kenyans through a national referendum for it to enjoy legitimacy and their confidence;

(ii) Section 47 requires to be amended to safeguard the final draft Constitution from being watered down in Parliament or be voted out by a self-serving parliamentary minority; (iii) The Act contains several ambiguities and democratic heresies that enable a superficial majority in the National Conference at Bomas to ride rough-shod over other delegates; (iv) It is absolutely important that the provisions of the Act that impede some views from either being heard or standing a chance to success be amended in order to enhance consensus and democracy in the review process; (v) In view of the increasing polarization of the country owing to deep-rooted grievances and mutual distrust it is important to amend the Act to level the playing field and ensure that a new Constitution which results from the process will be strictly lawful and democratic'.

(o) For all intents and purposes the NCC at Bomas of Kenya is a political slaughter house for delegates who support or are perceived by the superficial majority as supporting the views of certain political factions. To the extent that applicants, by sheer coincidence, share some of the political views of certain political factions, they are apprehensive that their right to participate meaningfully in the review process is in great jeopardy unless this Honourable Court intervenes.

[**8.**] The application was supported by an affidavit sworn by the Reverend Dr Timothy M Njoya, the first applicant on 27 January 2004.

[**9.**] The respondents to the summons were the Attorney-General (first respondent) and the Constitution of Kenya Review Commission (second respondent). At the scheduled first hearing of the matter on 16 February 2004, Mr Kiriro Wa Ngugi and Mr Koitamet Ole Kina applied to be and were joined as the third and fourth respondents and the Muslim Consultative Council and Chambers of Justice were on their application allowed to appear as the first and second interested parties. On the same day the Law Society of Kenya was allowed to appear as *amicus curiae* and Mr Mazrui's application to withdraw from the proceedings was granted.

[**10.**] Before the summons could be heard the second respondent took the following points of preliminary objection:

(a) That, the originating summons does not seek or raise any matter which requires the interpretation of the Constitution but merely requires interpretation of an Act of Parliament;

(b) That, if the orders sought are granted, this Honourable Court will have usurped the powers of Parliament contrary to the principles of separation of powers;

(c) That, the issues raised by the applicants are in any event not justiciable and this Court has no jurisdiction to entertain them;

(d) That, the management of the Constitution review process is now in the hands of National Constitutional Conference and not the second respondent; and

(e) That, the applicants have not shown that the matters they complain of have or are likely to contravene any rights vested upon them personally.

[**11.**] We considered those points of objection and in a considered ruling delivered on 3 March 2004, we upheld the objections with regard to

prayers 2, 4, 5, 6, 8, 10, 11, 13, 15, 16 and 18. We directed that prayers 1, 3, 7, 9, 12, 14 and 17 proceed to hearing on the merits.

[**12.**] The merits of the case were canvassed before us on 3, 4, 5, 8, 10, 11, 12 and 15 March 2004. The learned advocates who appeared before us as well as Mr Kiriro Wa Ngugi, the third respondent, who appeared in person, ably and eloquently pressed their respective cases. We are indebted to Mr Kibe Mungai for the applicants, Mr John Ougo for the CKRC, Miss Muthoni Kimani, the Deputy Chief Litigation Counsel for the Attorney-General, Mr Namwamba for the interested parties, and Mr Harun Ndubi who appeared for the Law Society of Kenya as *amicus curiae*.

The issues calling for answers

[**13.**] After conclusion of the arguments the Court retired to consider the same. In the course of our deliberations we formed the view that the arguments pressed called us to pronounce upon the issues of the proper approach to constitutional interpretation, the constitutional status of the concept of the constituent power of the people and its implications for the constitutional review process, the constitutional right to equal protection of the law and non-discrimination, the scope of the power of Parliament under section 47 of the Constitution of Kenya (the Constitution) and whether the provisions of section 28(3) and (4) of the Act were inconsistent therewith, and the appropriateness of an injunction to stop the review process in the circumstances of the case. We agreed that the matters raised with regard to the constituent power of the people and the interpretation of section 47 of the Constitution were quite novel and without precedent in our jurisdiction and that indeed the question of whether Parliament could in exercise of its amendment power repeal a Constitution and enact a new one in its place was without precedent in Commonwealth jurisprudence. In light of those considerations, we agreed that we would deliver our individual judgments on those matters. I now turn to a consideration of those matters.

The proper approach to constitutional interpretation

[**14.**] On behalf of the applicants, it was urged that the Constitution being the supreme law should not be interpreted as an Act of Parliament. It should be given a broad liberal and purposive construction. We were told that the Constitution embodies certain values and principles which it was the duty of the Court to give effect to. In that regard we were referred to the following authorities. In *Crispus Karanja Njogu v Attorney-General* (criminal application 39 of 2000), a three judge bench of this Court had this to say on constitutional interpretation:

> We do not accept that a Constitution ought to be read and interpreted in the same way as an Act of Parliament. The Constitution is not an Act of Parliament. It exists separately in our statutes. It is supreme . . . it is our considered view that, constitutional provisions ought to be interpreted broadly or liberally, and not in

> a pedantic way, that is restrictive way. Constitutional provisions must be read to give values and aspirations of the people. The Court must appreciate throughout that the Constitution, of necessity, has principles and values embodied in it; that a Constitution is a living piece of legislation. It is a living document.

And later on in the same ruling, the Court said:

> We hold that, due to its supremacy over all other written laws, when one interprets an Act of Parliament in the backdrop of the Constitution, the duty of the Court is to see whether that Act meets the values embodied in the Constitution.

[**15.**] The Court delivered itself as above in direct response to an alternative view of constitutional interpretation urged by counsel for the Republic. That is evident from the following passage:

> Mr Okumu based his submission on the decision in *Republic v El Mann* [1969] EA 357 where the Court had this to say on page 360 letter D: 'We do not deny that in certain contexts a liberal interpretation may be called for, but in one cardinal respect, we are satisfied that a Constitution is to be construed in the same way as any other legislative enactment, and that is, where the words used are precise and unambiguous, they are to be construed in their ordinary and natural sense'.

[**16.**] The Court was thus in effect rejecting what may be called 'the El Mann doctrine' of constitutional interpretation, namely that a Constitution is to be interpreted as any Act of Parliament in that where the words are clear and unambiguous, they are to be construed in their ordinary and natural sense. In *Ndyanabo v Attorney-General* [2001] 2 EA 485, at 493, the Court of Appeal of Tanzania had occasion to broach the issue. Samatta CJ wrote:

> We propose . . . to allude to general provisions governing constitutional interpretation. . . . These principles may, in the interest of brevity, be stated as follows. First, the Constitution of the United Republic of Tanzania is a living instrument, having a soul and consciousness of its own as reflected in the Preamble and Fundamental Objectives and Directive Principles of State Policy. Courts must, therefore, endeavour to avoid crippling it by construing it technically or in a narrow spirit. It must be construed in (tune) with the lofty purposes for which its makers framed it. So construed, the instrument becomes a solid foundation of democracy and rule of law. As was stated by Mr Justice EO Ayoola, a former Chief Justice of The Gambia . . . a 'timorous and unimaginative exercise of the judicial power of constitutional interpretation leaves the Constitution a stale and sterile document'. Secondly, the provisions touching fundamental rights have to be interpreted in a broad and liberal manner, thereby jealously protecting and developing the dimensions of those rights and ensuring that our people enjoy their rights, our young democracy not only functions but also grows, and the will and dominant aspirations of the people prevail. Restrictions on fundamental rights must be strictly construed.

[**17.**] The counsel for the second respondent urged the Court very vigorously to adopt the 'El Mann doctrine' and interpret the pertinent provisions of the Constitution of Kenya accordingly. Counsel for the Attorney-General though not expressly canvassing for any doctrine of interpretation was obviously in favour of the 'El Mann doctrine'. Counsel for the first and

second interested parties enthusiastically associated himself with the submissions of counsel for the second respondent. Mr Kiriro Wa Ngugi also associated himself with what he called the 'legalistic submissions' in the *El Mann* case. The *amicus curiae* did not offer any express doctrinaire view.

[**18.**] Having considered the rival submissions and bearing in mind that previous decisions of the High Court being decisions of a court of co-ordinate jurisdiction are not binding on us and that decisions by foreign tribunals can also only be of persuasive effect in this jurisdiction, I am wholly persuaded by the force and logic of my brethren in the *Njogu* case and the Tanzanian Court of Appeal in the *Ndyanabo* case. I shall accordingly approach constitutional interpretation in this case on the premise that the Constitution is not an Act of Parliament and is not to be interpreted as one. It is the supreme law of the land; it is a living instrument with a soul and a consciousness; it embodies certain fundamental values and principles and must be construed broadly, liberally and purposely or teleologically to give effect to those values and principles; and that whenever the consistency of any provision(s) of an Act of Parliament with the Constitution are called into question, the court must seek to find whether those provisions meet the values and principles embodied in the Constitution. To affirm that is not to deny that words even in a constitutional text have certain ordinary and natural meanings in the English or other language employed in the Constitution and that it is the duty of the court to give effect to such meaning. It is to hold that the court should not be obsessed with the ordinary and natural meaning of words if to do so would either lead to an absurdity or plainly dilute, transgress or vitiate constitutional values and principles. And what are those values and principles? I would rank constitutionalism as the most important. The concept of constitutionalism betokens limited government under the rule of law. Every organ of government has limited powers, none is inferior or superior to the other, none is supreme: the Constitution is supreme and they all bow to it. I would also include the thread that runs throughout the Constitution — the equality of all citizens, the principle of non-discrimination. The doctrine of separation of powers is another value of the Constitution. And so is the enjoyment of fundamental rights and freedoms. Those, to my mind, are the values and principles of the Constitution to which a court must constantly fix its eyes when interpreting the Constitution. It is in that prism that I now turn to a consideration of the relief sought by the applicants.

The constituent power of the people and its implications

[**19.**] Prayers 1, 3 and 12 of the originating summons are predicated on the premise that the applicants have along with other Kenyans what is called a constituent power to participate in the making and adoption of a new Constitution of Kenya by the machinery of a constituent assembly and a referendum. Their contention is that such power is inherent in them as part of the sovereign people of Kenya and that such power has been

vitiated, diluted and transgressed by the provisions of the Act to the extent that the NCC is not a constituent assembly, as they understand it, and there is no provision for a compulsory referendum on the final draft Bill prepared by the Constitution of Kenya Review Commission. All this calls for an appreciation of what is the constituent power of the people. The most elaborate definition we were supplied with is by BO Nwabwezi, a leading constitutional scholar in Commonwealth Africa. In his book entitled *Presidentialism in Commonwealth Africa* L Hurst and Company (1974) the author writes at 392:

> The nature and importance of the constituent power need not be emphasized. It is a power to constitute a frame of government for a community, and a constitution is the means by which this is done. It is a primordial power, the ultimate mark of a people's sovereignty. Sovereignty has three elements: the power to constitute a frame of government, the power to choose those to run the government, and the powers involved in governing. It is by means of the first, the constituent power that the last are conferred. Implementing a community's constituent power, a constitution not only confers powers of government, but also defines the extent of those powers, and therefore their limits, in relation to individual members of the community. This fact at once establishes the relation between a constitution and the powers of government, it is the relation of an original and a dependent or derivative power, between a superior and a subordinate authority. Herein lies the source and the reason for the constitution's supremacy.

[**20.**] And FF Ridley, in an article entitled 'There is no British Constitution: A dangerous case of the Emperor's clothes' reproduced in *Cases and Materials on Constitutional and Administrative Law* (6th ed) Blackstone Press Limited, opines at 5—6 that the characteristic of a Constitution are as follows:

> (1) It establishes, or constitutes, the system of government. Thus it is prior to the system of government, not part of it, and its rules cannot be derived from that system.
>
> (2) It therefore involves an authority outside and above the order it establishes. This is the notion of the constituent power . . . in democracies that power is attributed to the people, on whose ratification the legitimacy of a constitution depends and, with it, the legitimacy of the government system.
>
> (3) It is a form of law superior to other laws — because (i) it originates in an authority higher than the legislature which makes ordinary law and (ii) the authority of the legislature derives from it and is thus bound by it.
>
> (4) It is entrenched — (i) because its purpose is generally to limit the powers of government, but also (ii) again because of its origin in a higher authority outside the system. It can thus only be changed by special procedures, generally (and certainly for major change) requiring reference back to the constituent power.

[**21.**] Neither the respondents nor the interested parties doubted the notion of a peoples' constituent power. What was seriously in contest was the constitutional status of such a concept and its implications for this case. The submissions by the applicants were that the concept is part of our Constitution and is to be found by implication in sections 1, 1A, 3 and 47 of the Constitution, which were all invoked in aid. As section 47 will be

subject of a separate treatment later on, I will content myself at this stage with a consideration of those other provisions. They read:

> 1. Kenya is a sovereign Republic.
> 1A. The Republic of Kenya shall be a multiparty democratic state.
> 3. This Constitution is the Constitution of the Republic of Kenya and shall have the force of law throughout Kenya and, subject to section 47, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void.

[**22.**] With respect to sections 1 and 1A counsel contended that when the Constitution declared Kenya to be a sovereign Republic it did more than just assert that Kenya was independent and was not subject to the control of any other state or body in the conduct of its external and internal affairs. In his view, the declaration of a sovereign republic was a vesting of sovereign powers in the people.

[**23.**] And, so he argued, the sovereignty of the people embodied their constituent power. He further argued that the provision that Kenya is a multi-party democratic state meant more than just that there would be in Kenya more than one political party. It also meant that the country would be a democratic state. From that premise he derived the further principle that since in a democratic state, sovereignty was vested in the people, it followed that the constituent power was vested in them.

[**24.**] As regards section 3 of the Constitution, counsel argued that the assertion of the supremacy of the Constitution over other laws is a recognition of the sovereignty of the people by whom constitutions are made. With respect to section 47, counsel argued that the makers of the Constitution in limiting the power of Parliament to only amendment of the Constitution recognised that the residual power to constitute the frame of government is a power that belongs to the people.

[**25.**] As regards how the people were to exercise their constituent power, counsel submitted that the Act was a good attempt to provide a mechanism to do so. However, he argued, it was a faulty mechanism based on the faulty premise that the alteration of a Constitution was equivalent to the making of a new one — the Act was premised on the assumption that Parliament could enact a new Constitution through its power of amendment. In counsel's view, the exercise of the constituent power could not be undertaken by any of the organs established by the existing Constitution. It could only be exercised through a constituent assembly and a referendum. The constituent assembly is so called because it exercises the peoples' sovereign power to constitute a framework of government. Within the framework of the Act there was neither a constituent assembly nor a referendum. As regards want of a constituent assembly, counsel argued that NCC was not a constituent assembly strictly speaking. It was not because its membership were, on the whole, not elected directly by the people for making a new Constitution. Neither the members of the CKRC, nor the district representatives, nor the representatives of political

parties and/or the other organisations represented in the NCC were directly elected by the people. And although members of Parliament were elected, they were not elected specifically to make a new Constitution. As regards the referendum, counsel argued that the referendum provided in section 27(6) of the Act was not a compulsory but a contingent one dependent for its availability on lack of consensus or a two-thirds majority of delegates present and voting to pass the constitutional proposals presented. He further submitted that in any case, a referendum was an additional organ which could not substitute for a constituent assembly as it was a ratifying mechanism and not a constitution-making mechanism.

[**26.**] As I understood the respondents, they all took the view that the Constitution did not provide for the constituent power of the people and the notion was an extra-constitutional one in the same plane as the law of God; a very good notion, something to be aspired to but lacking in constitutional validity. It was therefore contended that the provisions of the Act said to transgress and dilute the applicants' constituent power could not be held to be inconsistent with the Constitution in those premises. In the colourful words of Kiriro Wa Ngugi, the applicants were in effect inviting the Court to a space outside and above the Constitution and asking it to judge the constitutionality of the impugned provisions of the Act in the light of that space. That, he submitted, was not permissible. Counsel for the second respondent was particularly emphatic that the Court cannot find something to be a constitutional right if it could not be found in the cold text of the Constitution. In his view, the provisions of the Constitution relied upon by the applicants could not support the existence of the constituent power in the Constitution. Section 1 declaring Kenya a sovereign Republic meant plainly that Kenya was not subject to the control of any other state or body; section 1A equally plainly meant that there shall be more than one political party in Kenya; section 3 meant what it said; the Constitution was (subject to the power to amend in section 47) the supreme law and any law inconsistent with it was null and void to the extent of the inconsistency; and section 47 did not so much as mention the expression 'constituent power'. In the alternative, it was urged that if the Court found that the provisions of the Constitution relied upon embodied the notion of constituent power, it should hold that such a power could be exercised either directly or indirectly. In the matter at hand, the power had been exercised directly through the consultation of the people at various fora and indirectly through such a body as the NCC where all shades of opinion and interest were represented. It was said that all people were represented there by their Members of Parliament and, in addition, as the applicants belonged to either certain districts or creeds or professional associations they were adequately represented by their district, religious, professional or other social interest representation. The Court was also impressed upon to consider that Parliament is the organ that exercises the peoples' constituent power in matters of legislation. It was said that what mattered was not the use of the words 'con-

stituent assembly' to describe a body making the Constitution but the fact that it was representative of the people and no law could provide for perfection. In the final analysis the respondents argued that the applicants had not demonstrated that they had a right to a constituent assembly and a referendum which had been contravened by the Act.

[**27.**] The *amicus curiae* on his part submitted that the constituent power of the people pre-exists any Constitution or written law and it existed whether or not recognised by the people or the authorities. It was a power which needed not to be textualised. What was important was that when a court looks at the supremacy of the Constitution it should bear in mind that the text thereof is a manifestation of the constituent authority of the people. He further submitted that the Act was a means by which the people of Kenya could exercise their constituent power. It was enacted to provide a mechanism for the alteration of the Constitution. In contrast, the applicants had proposed that the Constitution be replaced by a mechanism which they themselves proposed: a constituent assembly and a referendum. Counsel accepted that a constituent assembly and a referendum were the most democratic processes for making a new Constitution but submitted that they were not the only ones and they were not perfect. If the review process were to proceed as urged by the applicants, the *amicus curiae* contended, there would have to be a law providing for the process and stages of a constituent assembly and a referendum and to that extent the applicants were inviting the Court to enter into the realm of legislation by proposing to Parliament what law should be made to accommodate all that. Such recommendations were not within the jurisdiction of the Court.

[**28.**] I have considered all the submissions urged. I confess that no aspect of this case has so taxed my mind as the present one. Having said that, I am relieved to have come to definite conclusions. They are the following.

[**29.**] With respect to the juridical status of the concept of the constituent power of the people, the point of departure must be an acknowledgement that in a democracy, and Kenya is one, the people are sovereign. The sovereignty of the Republic is the sovereignty of its people. The Republic is its people, not its mountains, rivers, plains, its flora and fauna or other things and resources within its territory. All governmental power and authority is exercised on behalf of the people. The second stop is the recognition that the sovereignty of the people necessarily betokens that they have a constituent power — the power to constitute and/or reconstitute, as the case may be, their framework of government. That power is a primordial one. It is the basis of the creation of the Constitution and it cannot therefore be conferred or granted by the Constitution. Indeed it is not expressly textualised by the Constitution and, of course, it need not be. If the makers of the Constitution were to expressly recognise the sovereignty of the people and their constituent power, they would do so only *ex abundanti cautela* (out of an excessiveness of caution). Lack of

its express textualisation is not however conclusive of its want of juridical status. On the contrary, its power, presence and validity are writ large by implication in the framework of the Constitution itself as set out in sections 1, 1A, 3 and 47. In that regard I accept the broad and purposive construction of the Constitution canvassed by counsel for the applicants. I accept that the declaration of Kenya as a sovereign republic and a democratic multi-party state are pregnant with more meaning than ascribed by the respondents. A sovereign republic is a sovereign people and a democratic state is one where sovereignty is reposed in the people. In the immortal words of Abraham Lincoln, it is the government of the people, by the people, and for the people. The most important attribute of a sovereign people is their possession of the constituent power. And lest somebody wonder why, the supremacy of the Constitution proclaimed in section 3 is not explicable only on the basis that the Constitution is the supreme law, the *grundnorm* in Kelsenian dictum; nay, the Constitution is not supreme because it says so: its supremacy is a tribute to its having been made by a higher power, a power higher than the Constitution itself or any of its creatures. The Constitution is supreme because it is made by they in whom the sovereign power is reposed, the people themselves. And as I shall in due course demonstrate the powers of Parliament under section 47 of the Constitution are a further recognition that the constituent power reposes in the people themselves. In short, I am of the persuasion that the constituent power of the people has a juridical status within the Constitution of Kenya and is not an extra-constitutional notion without import in constitutional adjudication.

[**30.**] With regard to how such power is to be exercised to make and adopt a new Constitution, I agree that it may be exercised directly and/or indirectly depending on what is to be done. It cannot be exercised directly in the process of constitution-making. In that regard, the generation of views by the people is not an act of constitution-making. It is their expression of opinion. Constitution-making involves the collation of those views, their processing into constitutional proposals, the debate of those proposals and their concretisation as the text of a document which bears the form and name of a Constitution. That function cannot be done by the people directly as there is neither a stadium large enough to accommodate them nor expertise on the part of their body as a whole to process a Constitution. The act of constitution-making can only be performed by representation. That is where a constituent assembly comes in. The people are represented by those they have elected to make the Constitution. The thing having been made, faithful recognition of the sovereignty of the people requires that they check and verify that what has been done for them and in their name is to their satisfaction. That process is the adoption or ratification of the Constitution. It is where a referendum or plebiscite comes in. The sting of the applicants in this case is that they alongside with other Kenyans have not been afforded the vehicle of the constituent assembly and a referendum. In that regard I agree with counsel for the

respondents and the *amicus curiae* that whatever name is given to the vehicle is unimportant. It could be a conference, platform, constituent assembly, or even Parliament especially constituted as a constituent assembly as shown by the histories of Ghana, Uganda and Tanzania in the 1960's. What matters is the fact that the body concerned should have the peoples' mandate to make a Constitution. In the current review process, one can say that the acts of constitution-making have been performed at Bomas. Did the NCC have such a mandate? The applicants' complaint that it did not because none of its membership were directly elected by the people for the purpose of making a new Constitution is not without merit. The entire membership consisted of 629 delegates. Out of those only the 210 elected Members of Parliament could claim to have been directly elected by the people. Although they were not directly elected for the specific purpose of making a new Constitution, it is a notorious fact of which the Court may take judicial notice that one of the issues in the general elections of 2002 was the delivery of a new Constitution. To that extent the elected members could claim to have had the direct mandate of the people to participate in the making of a new Constitution. The other categories of membership were all unelected directly by the people. 210 of them represented districts (whose councils were constituted into electoral colleges for purposes of selecting them) and the rest (209) consisted of 12 nominated Members of Parliament, 29 CKRC Commissioners, and 168 members representing such diverse interests as trade unions, non-governmental organisations, women's organisations, religious organisations and special interest groups. Thus, on the whole, only one third of the membership of the NCC was directly elected by the people. Can such a body be said to be representative of the people for purposes of constitution-making? Strictly speaking one cannot be a representative of another if the latter has not elected him to do so. That being so, it would be to turn logic on its head to describe a body largely composed of unelected membership as a representative one. So the NCC fails the test of being a body with the peoples' mandate to make a Constitution and the applicants' case that they have been denied the exercise of their constituent power by means of a constituent assembly is, in my view, unassailable. All I would want to add to that is that, as counsel for the applicants conceded, in a constituent assembly it is perfectly permissible to have some unelected membership. The reasons are these. First in constitution-making, it is necessary to have expertise in such matters as public affairs and administration, institutional design, constitutional law and practice, comparative governmental systems, and legal drafting. Secondly, a Constitution is for all, majorities and minorities alike, men and women, and other social formations. Accordingly there is need to have a representation of various interests. If one were to base membership of the constituent assembly on elections only, the expertise and the special interests we have alluded to may be absent from the deliberative body. That would not be right. Be that as it may, the bottom line is that a majority of the membership must trace their roots to direct election by the people in

whose name they are participating in constitution-making. In reaching the conclusion I have I must confess that I have been tempted to affirm the validity of the NCC as a constituent assembly considering the colossal amount of time and resources expended on the process so far and the fact that all shades of political opinion and various social formations and interests had seats there. I have in the end formed the conviction that constitution-making is not an everyday or every generation's affair. It is an epoch-making event. If a new Constitution is to be made in peace time and in the context of an existing valid constitutional order (as is being done in Kenya) as opposed to in a revolutionary climate or as a cease fire document after civil strife it must be made without compromise to major principles and it must be delivered in a medium of legal purity. Sound constitution-making should never be sacrificed at the altar of expediency.

[**31.**] The second element in the exercise of a people's constituent power is the mechanism for the ratification of the Constitution made by the constituent assembly. Whether it be called a referendum or a plebiscite, that facility is a fundamental right of the people in exercise of their constituent power.

[**32.**] Having found above that the constituent power is a juridical constitutional concept, I am impelled to the conclusion that the applicants together with other Kenyans have a constitutional right to a referendum on the proposed Constitution. Indeed if the process of constitutional review is to be truly people driven, 'Wanjiku' (the mythical common person) must give her seal of approval, her very imprimatur to the proposed Constitution. If it is to have her abiding loyalty and reverence, it must be ratified by her in a referendum. Now looking at section 27(5) and (6) of the Act, it is apparent that the right to a referendum is a contingent one depending on the absence of consensus at the NCC or the results of a vote thereat. The exercise of the constituent power requires nothing less than a compulsory referendum.

[**33.**] In the above premises, having found that the applicants have been denied the exercise of their constituent power to make a Constitution through a constituent assembly and to ratify it through a referendum, I hold that they succeed in prayers 3 and 12. Section 26(7) of the Act merely indicates that one of the functions of the Commission is to compile its report together with a summary of its recommendations and on the basis thereof draft a Bill to alter the Constitution. And section 27(1)(b) mandates the Commission to convene the National Constitutional Conference for discussion, debate, amendment and adoption of its report and draft Bill. I am unable to see how the two provisions transgress or dilute or vitiate the applicant's constitutional right. I accordingly decline to grant prayer 1.

[**34.**] I now turn to a consideration of the applicant's affirmation that their rights to equal protection of the law and non-discrimination have been violated.

The constitutional right to equal protection of the law and non-discrimination

[**35.**] Prayers seven and fourteen are in essence a complaint that the applicants' rights to equal protection of the law and non-discrimination have been contravened by the inequality of representation evident in the composition of the National Constitutional Conference. In the affidavit of the Reverend Dr Timothy Njoya in support of the summons, it is deposed in material parts as follows:

> 11. That my co-applicants and I are of the considered view that owing to the grave inequality in terms of representation in the NCC at Bomas of Kenya, our objections to the draft Constitution are doomed to fail undemocratically and we, in common with other Kenyans who share our view, stand no chance to effectively lobby for inclusion of our views in the proposed Constitution.
>
> 12. That it is our considered view that inequality in representation stems from under-representation of provinces and districts with the majority of people who share our views. In particular the allocation of slots for district representatives disregarded all democratic principles in a manner clearly violative of the Constitution. Annexed hereto marked TMN3 is a true copy of the final list of delegates to the National Constitutional Conference.
>
> 16. That our constitutional rights not to be discriminated against, our right to freedom of expression, freedom of conscience and association have been curtailed by the on-going constitutional review process and that we stand to suffer further prejudice unless the weaknesses in the Review Act are urgently corrected and the process democratically reconstituted.

[**36.**] And in grounds (l) and (m) the applicants express themselves as follows:

> (l) The applicants are aggrieved by the gross under-representation of the districts and provinces with majority of residents who share their views on constitutional matters. As a case in point Nakuru District with 1 187 039 people by the last census is represented by three delegates the same as Keiyo District with 143 865. Similarly, both Machakos District with 906 644 people and Lamu District with 72 686 are represented by three delegates each. The magnitude of inequality in representation is so blatantly unconstitutional.
>
> (m) It is grossly unfair, undemocratic and unconstitutional for Nairobi Province with 2 143 254 residents to be deemed and treated as a county council by the Act to justify its representation by only three delegates at the National Conference whilst North Eastern Province with a population of 962 153 has 12 delegates.

[**37.**] Those complaints are further elaborated in paragraphs 10 and 11 of the further affidavit sworn by Kepta Ombati, the second applicant on 8 March 2004. In those paragraphs, it is deposed as follows:

> 10. That further to the foregoing we contend that the composition of the National Constitutional Conference is discriminatory of the applicants and other Kenyans with whom they are related in terms of residence, tribe, political beliefs and other local connections. The major group that form the bulk of the NCC delegates are Members of Parliament and district delegates. The representation of Kenyan provinces with respect to these categories of delegates is as follows:

Province	Population	MPs delegates	District delegates	Total
Nairobi	2 143 254	8	3	11
Coast	2 487 264	21	33	54
North Eastern	962 143	11	12	23
Eastern	4 631 779	36	39	75
Central	3 724 159	26	21	50
Rift Valley	5 078 036	49	54	103
Western	3 358 776	24	24	48
Nyanza	4 392 136	32	36	68
Totals	26 777 547	210	222	432

11. That we are aggrieved by the composition of the National Constitutional Conference which is discriminatory of us within the meaning of sections 1A and 82 of the Constitution. The first applicant is the national spokesman of the NCA movement and a resident of Nairobi. I, the second applicant, work in Nairobi as the Head of Secretariat of the National Convention Executive Council (NCEC), and I am a registered voter in Gucha District of Nyanza Province. The third applicant is an advocate of Kenya who works and lives in Nairobi. The fourth applicant is a businessman in Nakuru District of Rift Valley Province. The fifth applicant is a schoolteacher who lives and works in Nairobi. The sixth applicant is a civil engineer in Nairobi and a member of the Democratic Party of Kenya. The seventh applicant is the co-ordinator of the NCA Movement in Central Province. The sixth applicant informs me and I believe the said information to be true that he is aggrieved by the inequitable and discriminatory representation of his party at the National Constitutional Conference.

[**38.**] From the foregoing depositions and affirmations as well as the submissions of learned counsel for the applicants, it appears that the main complaint by the applicants is that in determining the composition of the NCC the principle of equality of citizens which is implicit in a multi-party democratic state (and Kenya is proclaimed as such in article 1A of the Constitution) was not honoured and accordingly the representation of provinces and districts was blatantly discriminatory. Indeed paragraph 10 of the further affidavit is self-explanatory. Nairobi with a population of 2.1 million people had a total of 11 delegates at the NCC while Coast Province with 2.4 million people had 54 delegates and North Eastern Province with 962 000 people had 23 delegates. Furthermore, from ground 1 it is clear that Nakuru District with 1 187 039 had the same number of delegates (3) as Keiyo with a population of 143 865. Similarly both Machakos district with 906 644 people and Lamu with 72 686 were represented by three delegates each. And of course all political parties irrespective of their strength either in Parliament or in their registered membership were represented by one delegate each. All that, according to the applicants, negated the principle of equality and was blatantly discriminatory of the residents in some provinces and districts and of certain political opinion as embodied in political parties. They relied heav-

ily on the decision of the Supreme Court of the United States in *Reynolds v Simms* 377 US 533, 12 L Ed 2d 506. Writing for the majority, Chief Justice Warren had the following things to say about the equality of citizens at 527–528:

> Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests. As long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system. Weighting the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable. One must be ever aware that the Constitution forbids 'sophisticated as well as simple-minded modes of discrimination'.

Then at 529, he wrote in similar vein as follows:

> Logically, in a society ostensibly grounded on representative government, it would seem reasonable that a majority of the people of a state could elect a majority of the state's legislators. To conclude differently and to sanction minority control of state legislative bodies would appear to deny majority rights in a way that far surpasses any possible denial of minority rights that might otherwise be thought to result.

[**39.**] The essence of the decision, as I understand it, is this: equal citizenship calls for equality of the vote, to accord some votes greater weight than others for any reason is discriminatory and offensive to the character of a representative democracy, while there must be minority protection it should not lead to minority control of legislative bodies and thereby deny the majority of their rights, and to underweight any citizen's vote is to degrade his citizenship.

[**40.**] The respondents distinguished that case by pointing out that it concerned elections to state legislatures and was decided when racial discrimination was rampant in the United States of America. It was also said that population figures relied upon by the applicants had not been authenticated (a claim quickly shot down by applicants' counsel on the basis that the figures had been extracted from a report prepared by the second respondent in August 2003 and that in any case they had not been contradicted). Counsel for the first and second interested parties for his part pointed out that the representation to the NCC had been on the basis of existing political and administrative units created over a 40-year history of independence and the Court should not be asked to overturn that legacy.

[**41.**] The respondents and the interested parties also argued that the applicants had not properly invoked the jurisdiction of the High Court under section 84 of the Constitution in respect of prayers 7 and 14 the essence of which was an allegation of contravention of fundamental rights protected by sections 1A, 70, 78, 80 and 82 of the Constitution. In that regard it was contended that the applicants had to particularise the nature

of the contravention of their rights and the manner in which those rights had been contravened. The Court was referred to the decisions of this Court in *Adar and Others v Attorney-General and Others* misc civil application 14 of 1994 (unreported) and *Matiba v Attorney-General* misc civil application 666 of 1990 (unreported) in support of those propositions.

[**42.**] The Court was also reminded that the fundamental rights guaranteed by the Constitution are all subject to such limitations as are necessary in the public interest and for the protection of the rights and freedoms of others. The case of *Mutunga v Republic* [1986] KLR 167 was cited in that regard.

[**43.**] I have now weighed the rival arguments. To my mind, the strict logic of the *Reynolds v Simms* (*supra*) decision is unassailable. The concepts of equality before the law, citizens' rights in a democratic state and the fundamental norm of non-discrimination all call for equal weight for equal votes and dictate that minorities should not be turned into majorities in decision-making bodies of the state. That should be basic and it has evidently not been reflected in the composition of the NCC as demonstrated by the applicants. However, that cannot be the only consideration in a democratic society. The other consideration is that minorities of whatever hue and shade are entitled to protection. And in the context of constitution-making it is to be remembered that the Constitution is being made for all, majorities and minorities alike and, accordingly, the voice of all should be heard. Furthermore in a multi-ethnic society such as ours which is still struggling towards a sense of common nationality and unity of purpose, it is important that all tribes should participate in the process of constitution-making so that they can all own the Constitution which will be the glue binding them together. It should also be borne in mind that justice is the foundation of peace. If in the making of a new Constitution some minorities feel that they have been denied political justice, they will resent the Constitution and may, if they could, thwart it by resort to arms. Other factors which should not be ignored are the terrain and size of the various political units. Representation must be effective and it cannot be so if the representative has either too vast a territory to traverse or too many people to attend to. In the result my conclusion is that what is called for in a society such as ours is a balance between the majoritarian principle of one person one vote and the equally democratic dictates of minority accommodation in the democratic process. Naturally the predominant principle of application should be majoritarianism. To accommodate minorities does not entail reversing the democratic equation by having minority dominance in representative forums. Viewed in that light the composition of the NCC was quite flawed and no amount of antecedent history of skewed representation in Parliament or elsewhere could wholly justify it. Do those considerations justify the grant of the prayers sought by the applicants?

[**44.**] I am afraid not. The scheme of protection of fundamental rights

envisaged by our Constitution is one where individual as opposed to community or group rights are the ones enforced by the courts. Section 84(1) of the Constitution is clear. It provides:

> Subject to subsection (6), if a person alleges that any of the provisions of sections 70 to 83 (inclusive) has been, is being or is likely to be contravened *in relation to him* (or, in the case of a person who is detained, if another person alleges a contravention in relation to the detained person), then, . . . that person . . . may apply to the High Court for redress (emphasis mine).

[**45.**] The emphasis is clear. Except for a detained person for whom someone else may take up the cudgels, every other complainant of an alleged contravention of fundamental rights must relate the contravention to himself as a person. Indeed the entire Chapter V of the Constitution is headed 'Protection of Fundamental Rights and Freedoms of the Individual'. There is no room for representative actions or public interest litigation in matters subsumed by section 70–83 of the Constitution. Bearing that in mind, the respondents' submissions that the applicants have not brought themselves within the ambit of section 84 are irresistible. In none of the affidavits does any of the applicants demonstrate how his personal right to equality before the law or non-discrimination is contravened. They appear to take up cudgels on behalf of the residents of Nairobi, Nakuru, Central Province and Gucha areas of the Republic of Kenya and on behalf of political parties. In short, I think the applicants could not, and have not, in the circumstances here brought themselves within the grace of the Court in exercise of its power under section 84 of the Constitution.

[**46.**] Before concluding this aspect of the matter I would want to endorse and associate myself with the previous stream of authority of this Court regarding adjudication under section 84 of the Constitution. In the *Dr Korwa Adar and Others v Attorney-General* case the Court said:

> As this Court stated in the case of *Matiba v Attorney-General* High Court civil miscellaneous appeal number 666 of 1990 (unreported), an applicant in an application under section 84(1) of the Constitution is obliged to state his complaint, the provision of the Constitution which he considers has been infringed in relation to him and the manner in which he believes they have been infringed. Those allegations are the ones which if pleaded with particularity, invoke the jurisdiction of this Court under that section. It is not enough to allege infringement without particularizing the details and manner of infringement.

I entirely agree.

[**47.**] In the result, although we had overruled the preliminary objection with regard to prayers 7 and 14 of the summons, a careful scrutiny of the matter during the consideration of the merits discloses that there are no merits in those prayers in so far as the applicants as individuals are concerned. I would accordingly dismiss prayers 7 and 14 of the summons.

[**48.**] I now turn to a consideration of the fourth important matter in this

application, namely, the scope of the power of Parliament under section 47 of the Constitution.

Inconsistency of section 28(3) and (4) of the Act with section 47 of the Constitution

[**49.**] This matter was hotly debated before us. The point of entry into the debate was the meaning of section 47 of the Constitution and the scope of Parliament's power under that provision. It was common ground that the product of Bomas will be a new Constitution and that what will be presented to the Attorney-General as a draft Bill to alter the Constitution and what will thereafter be presented to the National Assembly, is in effect a Bill for the enactment of a new Constitution for Kenya. Indeed 'draft zero' of the Conference which was annexed to the affidavit of Kiriro Wa Ngugi bears that out. The existing Constitution is proposed to be repealed and a new one enacted in its place. So the issue was whether Parliament could in exercise of its amendment power under section 47 repeal the Constitution and enact a new one.

[**50.**] Section 47 of the Constitution reads in material parts:

> 1. Subject to this section, Parliament may alter this Constitution.
> 2. A Bill for an Act of Parliament to alter this Constitution shall not be passed by the National Assembly unless it has been supported on the second and third readings by the votes of not less than sixty-five per cent of all the members of the Assembly (excluding the *ex officio* members).
> 6. In this section: (a) references to this Constitution are references to this Constitution as from time to time amended; and (b) reference to the alteration of this Constitution are references to the amendment, modification or re-enactment, with or without amendment or modification, of any provision of this Constitution, the suspension or repeal of that provision and the making of a different provision in the place of that provision.

And section 123(9)(b) provides that in the Constitution, words in the singular shall include the plural, and words in the plural shall include the singular.

[**51.**] Counsel for the applicants argued that Parliament had no power under section 47 to repeal or abrogate the Constitution and to enact another one in its place. He premised his submission on an understanding of the words of the section, the notion of the constituent power of the people and principles of constitutional interpretation. In his understanding of the text, the provisions of subsection (6) were clear that Parliament could alter by amendment, modifications, re-enactment, suspension or repeal any provision of the Constitution. However, the proposed Constitution would be a new Constitution and not an alteration of the Constitution. Section 47 was all about the amendment of the current Constitution and could not be read to include the adoption of another Constitution outside the framework of the existing Constitution. On the proposition that if Parliament could amend or repeal one provision of the Constitution

it could amend or replace all of them by dint of the provision of section 123(9)(b), counsel submitted that the proposition would produce an absurd result.

[**52.**] On the notion of the constituent power of the people and its implication on the power of Parliament, it was argued that the sovereign constituent power to make a Constitution was reposed in the people as a whole. In that regard he argued that there was all the difference between the power to amend a Constitution and the power to make a new one. The former was vested in Parliament and the latter reposed only in the people themselves.

[**53.**] On the principles of constitutional interpretation, counsel argued that the framework of governance under the Constitution recognised that sovereignty reposed in the people. The hallmark of that sovereignty was possession of the constituent power. If any organ of government was vested with sovereign powers, it would mean that the people were not sovereign. The principle of the supremacy of the Constitution also precluded the notion of unlimited powers on the part of any organ created by the Constitution. He argued that in the light of the foregoing, section 30 of the Constitution (which vests the legislative power of the republic in Parliament) as read with section 47 conferred on Parliament only a limited power to enact ordinary law and amend the Constitution. He placed heavy reliance in the decision of the Supreme Court of India in the case of *Kessevananda v State of Kerala* [1973] AIR (SC) 1461. In that case the Supreme Court in interpreting article 368 of the Constitution of India (the article embodying the amendment power) held that the power to amend the Constitution did not include the power to alter the basic structure or framework of the Constitution. Khanna J, who was one of the majority of nine justices out of 13 in the Court delivered himself as follows:

> Amendment of the Constitution necessarily contemplates that the Constitution has not been abrogated but only changes have been made in it. The word 'amendment' postulates that the old Constitution survives without loss of its identity despite the change. As a result of the amendment, the old Constitution cannot be destroyed or done away with; it is retained though in the amended form. The words 'amendment of the Constitution' with all their wide sweep and amplitude cannot have the effect of destroying or abrogating the basic structure of the Constitution. It would not be competent under the garb of amendment, for instance, to change the democratic government into a dictatorship or a hereditary monarchy nor would it be permissible to abolish the Lok Sabha (the Indian Parliament).

[**54.**] I may add that the above decision has since then received the unanimous endorsement of the Supreme Court of India in the case of *Minerva Mills Limited v Union of India* [1981] 1 SCR 206.

[**55.**] Counsel for the second respondent argued that a plain reading of section 47(6) as read with section 123(9)(b) of the Constitution shows that Parliament can change or replace any and all provisions of the Con-

stitution and enact a new one. He argued that the word re-enact means a new Constitution could come in place of or in lieu of the existing one. In his view, it was the only sense in which the word was used in the Constitution. Counsel thought he got support for his contentions from the decision of the High Court of Singapore in the case of *Teo So Lung v Minister for Home Affairs* [1990] LRC 490 where it was held that:

> If the framers of the Constitution had intended limitations on the power of amendment, they would have expressly provided for such limitations. But article 5, which provided that any provisions of the Constitution could be amended by a two third majority in Parliament, did not put any limitation on that amending power. For the courts to impose limitations on the legislature's power of constitutional amendment would be to usurp Parliament's legislative function contrary to section 58 of the Constitution. The Kessevananda doctrine did not apply to the Singapore Constitution as it did to the Indian Constitution.

[**56.**] Counsel strongly urged the Court to follow the reasoning of the High Court of Singapore and refuse to follow the *Kessevananda* doctrine. He urged that the Court should not impose a limitation on the power of Parliament and should hold that Parliament could repeal all the provisions of the Constitution and make new provisions in place of the repealed ones. To impose any limitations would offend section 30 of the Constitution. He submitted that fear of abuse of the power was no argument against the existence of such a power for if Parliament abused its power, the solution would be to reject such a Parliament. It mattered not what the Supreme Court of India had said on its own Constitution: the Court must look at what the Constitution of Kenya says. In any case, he further contended, article 13 of the Constitution of India placed a limitation on the power of Parliament, a limitation which was absent in our Constitution.

[**57.**] Counsel for the Attorney-General steered clear of offering any interpretation of section 47. She observed that there was doubt on the matter and the government had published a Bill to clear the air of doubt. Counsel for the interested parties strongly supported the position taken by the second respondent. The *amicus curiae* was also supportive of the proposition that Parliament could enact a new Constitution. In his view that was because Parliament could exercise the constituent power of the people.

[**58.**] In reply, counsel for the applicants submitted that section 47(6)(b) read together with section 123(9) only meant that Parliament could alter one or more or many provisions of the Constitution. It was still a limited power and could not be extended to mean that if Parliament could amend several provisions it could enact a new Constitution. Such an interpretation, he said, would be absurd. On whether the Court should be persuaded by the *Kessevananda* case or the *Teo So Lung* case, he submitted that under the doctrine of *stare decisis* the Court should be persuaded by decisions of courts of similar or higher jurisdiction. In that regard he noted that the Singapore case relied on the decision of Ray J, who was one of the minority in the *Kessevananda* case. He submitted that the more persuasive decision was that of the majority which had subsequently been affirmed

by the Supreme Court of India in a unanimous decision. He further argued that article 2 of the Singapore Constitution required the Court to interpret the Constitution as an ordinary Act of Parliament — the *El Mann* doctrine — and that the Court should not follow it in that regard. He further contended that there was no limitation on the power to amend in article 13 of the Constitution of India contrary to the second respondent's submissions. As regards the argument that adherence to the *Kessevananda* doctrine would amount to judicial legislation, counsel argued that in limiting the powers of Parliament the makers of the Constitution did not intend to place the courts above Parliament but to ensure that all organs of government would operate in a manner not subversive of the Constitution. That could only be done by invoking the doctrine of limited powers.

[**59.**] I have weighed the heavy and elaborate submissions presented to the Court. Having done so, I must begin by affirming that the Court's most sacrosanct duty is to uphold the supremacy of the Constitution. The Court must follow the clear command of the Constitution. And what is the clear command of the Constitution in this aspect of the matter? I have come to the unequivocal conclusion that Parliament has no power under the provisions of section 47 of the Constitution to abrogate the Constitution and/or enact a new one in its place. I have come to that conclusion on three premises: First, a textual appreciation of the pertinent provisions alone compels that conclusion. The dominant word is 'alter' the Constitution. The modes of alteration are amendment, modification, re-enactment, suspension, repeal and the making of a different provision in the place of the repealed one. The emphasis in subsection 6(b) is alteration by those modes of *this Constitution*. To my mind the provision plainly means that Parliament may amend, repeal and replace as many provisions as desired provided the document retains its character as the existing Constitution. A new Constitution cannot by any stretch of the imagination be the existing Constitution as amended. And the word *re-enact* does not mean, as counsel for the second respondent understood it to mean the replacement of the Constitution with a new one. It simply means to enact again, to revive. One can only re-enact a past provision, that is bring back into the Constitution a provision which had earlier been in it but had been removed in exercise of the power of amendment. For example, if Parliament were to bring back the provision that there shall be only one political party called the Kenya African National Union that would be a re-enactment of that provision. The above textual analysis is supported by *Black's Law Dictionary* (6th ed) at 77, the word 'alter' is defined as:

> To make a change in; to modify; to vary in some degree; to change some of the elements or ingredients or details without substituting an entirely new thing or destroying the identity of the thing affected. To change partially. To change in one or more respects, but without destruction of existence or identity of the thing changed.

[**60.**] It is thus crystal clear that alteration of the Constitution does not involve the substitution thereof with a new one or the destruction of the

identity or existence of the Constitution altered. Secondly, I have elsewhere in this judgment found that the constituent power is reposed in the people by virtue of their sovereignty and that the hallmark thereof is the power to constitute or reconstitute the framework of government, in other words, make a new Constitution. That being so, it follows *ipso facto* that Parliament being one of the creatures of the Constitution cannot make a new Constitution. Its power is limited to the alteration of the existing Constitution only. Thirdly, the application of the doctrine of purposive interpretation of the Constitution leads to the same result. The logic goes this way. Since (i) the Constitution embodies the peoples' sovereignty; (ii) constitutionalism betokens limited powers on the part of any organ of government; and (iii) the principle of the supremacy of the Constitution precludes the notion of unlimited powers on the part of any organ, it follows that the power vested in Parliament by sections 30 and 47 of the Constitution is a limited power to make ordinary laws and amend the Constitution: no more and no less.

[**61.**] If it were necessary to fortify those conclusions by reference to judicial *dicta* — and strictly speaking it is not — I would say this. First, the doctrine of *stare decisis* does not bind this Court to follow any decision of any foreign tribunal however highly placed. That is part of the country's judicial sovereignty. The Court is bound only by the decisions of the Court of Appeal. Secondly, the matter we are handling is a unique one. There is no Commonwealth decision on the issue and it does not appear from the researches of counsel or our own knowledge that any court in the Commonwealth has been called upon to pronounce on whether Parliament can in the exercise of its amendment power under the Constitution abrogate and replace the Constitution with a new one. Indeed the two contending decisions from India and Singapore were on issues touching on the constitutionality of constitutional amendments of specific provisions of the respective Constitutions. So what are really before us are *dicta* which may or may not persuade us. Having said that, I am of the considered opinion that the *dicta* in the *Kessevananda* case are to be preferred to those in the *Teo So Lung* case. I say so for the following reasons. First, the *Kessevananda* case was a decision of a Supreme Court of a Commonwealth country which was affirmed nine years later. The *Teo So* case is a decision of the High Court of Singapore which is not the highest court of that country. Secondly, the Indian case proceeded on the premise of a purposive and liberal interpretation of the Constitution — an approach which I have embraced herein before — while the Singapore case proceeded on the premise that a Constitution was to be interpreted as an ordinary Act of Parliament (an echo of the *El Mann* doctrine which I have rejected). And thirdly, the interpretation of the word 'amend' in the Constitution of India completely accords with the definition of the word 'alter' in the *Black's Law Dictionary* which I have expressly approved. May I also observe that the limitation in article 13(2) of the Indian Constitution that the state shall not make any law which takes away or abridges the rights conferred by Part III

of the Indian Constitution (the fundamental rights) did not colour the Court's interpretation of article 368 (the amendment power). On the contrary, the Court in the *Kessevananda* case affirmed the validity of the twenty-fourth amendment to the Constitution which expressly empowered Parliament to amend any provisions of the Constitution including those relating to fundamental rights and also made article 13 of the Constitution inapplicable to an amendment of the Constitution under article 368. The Court concluded that notwithstanding article 13(2), the true position was that every provision of the Constitution could be amended provided in the result the basic foundations and structure of the Constitution remained the same. With respect to fundamental rights, the Court affirmed that reasonable abridgements could be effected thereto in the public interest provided the rights were not abrogated. All in all, I completely concur with the *dicta* in the *Kessevananda* case that Parliament has no power to and cannot in the guise or garb of amendment either change the basic features of the Constitution or abrogate and enact a new Constitution. In my humble view, a contrary interpretation would lead to a farcical and absurd spectacle. It would be tantamount to an affirmation, for example, that Parliament could enact that Kenya could cease to be a sovereign Republic and become an absolute monarchy, or that all the legislative, executive and judicial power of Kenya could be fused and vested in Parliament, or that membership of Parliament could be co-optional, or that all fundamental rights could stand suspended and such other absurdities which would result in there being no 'this Constitution of Kenya'. In my judgment, the framers of the Constitution could not have contemplated or intended such an absurdity. And it would not be an answer to that concern to say, as was said by counsel for the second respondent, that the people can change their Parliament, for if Parliament had a totally free hand, it could even perpetuate itself. All in all, the limitation of Parliament's power was a very wise ordination by the framers of the Constitution which is worthy of eternal preservation.

[**62.**] Before I leave this aspect of the matter let me comment on the previous amendments to the Constitution of Kenya. Since independence in 1963, there have been 38 amendments to the Constitution. The most significant ones involved a change from Dominion to Republic status, abolition of regionalism, change from a parliamentary to a presidential system of executive governance, abolition of a bicameral legislature, alteration of the entrenched majorities required for constitutional amendments, abolition of the security of tenure for judges and other constitutional office holders (now restored), and the making of the country into a one party state (now reversed). And in 1969 by Act 5 Parliament consolidated all the previous amendments, introduced new ones and reproduced the Constitution in a revised form. The effect of all those amendments was to substantially alter the Constitution. Some of them could not be described as anything other than an alteration of the basic structure or features of the Constitution. And they all passed without challenge in the courts.

[**63.**] Be that as it may, it is evident that in none of the various amendments did Parliament purport to or in fact abrogate the Constitution or make a new one. Everything was done within the text and structure of the existing Constitution. Even the radical Act 5 of 1969 which set out the authentic version of the Constitution did not purport to and did not in fact introduce a new Constitution. It was an hybrid of a consolidating Act, an amendment Act and a revisional Act. Section 2 thereof was clear that the 'Constitution' meant the Constitution of the Republic of Kenya contained in Schedule 2 to the Kenya Independence Order in Council, 1963 as amended by other acts from 1964 to 1968. And section 6 was equally significant. The revised Constitution which was set out in the Schedule to the Act was a revised version of the Constitution as amended by the same Act incorporating revisions as to form only and effecting no changes of substance. In those premises there is no precedent in the parliamentary practice of Kenya for the proposition that Parliament can make a new Constitution. As regards alterations to the basic structure of the Constitution, that had manifestly been effected, all I can say in that respect is that, fortunately or unfortunately, the changes were not challenged in the courts and so they are now part of our Constitution.

[**64.**] Having come to the above conclusions, it is now time to explore whether and how sections 28(3) and (4) of the Act are inconsistent with the Constitution.

[**65.**] The case of the applicants, as we understood it, was that section 28(3) and (4) was in effect a legislative direction to the Attorney-General to publish the 'Bomas' product in the form of a Bill to alter the Constitution and to the National Assembly to enact such a Bill within seven days of the Attorney-General introducing it. It was argued that that was inconsistent with section 47 of the Constitution in that the Bomas draft, though required to be published in the form of a Bill to alter the Constitution, was in reality not a Bill to alter the Constitution but one to enact a new Constitution and repeal the existing one. Since Parliament could not enact a new Constitution, so the argument went, the provisions of the Act providing for such enactment were inconsistent with the Constitution.

[**66.**] The respondents and the interested parties on their part contended that in the first place, the provisions in question were no more than a timetable of action on the part of the Attorney-General and the National Assembly — the Attorney-General to publish the 'Bomas' product as a Bill within seven days of receipt thereof and the National Assembly to enact the same within seven days of its being tabled therein. In the second place, they contended, section 47 was not concerned with events happening outside Parliament, it had no bearing on the manner of preparation of a Bill to alter the Constitution, its operation began only after a Bill to alter the Constitution was presented. In that regard, any Member of Parliament could present a Bill to alter the Constitution, it was argued.

[**67.**] I have considered the rival arguments. My conclusion is that what

offends section 47 of the Constitution is neither the fact that a Bill to alter the Constitution has been prepared in the manner enacted in Cap 3A nor the fact that the Attorney-General is required to publish the said Bill within seven days. What offends the Constitution is that the National Assembly is required by dint of subsection (4) of section 28 to enact the said Bill into law within seven days. As we have previously stated, the Bill though styled a Bill to alter the Constitution is in substance a Bill for the enactment of a new Constitution and the repeal of the existing Constitution. The Act is thus in effect directing Parliament to entertain and pass a Bill for the replacement of the Constitution with a new one. That offends section 47 of the Constitution in two major respects. First, it invites Parliament to assume a jurisdiction or power it does not have — to consider a Bill for the abrogation of the Constitution and the enactment of a new one. The provision is imposing a duty on Parliament to do that which it cannot do. Secondly, the provision takes away the constitutional discretion of Parliament to accept or reject a Bill to alter the Constitution. It directs that the National Assembly enacts the Bill presented to it into law. I recall counsel for the second respondent arguing that the words 'for enactment' were no more than an expression of desire or a hope that the Bill will be enacted. I am unable to agree. In my view, if that were so, those words would have been prefixed with such words as 'hopefully for enactment' or 'for consideration and possible enactment'. In my view what the provisions of subsection (4) of the Act do is command the National Assembly to enact the Bill. That is a patently unconstitutional presumption on the National Assembly. In short, I find nothing in subsection (3) of section 28 of the Act which is inconsistent with section 47 of the Constitution. However section 28(4) of the Act is clearly inconsistent with section 47 of the Constitution. That should be the end of the consideration of prayer 9 in the summons. However, in the course of a close analysis of the text of the Act and the Constitution, I could not help but observe the following further possible inconsistencies between section 28(4) of the Act and the Constitution. First, the provision provides for a time frame of action by the National Assembly. That to my mind, offends section 47 as read with section 56 of the Constitution for the timetable of the National Assembly is provided for by the standing orders of the House made pursuant to section 56 of the Constitution. According to those orders, there is no time frame for the passage of any Bill, let alone a Bill to alter the Constitution. Secondly, the provision assumes, erroneously, that the National Assembly enacts Bills into law. It has no power to do such a thing. The power of the National Assembly is to pass Bills. The enactment of them into law is the function of Parliament which according to section 30(2) of the Constitution comprises of the National Assembly and the President. A Bill is not enacted by the Parliament of Kenya into law unless it has been passed by the National Assembly and assented to by the President in accordance with section 46 of the Constitution. Those two observations were however not prompted by any of the advocates before us and are not necessary for the decision. They are strictly speaking mere *obiter dictum*.

[**68.**] The result of my consideration of this aspect of the matter is that the applicants succeed in their contention that section 28(4) of the Act is inconsistent with section 47 of the Constitution and accordingly prayer 9 will be granted subject to the modification that reference to section 28(3) of the Act will be deleted.

[**69.**] From what I have stated so far it should be manifestly clear that the bane of the Act is the inherent presumption that the making of a new Constitution could be accommodated within the power of Parliament to alter the Constitution. As demonstrated herein the two are entirely different processes requiring the exercise of different powers. The former requires the exercise of the peoples' constituent power and the latter requires the exercise of Parliament's limited amendment power.

[**70.**] I now turn to the last prayers in the summons, namely, an injunction to stop the National Constitutional Conference at Bomas of Kenya for a period of six months and the costs of the summons.

Injunction

[**71.**] The Court heard elaborate and, I must say, sincerely passionate arguments for and against the stoppage of the National Constitutional Conference. Well, that is all water under the bridge now. The Conference has come to an end and the delegates have returned whence they came. One of the most fundamental aspects of the Court's jurisdiction is that we are not an academic forum and we don't act in vain. The prayer for injunction (that is prayer 17) is declined on that ground.

Costs

[**72.**] The issues canvassed in the originating summons were important and novel in Commonwealth jurisprudence. And on both the preliminary objections taken as well as on the merits, the applicants and the respondents have each partially succeeded. The interested parties for their part entered the fray on their own application. So did the *amicus curiae*. In those circumstances, I think the just order on costs is that each party should bear own costs.

Final orders

[**73.**] In view of the conclusions I have reached above and taking into account what has fallen from the lips of my brother Kubo J, and my sister Kasango AJ. It is obvious that the judgment of this Court is:

1. That Parliament has no jurisdiction or power under section 47 of the Constitution to abrogate the existing Constitution and enact a new one in its place. Parliament's power is limited to only alterations of the existing Constitution. The power to make a new Constitution (the constituent power) belongs to the people of Kenya as a whole, including the applicants. In the exercise of that power, the applicants to-

gether with other Kenyans, are, in the circumstances of this case, entitled to have a referendum on any proposed new Constitution;
2. That the applicants have not established that they have been discriminated against by virtue of the composition of the National Constitutional Conference;
3. The applicants are not entitled to an injunction to stop the National Constitutional Conference; and
4. Every party will have to bear their own costs of the originating summons.

[**74.**] It follows, therefore, that prayer 3, prayer 9 (subject to the modification that only subsection (4) of section 28 of the Act is inconsistent with section 47 of the Constitution) and prayer 12 of the summons are granted and prayers 1, 7, 14 and 17 are dismissed.

[**75.**] Accordingly, declarations should be and are hereby issued that:

(a) Subsections (5), (6) and (7) of section 27 of the Constitution of Kenya Review Act are unconstitutional to the extent that they convert the applicant's right to have a referendum as one of the organs of reviewing the Kenyan Constitution into a hollow right and privilege dependent on the absolute discretion of the delegates of the National Constitutional Conference and are accordingly null and void.
(b) Section 28(4) of the Constitution of Kenya Review Act is inconsistent with section 47 of the Constitution of Kenya and is therefore null and void.
(c) The Constitution gives every person in Kenya an equal right to review the Constitution which right embodies the right to ratify the Constitution through a national referendum.

And each party will bear their own costs.

[**76.**] Those, then, are the orders of this Court.

* * *

Wambua v Wambua

(2004) AHRLR 189 (KeHC 2004)

Diana Ndele Wambua v Dr Paul Makau Wambua
High Court of Kenya at Nairobi, civil case 30 of 2003, 24 May 2004
Judge: Koome

Education (parental responsibility for higher education, 17, 20, 22-27)
Interpretation (international standards, 21)

Ruling

1. Diana Ndele Wambua was born on 1 February 1982 to Dr Paul Makau Wambua and Rosemary Mbithe Wambua. She has filed this originating summons under section 91 of the Children Act 2001 and what I would call the omnibus clause known as all the enabling and guiding provisions of the law. What was argued before me was first of all, the applicant be granted leave which will enable her to file an application for an order of maintenance against her father who is the respondent in this matter.

2. The applicant is 22 years of age, she is seeking for an order compelling her father to pay part of, the whole university fees, or any sum that the Court may consider fair and just.

3. The applicant is engaged as a student at the University of Nairobi undertaking a medical degree under the parallel programme since 2001. The applicant's parents separated in 1995, and custody of the children of the marriage including the applicant was given to the mother. The respondent was ordered to pay school fees for the children. He paid school fees for the applicant up to Form IV level at Precious Blood Secondary School. The applicant qualified to go to the university but she had already attained the age of majority and so the maintenance order lapsed.

4. The applicant wanted to pursue a degree in medicine and opted to apply under the parallel programme. The respondent is a lecturer at the University of Nairobi, he is entitled to a staff education support (SESF) fund for his children which would cover up to 50% of the university fees. According to the SESF forms attached to the application a member of staff of University of Nairobi is entitled to this facility for up to two children. Children must not be more than 30 years at the time of registration for the degree course and there should be evidence that the child/children are entirely dependent on the parent.

5. An enrolled SESF beneficiary child of a staff member, who cease to be permanent and confirmed employee of University of Nairobi through death or normal retirement continues to benefit until he/she completes the programme enrolled on.

6. According to the applicant she approached her father to sign for her the form that would entitle her to this benefit but the respondent refused. She sought the intervention of the Vice-Chancellor to prevail upon the respondent but this did not yield any results. Hence the applicant sought the intervention of the Court under the provisions of the Children Act 2001. The matter was first filed before the Children's Court but the Court advised (according to both counsel) that for reasons to do with monetary jurisdiction the matter would better be filed in the High Court. That is when the matter at the Children's Court was withdrawn and the present application was filed. The applicant's counsel argued that the High Court has jurisdiction to determine this matter which touches on the payment of education as provided for under section 7(1) of the Children Act. This right to educa-

tion can be extended to a child of over 18 years as the Court has power under the provisions of section 28 of the Act the Court can extend the parental responsibility in respect of a child beyond the date of the child's 18th birthday if the Court is satisfied upon application or on its own motion, that special circumstances exist with regard to the welfare of the child. Those special circumstances would necessitate an extension of time and such application may be made by the child, parent or relative, any person who has parental responsibility for the child.

7. Counsel for the applicant urged the Court to take judicial notice of the Kenyan system of education where a child starts school at the age of six years and until they attain a vocational training, the child remains reliant upon its parents for school fees, university or college fees beyond the age of 18 years.

8. The applicant were referred to the provisions of section 60 of the Constitution that gives this Court unlimited original jurisdiction in civil and criminal matters and although the jurisdiction of this Court is limited to matters covered under part II and XII of the Children Act, the nature of this application that involves the education of a child beyond 18 years involves parental responsibility that is dealt with under part III of the Act as well.

9. This application was strenuously opposed by the respondent. First of all the respondent argued that this Court has no jurisdiction to deal with the application for leave. The applicant is not qualified as the applicant's rights under sections 14 to 19 of the Children Act have not been contravened. The definition of a child means 'any human being under the age of eighteen years' in this regard therefore counsel agreed that the responsibility of extending parental responsibility lies with the children's courts as duly ordained under section 73 of the Act.

10. According to the respondent, there are no special circumstances that would apply to the applicant who has attained the age of 22 years. The respondent duly discharged his parental responsibility and the only time special circumstances would have arisen is for instance if the applicant attained the age of majority before completing secondary school or if the applicant was suffering from any form of disability.

11. The applicant is a normal child who was admitted at the same university to pursue a BA degree course in this regard the applicant is a normal child who can apply for a bursary or a loan under the Higher Education Board like other children who have no support from their fathers.

12. The respondent also took issue with the applicant for applying for the SESF directly. The applicant made the application without consulting the respondent and now expects the father to be compelled to make a sacrifice. The respondent felt strongly that he is under no legal obligation to make a sacrifice to fulfil moral and social responsibility.

13. In this respect counsel referred to an English authority *Norman v Norman Allec* LR 1950 1083 whereby the order of maintenance for a child who had attained 16 years could not be continued because it had already ceased to exist. Counsel for the respondent also referred to the *Halsbury's Laws of England* vol 17 paragraph 516 which deals with the duty of parents to provide every child with education. According to this text the education should be at the level of compulsory school age hence university education is not a basic right that a parent should be compelled to provide.

14. The above is the summary of the facts and arguments presented in this matter. I have given the submissions due consideration and also the provisions of the law. The first issue for me to address is whether this Court has jurisdiction to deal with this matter. As pointed out earlier, the applicant filed this matter before the Children's Court. The Act is quite clear what matters fall under the Children's Court as provided for under section 73. All matters under parts III, V, VII, VIII, IX, X, XI and XII should be heard by the Children's Courts. There is no set ceiling based on monetary jurisdiction of the magistrate.

15. The Constitution of Kenya also gives this Court unlimited original jurisdiction in civil and criminal matters. Counsel for the applicant also submitted that there is a breach of the provisions of section 7 of the Children Act which breach can be handled by the High Court.

16. The desperation by the applicant to pursue higher education has brought her to the High Court and to the Children's Court. The responsibility of the Court is to decide all cases according to substantial justice without undue regard to technicalities of procedure and without undue delay. In this regard I am satisfied that the Court has jurisdiction to deal with the application as transferring the matter to the Children's Court would occasion delay, and inconvenience to the applicant. Secondly there is the issue that was raised regarding section 7 of the Act whose jurisdiction is vested in the High Court.

17. The next issue to tackle is whether there are special circumstances that would entitle the extension of parental responsibility. The applicant is pursuing a degree course in medicine. She has no ability to pay school fees for herself. The respondent is a professor at the same university and he is entitled to Staff Education Support Fund (SESF) to the tune of 50% of the fees. The applicant is only requesting the respondent to be compelled to sign the SESF forms for 50%. Her mother has been struggling to raise the other 50%. The respondent is not at all required to pay any money from his pockets.

18. I have carefully considered the reasons given by the respondent for his refusal to sign the form. These reasons are quite clearly articulated in a letter written by the respondent and addressed to the Deputy Vice-Chancellor, dated 30 September 2003. The respondent blames the mother of the respondent and makes accusations against her for taking him to court

whereby he was ordered to pay school fees for the children. He complains of not having been consulted when this applicant made a choice of pursuing a degree in medicine. He says it is very painful for him and I can understand why he declined to sign the forms. According to him the request and pursuit by the applicant is instigated by her mother. The respondent has no relationship with his daughter; he has not drawn a distinction between his differences with his wife/mother of the applicant. The applicant has also not nurtured a cordial relationship with her father; but who among the applicant and respondent should nurture and promote an atmosphere of happiness, understanding and companionship? I think both should attempt to build this relationship as they are the biggest prime movers in this respect.

19. Due to this stalemate, the applicant has sought the intervention of this Court. It was submitted quite eloquently by counsel for the respondent that this Court cannot implement a moral obligation. Legal obligation by the respondent ceased when the applicant turned 18 years and in any case parental responsibility cannot be extended to include higher education.

20. This has led me to unravel the mystery of what is basic education. According to the Children Act 2001, 'education' means 'the giving of intellectual, moral, spiritual instruction or other training to a child'. A child means 'any human being under the age of 18 years'. Parliament in its own wisdom provided for a situation whereby parental responsibility can be extended.

21. The Preamble of the Children Act 2001 has acknowledged the application of the principles of the United Nations Convention on the Rights of Child and the African Charter on the Rights and Welfare of the Child. The Act also largely incorporated these principles but I was particularly drawn to the articles dealing with education especially article 28(1) of the United Nations Convention on the Rights of the Child; whereby state parties are enjoined to: '(c) Make higher education accessible to all on the basis of capacity by every appropriate means; (e) Take measures to encourage regular attendance at schools and reduction of drop out rates.'

22. In view of the above, and in my humble opinion, basic education is more than just learning how to read, write and calculate. It encompasses the broadest possible sense of learning at any state of life and it is not confined to childhood and formative years. The definition of education varies depending on the social class, personal circumstances, national standards and other reasons. Hence to some people basic education would include higher education or tertiary which is seen as a foundation for working life and further education. Yet to some other people, education is the first stage of formal schooling and yet to others it extends to full secondary school.

23. The applicant is a daughter of a medical doctor, a professor at the university.

24. The mother's profession is not disclosed but it is said she is an international civil servant working with a United Nations organisation. To my mind these parents belong to an educated elite. They have set very high standards for their children and education in this respect can be construed to include higher education in their circumstances.

25. I would therefore not fault the applicant for striving to attain what she considered to be the best for her, that is medical degree under the parallel programme.

26. The parents having set high standards for their children have a responsibility to promote their social progress and better standards of life for their children especially children who are willing and who are self driven.

27. The University of Nairobi, a public body, has set up a scheme for the education of the children of their staff members. I find the refusal by the respondent to extend this facility to the applicant unreasonable, especially when the applicant is not asking the respondent to go beyond what is offered by the scheme.

28. The sum total of the above analysis leads me to a conclusion that the circumstances of the applicant, looked together with the circumstances of the respondent, I am satisfied that the applicant should be granted leave to file an application for an order of maintenance against the respondent. I would however wish to add that the said maintenance should not go beyond what is provided under the SESF and as long as the respondent remains an employee of Nairobi University.

29. Since this is a family matter there will be no order to costs.

LESOTHO

Baitsokoli and Another v Maseru City Council and Others

(2004) AHRLR 195 (LeCA 2004)

Khathang Tema Baitsokoli and Mosala Nkekela v Maseru City Council, Minister of Local Government, Commissioner of Police and Attorney-General
Court of Appeal of Lesotho, 20 April 2004, CA (Civ) 4/05 CONST/C/1/2004
Judges: Gauntlett, Grosskopf, Smalberger

Life (right to livelihood, 9, 12, 15-18, 20-23, 21, 28; limitations, 16, 17)
Interpretation (constitutional interpretation, 14; foreign case law, 14, 23-27)
Socio-economic rights (principles of state policy, 18, 28; justiciability, 19)

Gauntlett JA

1. The appellants are respectively a registered association of traders, and an individual member who from 1979 until recently had a stall in the centre of Maseru at the area known as Makhetheng, situated on Kingsway. Members of the first appellant seek to ply their trade along Kingsway, the capital's main thoroughfare, selling foodstuffs and other items to the public. The first and second appellants have instituted a constitutional challenge (pursuant to section 22(6) of the Constitution, read with GG 104 of 14 December 2000) to their removal by the first respondent (with the assistance of the other respondents) from Makhetheng to a market some 200m away (according to the respondents). This is known as the Old Local Government Premises (the new market).

2. The challenge is squarely founded on the right to life, entrenched by the Bill of Rights comprising Chapter II of the Constitution of Lesotho. The second appellant's case is that at Makhetheng he used to gross about M300 in sales daily, but that now

> I hardly make anything per day because of being out of convenient reach of the public who would buy my goods. As a result of my removal from my long-term place of business I have been unable to meet my basis needs . . . I am not able to

> purchase food and clothing for my dependants, and we are slowly starving to death.

This claim is also made on behalf of other members of the first appellant. For brevity I shall refer to them and the second appellant collectively as 'the traders'.

3. The respondents deny this. They point to the fact that the statutory provisions which the traders had contended are relevant, in truth do not apply. They invoke the powers accorded to the first respondent under the Urban Government Act 1983 (to which further reference will be made). They say furthermore that the first respondent, seeking to exercise its local government responsibilities relating to the orderly development of Maseru, has established the new market. This has a capacity 'far outnumbering [first appellant's] members'. The respondents furthermore deny that the traders are being prohibited from trading in the urban area of Maseru. The statutory duties of the first respondent are said to require the orderly regulation of trading areas. In particular the respondents deny that moving the traders to the new market imperils their livelihood, let alone that (as the traders contend) this threatens their very survival.

4. It is common cause that the statutory provisions initially invoked by the traders were inapposite. The Court *a quo* (Peete J Molai *et* Nomngcongo JJ concurring) however allowed an amendment to the notice of motion. Ultimately an order was sought in these terms:

> (1) Declaring applicants' removal from Makhetheng area and other areas along Kingsway Street in Maseru where they trade as street vendors as a violation of applicants' right to life in terms of article 5 of the Constitution.
> (2) Declaring the first and second respondents' act of removing applicants from and refusing them permission to sell their goods along Kingsway Street in Maseru as *ultra vires* first respondents' powers under section 9 of the schedule I to Urban Government Act, 1983.
> (3) Granting applicants further and/or alternative relief.

5. In a judgment which gave extensive consideration to section 5 of the Constitution, Peete J (writing for the full bench) ultimately concluded that 'the right to life guaranteed under section 5 . . . cannot be defined and interpreted — even most expansively and purposively — to include [the] right to livelihood . . .'.

6. This is the first instance of which we are aware in which the right to life has been invoked in Lesotho. That right is of course foundational to human existence, and its constitutional significance is itself primary (*S v Makwanyane* 1995 (3) SA 391 (CC) at 429 H). In the words of Lord Bridge, an individual's right to life is '[t]he most fundamental of all human rights' (*R v Home Secretary, ex parte Bugdaycay* [1987] AC 514, [1987] 1 All ER 940 (HL) at 531 G).

7. The traders appear in the main to be people whom economic need has drawn from rural areas to the capital, seeking to eke out an existence

through informal trading. The phenomenon is familiar in many societies, particularly in Africa, and the plight of those concerned (like that of others who struggle as farmers or workers) is apparent.

8. The affidavits however do not (applying the rule laid down in *Plascon-Evans Paints v Van Riebeeck Paints Pty* 1984 (3) SA 623 (A) at 634C-635C) establish a threat to actual survival arising from the relocation of the stalls, imminent or gradual, as the appellants assert. In argument before us, the case for the appellants instead rests most centrally on the proposition that the traders' rights to a livelihood was imperilled, and that the right to life under Lesotho's Constitution encompasses these rights. Counsel said he stood or fell by this proposition, and by his reliance on Indian and Bangladeshi case law in that respect.

9. Given the importance of a constitutional claim of a right to life, in the exceptional circumstances of this case we shall assume for the purposes of the appellants' argument that the traders' right to a livelihood has indeed been put at risk by their removal to the new market, some 200m away. We do so without deciding that factual inquiry. This is because the essential question for determination is whether the right to life in Lesotho encompasses the right to a livelihood. If that proposition fails, so does the claim made by the traders. They have attacked their removal to the new market on no other legal basis.

10. The statutory powers the respondents have exercised are these. Section 37 of the Urban Government Act, 1983 provides:

> (1) Subject to this Act or any other law relating to the duties of a council, the council shall, (a) control, manage and administer the municipality and generally assist in the maintenance of good order and government within its area; (b) generally promote the public health, welfare and convenience, and the development, sanitation and amenities of the municipality; (c) act as a rating authority and undertake all the duties with respect to rating as may be imposed on any local authority under this Act, or under the Valuation and Rating Act, 1980 or under any other law; (d) undertake the duties and responsibilities as land authority in respect of all land within the municipality under section 24(1) of the Land Act 1979 when called upon so to do by the Minister; (e) undertake the functions of the planning authority for the purpose of section 11(4) of the Town and Country Planning act 1980; and exercise any of the powers of consultation conferred on the public by that Act, including the lodging of objections under section 7(1)(c) of the Town and Country Planning Act 1980; and (e) undertake any other duties which may be placed upon a Council by this or any other Act. (2) Without prejudice to the generality of the foregoing, the Minister may, from time to time, by regulation, impose on any council any of the duties contained in schedule 1 to this Act, and described more particularly in the relevant paragraphs thereto.

Schedule I to the Act is as follows:

> Duties which the Council may perform
> 1. Sanitation and housing
> 2. Protection of foodstuffs

3. Water and food supplies
4. Abattoirs
5. Sanitary services and refuse removal
6. Infectious diseases
7. Streets and public places
8. Abatement of nuisance
9. Markets
10. Burial grounds
11. Pounds
12. Camping grounds
13. Grazing
14. Parks and gardens
15. Removal of obstructions
16. Control of building permits

Regulations made to enable the first respondent to carry out these duties in relation to Maseru include (in their relevant aspects) these:

> 9(1) To establish, regulate and control markets, to regulate and control trade therein, to let stands or plots in such markets, and whenever such markets are established to prohibit, regulate or control trade elsewhere in commodities which are sold at established markets.
>
> (2) To undertake the administration and enforcement of the Market Regulations LN 13 of 1971, and perform all the duties of local administration officer.
>
> (3) To employ health officers for the purpose of such regulations.

Yet other regulations empower the first respondent to facilitate 'the efficient, rapid and safe movement of pedestrians' and to control access to public streets.

11. The attack in this matter is not made at the level of a challenge to the validity of any of these statutory provisions. Any such attack would have to have been made clearly and not obliquely, to enable the other parties to know exactly what it is that is sought to be invalidated, and on what specific basis. The requirements relating to pleading a case — whether in motion or trial proceedings — apply with equal force in constitutional litigation (*National Director of Public Prosecutions v Phillips* 2002 (4) SA 60 (W) at 106C-107F, and cases there cited).

12. The attack on the actions of the respondents in obliging the applicants to trade at the new market accordingly must assume the constitutional validity of the statutory powers invoked. The argument then must be understood to be that while these powers authorise the respondents to effect the relocation of traders in Maseru to achieve the purpose of the statutory provisions, the exercise of those powers in the present case infringes the Constitution. This, I reiterate, is on the sole basis that the right to life subsumes the right to a livelihood and that the latter is infringed by the compulsory move to the new market.

13. Section 5 of the Constitution reads thus:

> *Right to life*

> (1) Every human being has an inherent right to life. No one shall be arbitrarily deprived of his life.
>
> (2) Without prejudice to any liability for a contravention of any other law with respect to the use of force in such cases as are hereinafter mentioned, a person shall not be regarded as having been deprived of his life in contravention of this section if he dies as the result of the use of force to such extent as is necessary in the circumstances of the case — (a) for the defence of any person from violence or for the defence of property; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) for the purpose of suppressing a riot, insurrection or mutiny; or (d) in order to prevent the commission by that person of a criminal offence, or if he dies as the result of a lawful act of war or in execution of the sentence of death imposed by a court in respect of a criminal offence under the law of Lesotho of which he has been convicted.

This right is entrenched in the Bill of Rights (Chapter II of the Constitution) in terms of section 4(1)(a), where it is described again as 'the right to life'.

14. It is well established now as a principle of constitutional interpretation that a fundamental right entrenched in this way in a justiciable Bill of Rights should be given a generous interpretation (*Sekoati v President of the Court-Martial* [1995-1999] LAC 812 at 820-2 and the further decisions there considered). At the same time, however, as Kentridge AJ noted in *S v Zuma* 1995 (2) SA 642 (CC) (in a passage adopted in *Sekoati supra* at 822E):

> We must heed Lord Wilberforce's reminder that even a constitution is a legal instrument, the language of which must be respected. If the language used by the law giver is ignored in favour of a general resort to 'values', the result is not interpretation but divination.

Apart from the words used, their context too will be of great importance in determining the ambit of the provision. As Lord Steyn noted most simply in a recent decision of the House of Lords, '[i]n law context is everything' *R v Secretary of State, ex parte Daly* [2001] 3 All ER 433 (HL) at 447a; *Aktiebolaget Hassle v Triomed (Pty) Ltd* 2003 (1) SA 155 (SCA) at 157G).

In interpreting a particular constitutional provision, moreover, while similar exercises in other jurisdictions will frequently be of value and sometimes of importance, reference to them must be undertaken with care. Kriegler J warned in *Bernstein v Bester NNO* 1996 (2) SA 751 (CC) against 'the frequent — and I suspect, often facile — resort to foreign authorities . . . [and the] blithe adoption of alien concepts or inapposite precedents' (at 811H-812B).

15. With these broad considerations as to the proper approach to interpretation in mind, I turn to the issue at hand. Section 5(1) states the right to life in both positive and negative terms: it recognises an inherent right to life and it prohibits its arbitrary deprivation. As counsel for the appellants accepted, this formulation creates a single basic right the scope of which is to be derived from taking both parts together.

16. The further provisions of section 5 to my mind made it clear that the protection accorded by the right relates to life in the ordinary sense of human existence (as the full bench of the High Court expounded in its judgment). Section 5(2) is the derogation clause in respect of the right conferred by section 5(1). Section 4(1), in legislating generally for the rights which follow, provides for derogation in these explicit and narrow terms: 'Subject to such limitations of that protection as are contained in those provisions . . .'. In other words, the right may only be limited in terms of these specific provisions.

17. The limitations thereafter specified in section 5(2) are hardly consistent with an interpretation of the right to life as encompassing the right to a livelihood. These limitations are both exclusive and specific, and nowhere authorize curtailment in any circumstances, however pressing, of a right to livelihood. Thus if the right to life includes the right to a livelihood, the appellants' argument would have the effect of recognizing an absolute right to livelihood in Lesotho. (The same logic would apply, counsel for the appellants acknowledged, to a claim to include the right to health and the procurement of education in the right to life, on the analogous reasoning that survival is endangered without adequate provision for either). This, moreover, in a context where the core right — the entitlement to exist as a human being — is itself derogable. The proposition is clearly not tenable. Appellants' counsel conceded that he could not argue for an absolute right to a livelihood, when the right to life itself is derogable, but he was unable (in the light of the specificity of section 4(1) *ad fin* and section 5(2) to suggest from what source and in what terms derogation would be derived.

18. The wider context too is further destructive of the argument. The position is not that there is no provision elsewhere in the Constitution of Lesotho relating to the right to livelihood. In accordance with a number of other constitutions and international covenants on human rights, Lesotho has dealt with what are generally described as socio-economic rights (or 'green rights') in a way which is distinct from the treatment of fundamental rights (or 'blue rights'). In Lesotho's case this is to provide separately for a chapter in the Constitution (Chapter III) entitled 'Principles of State Policy'. One of these (section 29(1)) is that 'Lesotho shall endeavour to ensure that every person has the opportunity to gain his living by work which he freely chooses or accepts'.

19. The aspirational language is significant. That is not to say that the provisions of section 29, like those of adjacent provisions regarding matters such as health, education, protection of children, workers' rights and interest and the environment, may not in appropriate circumstances and in appropriate ways find implementation, and that recourse may be had to the courts in that regard. But that is not a matter that falls to be determined in this case. It is however to say that the opportunity to gain a living by work — in other words, to secure a livelihood — is expressly dealt with

outside the ambit of section 5 (and thus outside the means for enforcement for Chapter II rights in terms of section 22, which is expressly confined to Chapter II rights).

20. The argument for the appellants means that the securing of a livelihood is dealt with twice under the Constitution: once implicitly as part of the right to life, entrenched in Chapter II with internal derogation provisions (which, as noted, cannot be applied to it) and explicit provision for enforcement under section 22; and again under Chapter III with none of those features. The contradiction is evident. Such a construction (entailing tautology, inconsistency and anomaly) is inimical to any sound approach to construction.

21. These difficulties in my view are fatal to the argument. It is not redeemed by the reliance placed on two decisions. The first is that of the Supreme Court of India in *Tellis v Bombay Municipal Corporation* [1987] LRC 351 (Const). This dealt with the forcible eviction of persons who were obliged by poverty and lack of adequate housing to live on the teeming pavements of that city in circumstances described by the Court (per Chandrachud, CJ) as 'very hell on earth' (at 376b). Their case was specifically that they could not be evicted from their shelters without being offered alternative accommodation. The judgment records in this regard (at 355c-e):

> They rely for their rights on article 21 of the Constitution which guarantees that no person shall be deprived of his life except according to procedure established by law. They do not contend that they have a right to live on the pavements. Their contention is that they have a right to live, a right which cannot be exercised without the means of livelihood. They have no option but to flock to big cities like Bombay, which provide the means of a bare subsistence. They only choose a pavement or a slum which is nearest to their place of work. In a word, their plea is that the right to life is illusory without a right to the protection of the means by which alone life can be lived. And, the right to life can only be taken away or abridged by a procedure established by law, which has to be fair and reasonable, not fanciful or arbitrary such as is prescribed by the Bombay Municipal Corporation Act or the Bombay Police Act. They also rely upon their right to reside and settle in any part of the country which is guaranteed by article 19(1)(e).

22. Assuming (at 368c) for the purposes of argument (as is done in this case) the factual premise that eviction would deprive the pavement dwellers of their livelihood, the Court held that article 4 of the Constitution of India, in protecting the right to life, encompasses the right to a livelihood. It referred (at 368 i) to the fact that the Constitution of India requires the state to direct its policies to securing that its citizens have the right to an adequate means of livelihood. It did not however consider the arguments in this regard addressed in paragraphs 18 to 20 above. It proceeded to reason thus (at 369 b-d):

> If there is an obligation upon the state to secure to the citizens an adequate means of livelihood and the right to work, it would be sheer pedantry to exclude

> the right to livelihood from the content of the right to life. The state may not, by affirmative action, be compellable to provide adequate means of livelihood or work to the citizens. But any person who is deprived of this right to livelihood, except according to just and fair procedure established by law, can challenge the deprivation as offending the right to life conferred by article 21.

Ultimately the Court upheld the validity of municipal enactments prohibiting the erection of structures or other encroachments upon the pavements in question, and held the local authority to the assurances it had made in its papers. It ordered that slum clearance which would affect the pavement dwellers could not take place until a date specified with regard to the end of the monsoon season.

23. An attempt to invoke the expansive concept of the right to life has also been made in South Africa. Rejecting the endeavour Chaskalson P (as he then was) said:

> These comments [in the Indian cases cited] must be seen in the context of the facts of that case which are materially different to those of the present case . . . In our Constitution the right to medical treatment does not have to be inferred from . . . the right to life which it guarantees. It is dealt with directly . . . If [that] were to be constructed in accordance with the appellant's contention it would make it substantially more difficult for the state to fulfill its primary obligations . . . In my view, much clearer language than that used . . . would be required to justify such a conclusion. (In *Soobramoney v Minister of Health, Kwazulu-Natal* 1998 (1) SA 765 (CC) at 773 E-774A).

(This analysis appears not to have been considered in *Victoria & Alfred Waterfront v Police Commissioner, W Cape* 2004 (4) SA 444(C), where the Court (Desai J), citing *Tellis v Bombay Municipal Corporation, supra* held in passing (at 448F) that the right to life 'includes the right to livelihood'. The Court also did not consider the separate and explicit provision in section 26(1) of the South African Constitution for the right 'freely to engage in economic activity and to pursue a livelihood anywhere in the national territory'.)

24. Similar considerations apply here. In *Tellis v Bombay Municipal Corporation supra*, the Court had to deal with a situation of exceptional social severity, rendered urgent by the advent of the monsoon. A situation akin to necessity applied. This appears from the following passage (at 355 a-b):

> Those who have made pavements their homes exist in the midst of filth and squalor, which has to be seen to be believed. Radib dogs in search of stinking meat and cats in search of hungry rats keep them company. They cook and sleep where they ease, for no conveniences are available to them. Their daughters come of age, bathe under the nosy gaze of passers-by, unmindful of the feminine sense of bashfulness. The cooking and washing over, women pick lice from each other's hair. The boys beg. Menfolk, without occupation, snatch chains with the connivance of the defenders of law and order; when caught, if at all, they say: 'Who doesn't commit crimes in this city?' It is these men and women who have come to this Court to ask for a judgment that they cannot be

evicted from their squalid shelters without being offered alternative accommodation.

Moreover, while the judgment ranges far and wide, its ultimate thrust (as already indicated) was a finding of procedural irregularity in slum clearance. 'Whilst the *Tellis* judgment conceptually broadened the ambit of the right to life to include an entitlement to the basic amenities of life, it limited the impact of its reach by stopping short of converting the broad right into an actionable claim against the administration' (Chaskalson *et al Constitutional Law of South Africa* 15-3 note 3). Thus the decision is no direct authority for the substantive challenge to the powers of the respondents mounted in this case.

25. Nor in my view does the decision of the Supreme Court of Bangladesh in *Bangladesh Society for the Enforcement of Human Rights v Government of Bangladesh* (14 March 2000) appear to assist the appellants materially. (We were furnished with a digest of the decision from the Commonwealth Legal Bulletin, 53 DLR 2001 1). That matter involved a forced removal of residents of an area, apparently because they were contended to be sex-workers, and their children. The Court granted an order declaring the evictions illegal and releasing the sex-workers. The petitioners had invoked two provisions in the Constitution of Bangladesh, which are quoted in these terms:

> Art 31: 'To enjoy the protection of the law, and to be treated in accordance with law, and only in accordance with law, is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Bangladesh, and in particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law.'
> Art 32: 'No person shall be deprived of life or personal liberty save in accordance with law.'

26. The Court appears to have held that 'given that article 31 has a similar scope to the right to life in article 21 of the Indian Constitution it should be read to include the right to livelihood (*Olga Tellis v Bombay Municipal Corporation* AIR 1986 (SC) 180 applied)'. It held that the police, in effecting the evictions, had acted illegally — and, it is suggested, possibly corruptly — in aiding and abetting 'the owners in their illegal acts'. The evictions, it considered, constituted a violation of the sex-workers' rights 'to life or livelihood' in a manner also 'contrary to their personal dignity'.

27. The factual premise for the present challenge is hardly comparable. The constitutional provisions differ materially. The extract available to us indicates that the Court followed *Tellis v Bombay Municipal Corporation supra*. It does not appear to have considered the further matters which constrain me respectfully to come to a different conclusion in relation to the claim made in this case.

28. I accordingly consider that the right to life in section 5 of the Constitution of Lesotho does not encompass a right to a livelihood. That is the

subject of specific and separate provision, in section 29. The latter derives its status from its inclusion as a principle of state policy. It is not included as a Chapter II right (even in the terms in which its comparator is under the Constitution of South Africa: see *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC); *Government of the RSA v Grootboom* 2001 (1) SA 46 (CC).

29. The appeal is accordingly dismissed. No order as to costs was made by the Court *a quo*. Although the respondents sought an order of costs on appeal in their heads of argument, this was not pressed in oral argument, evidently in accordance with the general approach in constitutional matters that a court will be disinclined to make an order of costs in a substantial challenge of a public nature (see *Transvaal Agricultural Union v Minister of Land Affairs* 1997 (2) SA 621 (CC); *Sanderson v Attorney General, Eastern Cape* 1998 (2) SA 38 (CC)).

NIGERIA

Odafe and Others v Attorney-General and Others

(2004) AHRLR 205 (NgHC 2004)

Festus Odefe, Tumba Terry, David Martins, Ekun Oluwatosin v Attorney-General of the Federation, Controller General of Prisons, Deputy Controller of Prisons Kirikiri Medium, Prison, Lagos, Minister for Internal Affairs
Federal High Court of Nigeria, Port Harcourt judicial division, 23 February 2004, suit FHC/PH/CS/680/2003
Judge: Nwodo
Extracts

Equality, non-discrimination (discrimination on the grounds of HIV status, 14, 29, 30)
Fair trial (access to justice, enforcement of human rights, 15, 16, 21-23; presumption of innocence, 17; trial within reasonable time, 18, 20, 38)
Health (non-treatment of prisoners with HIV/AIDS, 25-27, 33-35, 38)
Torture (non-treatment of prisoners with HIV/AIDS, 31-35)
Interpretation (international standards, 37)
Socio-economic rights (costs, 38)

Judgment

[**1.**] Sequel to the grant of leave on 25 November 2002 to the applicants to enforce their fundamental rights in respect of the relief stated in the statement in support of the application. The applicants by motion of notice dated 29 November 2002 and filed on 2 December 2002 prays the Court for the following relief:

1. A declaration that the continuous detention and the consequent segregation and discrimination of the applicants as confirmed HIV/AIDS patients is an infraction of the applicants' constitutionally guaranteed rights to dignity of the human person and their right to freedom from discrimination provided for in sections 34(1)(a) and 42(1) of the 1999 Constitution respectively.
2. A declaration that the applicants as confirmed HIV/AIDS patients have a right to proper medical treatment while in prison custody sequel to the Prisons Act, the Prisons Regulation Law and the United Nations Standard Minimum Rules for the Treatment of Prisoners.
3. A declaration that the failure of the officers, servants, agents and

privies of the respondents to give the applicants as confirmed HIV/AIDS patients proper medical attention while in prison custody amounts to inhuman and degrading treatment and an infraction of their fundamental rights as guaranteed under section 34 and section 42 of the 1999 Constitution of the Federal Republic of Nigeria, and article 5 of the African Charter on Human and Peoples' Rights.

4. A declaratory order directing the said authorities to relocate the applicants to designated government owned hospitals for proper medical attention.

[**2.**] The applicants relied on the affidavit of John Oziegbe and the statement in support of the motion *ex-parte* for leave.

[**3.**] The respondents did not file counter affidavit. The affidavits of service filed by the bailiff of court and which is part of Court's record is evidence of service of the motion on notice, enrolled court's order, the process, hearing notices and written address on the respondents respectively. Despite service none of the respondent appeared nor reacted in the application.

[**4.**] The learned counsel for the applicants, O Fapohunda, on application filed a written submission on 22 July 2003 and dated 21 July 2003 and 15 January 2004. He adopted the submission as his argument and with leave addressed the Court further orally.

[**5.**] In his written address he raised two issues for determination. On issue 1 he poised: 'Do the applicants have legal rights to seek the relief set out for determination by this honourable Court.' He submitted that the applicants have legal rights to seek the relief set out for determination by this honourable [Court] that the applicants' fundamental rights are guaranteed under sections 34(1)(a) and 42(1)(a) of the 1999 Constitution. He stated applicants are awaiting trial inmates and are presumed innocent until there is a conviction.

[**6.**] He submitted that the continuous detention of the applicants without trial in their physically disabled state having been confirmed as HIV/AIDS patients amounts to torture, whilst the refusal and or restriction from treatment and the discrimination by prison officials (agents for the respondent) and inmates as a result of the physical disabilities in their opinion would amount to discrimination. He submitted that the concept of torture has been held by the courts to include mental or psychological trauma referred to the case of *Uzoukwu v Ezeonu* 1991 6 NWLR pt 200 708. He submitted that the continuous detention, segregation and discrimination of the applicants amounts to torture and the condition under which they are held is inhuman, degrading and an infraction of the applicants' fundamental rights as provided for in section 34(1) of 1999 Constitution.

[**7.**] On issue 2 he poised: 'Has there been an infringement or infraction of the applicants' legal rights as contained in the provisions of the Constitution of the Federal Republic of Nigeria 1999, the Prisons Act, and the Prisons Regulation Law and The United Nations Standard Minimum Rules

for the Treatment of Prisoners'. He contended that the infringement and infraction of the applicants' legal rights flow from their continuous detention without trial and as awaiting trial inmates the applicants are entitled to the constitutional safeguard of their rights and having been diagnosed as carriers of HIV/AIDS patients they ought to be given proper medical treatment and should not be discriminated against.

[**8.**] He submitted that the prison authorities under section 8(1) to (3) of the Prison Act are given the responsibility of removing and taking prisoners to hospital, either private or government owned, for proper medical treatment but that this was not done.

[**9.**] Awaiting trial inmates who have not been convicted of any offence have a right to life and the failure of the respondents to give them proper medical attention is a deprivation of that right to life.

[**10.**] He submitted that applicants being Nigerian citizens although restrained under the law for allegedly committing various offences are presumed innocent until the allegations against them are proven.

[**11.**] Finally the Court has the duty to jealously protect and guide the citizens against flagrant infringement either by individuals or government officials. He relied on the case of *Muojekwu v Ejikeme* 2000 5 NWLR pt 657, 402 at 410 *ratio* 7.

[**12.**] In adopting his written submission, learned [counsel] orally addressed the Court further. He contended that the applicants are awaiting trial and presumed innocent. He referred to section 8(1) of the Prison Act and submitted the applicants are seeking relief known to law since the subsection refers to prisoners with serious illness. He submitted that HIV can appropriately be defined as a serious illness.

[**13.**] I have carefully considered the affidavit in support of the application, the submissions of the learned counsel and the authorities and statutes cited. The learned counsel formulated two main issues for determination. I will adopt those two issues in the determination of the relief sought.

Issue 1: Do the applicants have legal rights to seek the relief set out for determination by this Honourable Court?

[**14.**] The applicants are awaiting trial inmates currently at Kirikiri Medium Prison in Lagos detained on the orders of some magistrate in Lagos for various offences ranging from armed robbery and murder. Whilst applicants were in detention they were diagnosed and tested positive to HIV/AIDS. Exhibit LK1 is the medical report . . . and applicants averred in the affidavit that they are discriminated against because of their ailment.

[**15.**] On whether awaiting trial accused persons have a legal right to seek redress, section 46(1) of the 1999 Constitution provides that '[a]ny person who alleges that any of the provisions of this Chapter (four) has been, is

being or is likely to be contravened in any state in relation to him may apply to a High Court having jurisdiction in that area for redress'.

[**16.**] The word 'any person' I respectfully hold means that anybody without any distinction has a legal right to enforce the provisions of Chapter 4.

[**17.**] It is settled law that a prisoner on death row has rights enforceable under the Constitution. This was the legal position in the case of *Peter Nemi v State* 1996 6 NWLR pt 452 at 42. Equally, it is my respectful view that the Constitution, having stipulated that an accused awaiting trial is presumed innocent until proven guilty, the accused also enjoys similar enforceable rights under the provision of section 46(1) of the Constitution.

[**18.**] It is also pertinent to note at this stage that the evidence before the Court in exhibit LK1 reflects that the first applicant has been awaiting trial for three years eleven months, the second applicant for four years eight months, the third applicant for two years four months whilst the fourth applicant (reported dead) three years eight months. These reports are as of 2002 when the report was signed. Clearly the applicants have respectfully been awaiting trial for a period of not less than two years. The 1999 Constitution, in safeguarding the rights to personal liberty of every person, provide under section 35(1)(c) and subsection (4) that any person arrested and detained upon reasonable suspicion of having committed an offence shall be arraigned before a court of law within a reasonable time and if not tried within two months from date of arrest or detention shall be released on bail unconditionally or upon such conditions as are reasonably necessary. Reasonable time was defined as a period of two days or such reasonable time as may be considered by court.

[**19.**] Furthermore under section 36(1) of the Constitution a person shall be entitled to a fair hearing within a reasonable time by a court.

[**20.**] It is indisputable that applicants have been awaiting trial for an unreasonable period without trial. This is condemnable and the blame will go the first respondent, the chief legal officer in the country.

[**21.**] Therefore the Constitution recognises that accused persons detained awaiting trial has a right of access to court by virtue of the provision of section 36(1) and section 35(1)(c) and (4) and section 46(1) of the Constitution.

[**22.**] Furthermore the appellate Court has ruled in *Peter Nemi v State supra* that a prisoner on death row still has rights enforceable under the Constitution. I therefore respectfully hold that the present applicants awaiting trial are conferred with rights under the Constitution and article 7 of the African Charter on Human and Peoples' Rights Cap 10 to seek redress of court for any infraction of those rights.

[**23.**] Mr Fapohunda submitted that the continuous detention of the applicants without trial in their physical disabled state amounts to torture, whilst the refusal of treatment and discrimination by prison officials and

inmates amount to discrimination. I have earlier on condemned the fact that applicants have been awaiting trial for the period of not less than two years. Whether they are confirmed as HIV/AIDS patients or not, every detained accused is entitled to a fair hearing.

[**24.**] Obviously in the instant case applicants were diagnosed with HIV/AIDS whilst in detention.

[**25.**] Further, whether applicants are arraigned before a court or not each have a right under sections 7 and 8 of the Prisons Act Cap 366 to be treated for any serious illness once certified and the medical officer recommends his removal to a hospital. Exhibit LK1 issued by Dr Nebo Kingsley, the medical officer in prisons, has a list of 11 inmates awaiting trial and their special conditions.

[**26.**] The prison officials having been placed on sufficient notice by the contents of that document (exhibit LK1) are under a duty to [observe] the conditions set out in section 8 for removal of sick prisoners to hospital. The second and third respondents, though they were served did not appear nor [did they] file a counter affidavit to contradict the facts averred. I therefore deem the facts averred in the affidavit as correct. Consequently I hold the second and third respondents have not taken legal step to that effect.

[**27.**] On whether HIV/AIDS is a serious illness to fall within the provisions of section 8 of the Prison Act, it is my respectful view that AIDS is an understatement to use the word serious. This is because it is deadly. In the South African case of *Minister of Health and Others v Treatment Action Campaign and Others* [(2002) AHRLR 189 (SACC 2002)] the Constitutional Court of South African described HIV/AIDS as one of the many illness that requires attention and that it is the greatest threat to public health in their country.

[**28.**] The government HIV/AIDS & STD strategic plan for South Africa 2000 to 2005 in the same report had this to say:

> During the last two decades, the HIV pandemic has entered our consciousness as an incomprehensible calamity. HIV/AIDS had claimed millions of lives, inflicting pain and grief, causing fear and uncertainty and threatening the economy.

[**29.**] So presented clearly applicants who have been so diagnosed, as HIV/AIDS are afraid and also sick from the prognosis of the virus. Because of lack of sufficient awareness it is yet to be generally appreciated how contagious the virus is and the level of contact required before a person will contract the illness. It is therefore not strange nor am I surprised that the prisons officials are discriminating against the applicants from the averments in the affidavit which has not been contradicted.

[**30.**] However, the right to freedom from discrimination as enshrined in section 42(1) of the Constitution did not cover discrimination by reason of illness, virus or disease. For emphasis I produce section 42(1): a 'citizen of

Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not by reason only that he is such a person . . .'.

[**31.**] Therefore from the above category specified, applicants cannot invoke section 42(1) on the contention that they have a right to exercise under that section. The concept of torture has been succinctly described by the appellate Court in *Uzoukwu v Ezeonu supra* to include mental or psychological trauma.

[**32.**] Justice Nasir in the same case defined torture to include mental agony whilst inhuman treatment means any barbarous act or acting without feeling for the suffering of the other.

[**33.**] Justice Niki Tibi JCA observed that torture could mean mental torture where the person's mental orientation is disturbed so that he cannot think and do things rationally as a rational human being. Applying this definition to the present case it is my respectful view that an average person diagnosed with HIV/AIDS . . . will be greatly disturbed and will live in perpetual fear of the enemy attack. The second and third respondents are under a duty to provide medical help for applicants. Article 16 of African Charter Cap 10 which is part of our law recognises that fact and has so enshrined that '[e]very individual shall have the right to enjoy the best attainable state of physical and mental health'.

[**34.**] Article 16(2) places a duty on the state to take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick. All the respondents are federal agents of this country and are under a duty to provide medical treatment for the applicants.

[**35.**] I therefore hold that the state having failed to provide medical treatment for the applicants who are diagnosed as HIV/AIDS carriers, their continuous detention without medical treatment amounts to torture.

On issue 2

[**36.**] I have already held that the respondents failed to comply with the provisions of section 8(1) and (3) of the Prisons Act and article 16 of the African Charter. . . .

[**37.**] The applicants . . . have a right to life; however, the fact is that the applicants are in the custody of the second to fourth respondents awaiting trial and suffering from illness. The second to fourth respondents are under a duty to provide medical attention for them; failure to do so is non-compliance of the provisions of section 8 of the Prison Act and article 16 of the African Charter on Human and Peoples' Rights. The nature and detailed consequences of the virus are not placed before the Court for me to arrive at the conclusion that the non-compliance is an infringement of their right to life. In other words, that if treatment is provided they

will live, if not provided they will die. This is for an expert in the medical area concerned to tell the Court and there is no expert evidence before me. From the foregoing I conclude as follows: The government of this country has incorporated the African Charter on Human and Peoples' Rights Cap 10 as part of the law of the country. The Court of Appeal in *Ubani v Director SSS* 1999 11 NWLR pt 129 held that African Charter is applicable in this country. The Charter entrenched the socio-economic rights of a person.

[**38.**] The Court is enjoined to ensure the observation of these rights. A dispute concerning socio-economic rights such as the right to medical attention requires the Court to evaluate state policy and give judgment consistent with the Constitution. I therefore appreciate the fact that the economic cost of embarking on medical provision is quite high. However, the statutes have to be complied with and the state has a responsibility to all the inmates in prison, regardless of the offence involved, as in the instant case where the state has wronged the applicants by not arraigning them for trial before a competent court within a reasonable time and they have been in custody for not less than two years suffering from an illness. They cannot help themselves even if they wanted to because they are detained and cannot consult their doctor.

[**39.**] I therefore declare as prayed in [prayers for] relief 1 2, 3 and in respect of 4 I order the authorities to comply with the provision of section 8 of the Prison Act and relocate the applicants after the precondition has been complied with, to a hospital in accordance with section 8 of the Prison Act..

[**40.**] I award N100 000.00 costs in favour of the applicants.

SOUTH AFRICA

Bhe and Others v Magistrate, Khayelitsha and Others

(2004) AHRLR 212 (SACC 2004)

Nonkululeko Bhe, Anelisa Bhe, Nontupheko Maretha Bhe, Women's Legal Centre Trust v Magistrate, Khayelitsha, Maboyisi Nelson Mgolombane, President of the Republic of South Africa, Minister for Justice and Constitutional Development together with Commission for Gender Equality (amicus curiae) (CCT 49/03); *Charlotte Shibi v Mantabeni Freddy Sithole, Jerry Sithole, Minister for Justice and Constitutional Development* (CCT 69/03); *South African Human Rights Commission, Women's Legal Centre Trust v President of the Republic of South Africa, Minister of Justice and Constitutional Development* (CCT 50/03)
Constitutional Court of South Africa, 15 October 2004
Judges: Chaskalson, Langa, Madala, Mokgoro, Moseneke, Ngcobo, O'Regan, Sachs, Skweyiya, Van der Westhuizen
Extract: Langa with whom Chaskalson, Madala, Mokgoro, Moseneke, O'Regan, Sachs, Skweyiya and Van der Westhuizen concurred; full text on www.chr.up.ac.za
Previously reported: (2005) 1 SA 580; 2005 (1) BCLR 1 (CC)

Culture (customary law, 41, 43-45, 80, 82, 87, 90, 113)
Constitutional supremacy (44, 46)
Dignity (racist legislation, 48, 60, 63, 66, 68; primogeniture, 92)
Equality non-discrimination (49; substantive equality, 50; discrimination on the grounds of sex, primogeniture, 53, 77 , 88, 91; discrimination on the grounds of birth, 54, 59, 93; discrimination on the grounds of race, 60, 66 ,68; polygamy, 124)
Interpretation (international standards, 51, 55)
Children (discrimination of extra-marital children, 52, 54-59, 79, 93)
Limitations of rights (law of general application justified in a democratic society, 69, 71, 72, 95, 96)

[**1.**] Two statutes govern intestate succession in South Africa. They are the Intestate Succession Act 81 of 1987 and the Black Administration Act 38 of 1927 (the Act). Section 23 of the Act[1] read with regulations framed in terms of section 23(10) contains provisions that deal exclusively with

[1] See para 35 below for the full text of the section.

intestate deceased estates of Africans.[2] Estates governed by section 23 are specifically excluded from the application of the Intestate Succession Act.[3] The regulations were published in a Government Gazette[4] under the title 'Regulations for the Administration and Distribution of the Estates of Deceased Blacks' (the regulations).

[**2.**] The parallel system of intestate succession set up by section 23 and the regulations purports to give effect to the customary law of succession. It prescribes which estates must devolve in terms of what the Act describes as 'Black law and custom' and details the steps that must be taken in the administration of those estates.

[**3.**] Central to the customary law of succession is the principle of male primogeniture.[5] There are two main issues in the cases before this Court. The first is the question of the constitutional validity of section 23 of the Act. The second concerns the constitutional validity of the principle of primogeniture in the context of the customary law of succession.

[**4.**] Because of the nature of the issues to be canvassed, the Chief Justice directed the registrar of this Court to deliver copies of the directions and the two applications for confirmation[6] to the Chairperson of the National House of Traditional Leaders.[7] The provisions of rule 9 of the Rules of the Constitutional Court that were in force at the time[8] were also drawn to his attention. No submissions were, however, received from the House of Traditional Leaders.

[**5.**] There are three cases before the Court. They were heard together, by direction of the Chief Justice, since they are all concerned with intestate succession in the context of customary law.

[**6.**] The first case, *Bhe and Others v The Magistrate, Khayelitsha and Others*, (the *Bhe* case)[9] followed a decision by the Magistrate of Khayelitsha and, on appeal, that of the Cape High Court. The second, *Charlotte Shibi v*

[2] See paras 36-8 below for the full text and description of the regulations. Please note that whereas the Black Administration Act uses the term 'Black' to describe a member of the indigenous race in South Africa, the term 'African' has been used in this judgment. Its use should not be construed as conferring legal or constitutional validity for its exclusive use to describe one race group, nor is it intended to exclude persons of other race groups who are entitled to or describe themselves as 'Africans'.

[3] See n 37 below for the full text of section 1(4)(b) of the Intestate Succession Act.

[4] Government Gazette 10601 GN R200, 6 February 1987 as amended by Government Gazette 24120 GN R1501, 3 December 2002.

[5] See para 77 below for description of this principle.

[6] See paras 9 and 21 below.

[7] Section 212(2) of the Constitution provides that a house of traditional leaders may be established by legislation. The National House of Traditional Leaders was established under the National House of Traditional Leaders Act 10 of 1997 as amended.

[8] The rules were published in Government Gazette 18944 GN R757, 29 May 1998. Rule 9 dealt with the admission and participation of an *amicus curiae*.

[9] The case is reported as *Bhe and Others v Magistrate, Khayelitsha, and Others*, 2004 (2) SA 544 (C); 2004 (1) BCLR 27 (C).

Mantabeni Freddy Sithole and Others (the *Shibi* case),[10] concerned a decision of the Magistrate of Wonderboom which was successfully challenged in the Pretoria High Court. In both cases, the respective Magistrates made decisions on the basis of the relevant provisions of the legislation governing intestate succession.

[**7.**] The third case is an application for direct access to this Court brought jointly by the South African Human Rights Commission and the Women's Legal Centre Trust, respectively the first and second applicants. They had initially applied to the Pretoria High Court for relief which included the constitutional invalidation of the whole of section 23 of the Act. Before argument was heard in the High Court, the order in the *Bhe* case[11] was referred to this Court for confirmation. Rather than proceed in the Pretoria High Court, the two applicants then applied for direct access to this Court for the relief which they had initially sought in the High Court. The application for direct access was granted by this Court on 3 November 2003 and the reasons for that decision are set out below.[12]

[**8.**] I proceed to set out the background in respect to each of the matters before us.

(1) The Bhe case

[**9.**] This case comes before us as an application for confirmation of an order of the Cape High Court. It is brought jointly by Nontupheko Maretha Bhe (Ms Bhe), who is the third applicant in this matter, and the Women's Legal Centre Trust, the fourth applicant.

[**10.**] Ms Bhe seeks no relief for herself but brings the application in the following capacities: (a) on behalf of her two minor daughters, namely Nonkululeko Bhe, born in 1994 and Anelisa Bhe, born in 2001;[13] (b) in the public interest,[14] and (c) in the interest of the female descendants, descendants other than eldest descendants and extra-marital children[15] who

[10] Case 7292/01, 19 November 2003, as yet unreported.
[11] Above n 9.
[12] See paras 32-34 below.
[13] S 38 of the Constitution provides that: 'Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are — (a) anyone acting in their own interest; (b) anyone acting on behalf of another person who cannot act in their own name; (c) anyone acting as a member of, or in the interest of, a group or class of persons; (d) anyone acting in the public interest'.
[14] Id s 38(d) of the Constitution.
[15] The expression 'illegitimate children' has been used by lawyers in South Africa for many years, and was used by the Cape High Court in the *Bhe* case and by the lawyers in this case to describe children who are conceived or born at a time when their biological parents are not lawfully married. I choose not to use the term, however. No child can in our constitutional order be considered 'illegitimate', in the sense that the term is capable of

are descendants of people who die intestate.[16] Nonkululeko and Anelisa are the first and second applicants respectively and are the children of Ms Bhe and Mr Vuyo Elius Mgolombane (the deceased) who died intestate in October 2002. The Women's Legal Centre Trust acted in this application 'in the public interest'.[17]

[**11.**] In this Court, the first respondent is the Magistrate of Khayelitsha, who appointed the father of the deceased, Mr Maboyisi Nelson Mgolombane (the second respondent) as representative of the estate. The President of the Republic of South Africa (the President) and the Minister for Justice and Constitutional Development (the Minister) are cited as the third and fourth respondents respectively. The Commission for Gender Equality, a state institution established under section 187 of the Constitution,[18] was admitted as *amicus curiae* and presented helpful written and oral submissions to the Court.

[**12.**] There was only one potentially material factual dispute before the Cape High Court, and that is whether Nonkululeko and Anelisa Bhe are extra-marital children. Both Ms Bhe and the deceased's father were agreed that no marriage or customary union had taken place between Ms Bhe and the deceased. The deceased's father however insisted that the deceased had paid lobolo, an assertion which Ms Bhe denied. Relying on the rule in *Plascon-Evans*,[19] however, the High Court approached the issue

bearing, that they are 'unlawful' or 'improper'. As this Court has said on many occasions, our Constitution values all human beings equally, whatever their birth status, whatever their background. The term 'illegitimate children' may be construed as degrading of the status of children to whom it refers and I prefer to avoid it. See, also the discussion in the South African Law Reform Commission's report on the *Investigation into the legal position of Illegitimate Children* Project 38 (October 1985) at paras 6.25–6.26. Note also that Parliament has used the phrase 'extra-marital children' recently on several occasions. See section 3 of the Children's Status Act 82 of 1987. On the other hand, see the use of 'child born out of wedlock' in section 1 of the Child Care Amendment Act 96 of 1996; section 1 of the Births and Deaths Registration Amendment Act 40 of 1996; the Natural Fathers of Children Born out of Wedlock Act 86 of 1997 and the Adoption Matters Amendment Act 56 of 1998.

[16] S 38(c) of the Constitution above n 13.

[17] S 38(d) of the Constitution above n 13.

[18] S 187 of the Constitution provides that: '(1) The Commission for Gender Equality must promote respect for gender equality and the protection, development and attainment of gender equality. (2) The Commission for Gender Equality has the power, as regulated by national legislation, necessary to perform its functions, including the power to monitor, investigate, research, educate, lobby, advise and report on issues concerning gender equality. (3) The Commission for Gender Equality has the additional powers and functions prescribed by national legislation.'

[19] *Plascon-Evans Paints Ltd v Van Riebeeck Paints* (Pty) Ltd 1984 (3) SA 623 (A) 634F-635C where the rule is formulated as follows: ''' [W]here there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant's affidavits justify such an order . . . Where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted.'' . . . In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or *bona fide*

on the basis that lobolo had been paid and that Ms Bhe's daughters were accordingly not extra-marital children.

[**13.**] Since the question whether or not the two minor daughters of Ms Bhe are extramarital children bears on their status, reliance on the rule in *Plascon-Evans* was, in my view, inappropriate. I consider that the evidence produced is not sufficient to resolve the issue one way or another. It will accordingly be necessary, for purposes of this judgment, to deal with the effects of extra-marital birth on intestate succession, from the perspective of the rule of primogeniture and that of section 23 of the Act and the regulations. I return to this issue in due course.[20]

[**14.**] It was not in dispute that from 1990 the deceased had a relationship with Ms Bhe and they lived together. He was a carpenter and she a domestic worker. They were poor and lived in a temporary informal shelter in Khayelitsha, Cape Town. The deceased subsequently obtained state housing subsidies which he used to purchase the property on which they lived as well as building materials in order to build a house. He however died before the house could be built. Until his death, the youngest of the two minor children lived with him and Ms Bhe in the temporary informal shelter. Nonkululeko was staying temporarily at the home of the deceased's father. The deceased supported Ms Bhe and the two children and they were dependent on him. The estate comprises the temporary informal shelter and the property on which it stands, and miscellaneous items of movable property that Ms Bhe and the deceased had acquired jointly over the years, including building materials for the house they intended to build.

[**15.**] After the death of the deceased, the relationship between Ms Bhe and the father of the deceased deteriorated to the point of acrimony. In spite of the fact that he resided in Berlin in the Eastern Cape and nowhere near Cape Town, he was appointed representative and sole heir of the deceased estate by the Magistrate in accordance with section 23 of the Act and the regulations.

[**16.**] Under the system of intestate succession flowing from section 23 and the regulations, in particular regulation 2(e), the two minor children did not qualify to be the heirs in the intestate estate of their deceased father. According to these provisions, the estate of the deceased fell to be distributed according to 'Black law and custom'.

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dispute of fact . . . If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination . . . and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks . . . [T]here may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers.' (Footnotes omitted.)

[20] See para 79 below.

[**17.**] The deceased's father made it clear that he intended to sell the immovable property to defray expenses incurred in connection with the funeral of the deceased. There is no indication that the deceased's father gave any thought to the dire consequences which would follow the sale of the immovable property. Fearing that Ms Bhe and the two minor children would be rendered homeless, the applicants approached the Cape High Court and obtained two interdicts *pendente lite* to prevent (a) the selling of the immovable property for the purposes of off-setting funeral expenses; and (b) further harassment of Ms Bhe by the father of the deceased.

[**18.**] The applicants challenged the appointment of the deceased's father as heir and representative of the estate in the High Court. He opposed the application. The Magistrate and the Minister, cited as respondents, did not oppose and chose to abide the decision of the High Court.

[**19.**] The High Court concluded that the legislative provisions that had been challenged and on which the father of the deceased relied, were inconsistent with the Constitution and were therefore invalid. The order of the High Court, in relevant part, reads as follows:

> 1. It is declared that s 23(10)(a), (c) and (e) of the Black Administration Act are unconstitutional and invalid and that reg 2(e) of the Regulations of the Administration and Distribution of the Estates of Deceased Blacks, published under Government Gazette 10601 dated 6 February 1987 is consequently also invalid.
> 2. It is declared that s 1(4)(b) of the Intestate Succession Act 81 of 1987 is unconstitutional and invalid insofar as it excludes from the application of s 1 any estate or part of any estate in respect of which s 23 of the Black Administration Act 38 of 1927 applies.
> 3. It is declared that until the aforegoing defects are corrected by competent Legislature, the distribution of intestate black estates is governed by s 1 of the Intestate Succession Act 81 of 1987.
> 4. It is declared that the first and second applicants are the only heirs in the estate of the late Vuyu Elius Mgolombane, registered at Khayelitsha magistrate's court under reference No 7/1/2-484/2004.[21]

[**20.**] In this Court no submissions were received from the deceased's father. Helpful submissions were however received from the Minister, who supported the application for confirmation of the orders of the High Court and the *amicus curiae*, the Commission for Gender Equality.

(2) The Shibi case

[**21.**] The second matter is an application for the confirmation of the order of the Pretoria High Court. The applicant is Charlotte Shibi (Ms Shibi) whose brother, Daniel Solomon Sithole (the deceased), died intestate in Pretoria in 1995. The deceased was not married nor was he a partner to a customary union. He had no children and, when he died, was not survived by a parent or grandparent. His nearest male relatives were his two cousins

[21] *Bhe* above n 9 SA 555C-I; BCLR 37C-I.

Mantabeni Sithole and Jerry Sithole, the first and second respondents respectively.

[**22.**] Since the deceased was an African, his intestate estate fell to be administered under the provisions of section 23(10) of the Act. The Magistrate of Wonderboom decided to institute an inquiry in terms of regulation 3(2) in order to determine the person or persons entitled to succeed to the property of the deceased. She did not complete the inquiry, however, deciding to await the conclusion of a case which was then before the Pretoria High Court and which was later reported as *Mthembu v Letsela and Another*.[22] This High Court case concerned a challenge to the constitutional validity of the customary law rule of primogeniture and of section 23 of the Act.

[**23.**] When the application in Mthembu[23] was dismissed by the High Court, however, the Magistrate abandoned the inquiry and, without further notice to Ms Shibi, appointed Mantabeni Sithole as representative of the deceased estate. Mr Sithole was not required to provide security because of the size of the estate and the fact that he did not have the means to do so.

[**24.**] The appointment of Mr Sithole was not a happy one. There were complaints by his relatives, including his mother, that he was misappropriating the estate funds. The appointment was withdrawn by the Magistrate who then appointed an attorney, Mr Nkuna, to administer the estate and to distribute the assets according to customary law. In terms of the liquidation and distribution account the remaining asset in the deceased estate, an amount of R11,468.02, was awarded to Mr Jerry Sithole, the second respondent, as the only heir to the estate. The estate was wound up and finalised and Mr Nkuna was duly discharged as its representative.

[**25.**] In terms of the system flowing from the provisions of section 23 of the Act and the regulations framed under it, in particular regulation 2(e),[24] the estate of the deceased fell to be distributed according to custom. Ms Shibi was, in terms of that system, precluded from being the heir to the intestate estate of her deceased brother.

[**26.**] In the High Court Ms Shibi challenged the decision of the Magistrate and the manner in which the estate had been administered. She sought an order declaring her to be the sole heir in the estate of the deceased. She also claimed damages and other related relief against the first and second respondents as well as against the Minister.

[22] 1998 (2) SA 675 (T). The decision of the Supreme Court of Appeal is reported as *Mthembu v Letsela and Another* 2000 (3) SA 867 (SCA); [2000] 3 All SA 219 (A).
[23] Id.
[24] See text of the regulation in para 36 below.

[**27.**] The High Court set aside the decision of the Magistrate and declared Ms Shibi to be the sole heir. It then issued an order similar to that given by the Cape High Court in the *Bhe* case,[25] and, in addition, awarded damages against the deceased's two cousins, that is, first and second respondents in this case.

[**28.**] In this Court no submissions were received from the first and second respondents. The Minister supported the application for confirmation of the orders of the Pretoria High Court as he had done in respect of the decision of the Cape High Court in the *Bhe* case.[26]

(3) The South African Human Rights Commission and Another v President of the Republic of South Africa and Another

[**29.**] The South African Human Rights Commission is a state institution supporting democracy under Chapter 9 of the Constitution. Its mandate is, among other things, to 'promote respect for human rights and a culture of human rights . . . [and] to take steps to secure appropriate redress where human rights have been violated'.[27] The Women's Legal Centre Trust is a non-governmental organisation whose stated core objective 'is to advance and protect the human rights of all women in South Africa, particularly black women who suffer many intersecting forms of disadvantage.' To this end, it has established the Women's Legal Centre, in order to conduct public interest litigation including constitutional litigation to advance the human rights of women.

[**30.**] In bringing the application for direct access, both the South African Human Rights Commission and the Women's Legal Centre Trust were acting in their own interest[28] as well as in the public interest.[29] The Women's Legal Centre Trust was also acting in the interest of a group or a class of people.[30] The respondents are the President and the Minister, first and second respondents respectively. It was not disputed by the respondents that both the South African Human Rights Commission and the Women's Legal Centre Trust have standing in these proceedings.

[**31.**] The relief that the applicants sought is wider than that in the *Bhe* and *Shibi* cases above. Apart from the provisions declared invalid by the Cape and Pretoria High Courts, the applicants in this matter claim that the whole of section 23 of the Act, alternatively subsections (1), (2) and (6) of section 23, should be declared unconstitutional and invalid because of their inconsistency with the Constitution's equality provisions (section

[25] Above para 19.
[26] Above n 9.
[27] S 184(1)(a) and (2)(b) of the Constitution.
[28] S 38(a) of the Constitution above n 13.
[29] S 38(d) of the Constitution above n 13.
[30] S 38(c) of the Constitution above n 13.

9),[31] the right to human dignity (section 10)[32] and the rights of children under section 28 of the Constitution.[33]

Direct access

[**32.**] This Court will grant direct access in exceptional circumstances only.[34] In this case, the Court had regard to the considerations set out herein. In the first place, the challenged provisions govern the administration and distribution of all intestate estates of deceased Africans. The impact of the provisions falls mainly on African women and children, regarded as arguably the most vulnerable groups in our society. The provisions also affect male persons who, in terms of the customary law rule of primogeniture, are not heirs to the intestate estates of deceased Africans. Many people are therefore affected by these provisions and it is desirable that clarity as to their constitutional validity be established as soon as possible.

[**33.**] The submissions sought to be made by the applicants relate to substantive issues that were already before the Court. The direct access application, however, quite helpfully broadens the scope of the constitutional investigation, given the need to deal effectively with the unwelcome consequences of the Act in the shortest possible time. The

[31] S 9 provides that: '(1) Everyone is equal before the law and has the right to equal protection and benefit of the law. (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken. (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination. (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.'

[32] S 10 of the Constitution provides that: 'Everyone has inherent dignity and the right to have their dignity respected and protected.'

[33] Section 28 of the Constitution, in relevant part, provides that: '(1) Every child has the right — (a) . . . (b) to family care or parental care, or to appropriate alternative care when removed from the family environment; (c) . . . (d) to be protected from maltreatment, neglect, abuse or degradation; . . . (2) A child's best interests are of paramount importance in every matter concerning the child.'

[34] *S v Zuma and Others* 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC) at para 11; *Brink v Kitshoff NO* 1996 (4) SA 197 (CC); 1996 (6) BCLR 752 (CC) at para 3; *Minister of Justice v Ntuli* 1997 (3) SA 772 (CC); 1997 (6) BCLR 677 (CC) at para 4; *Bruce and Another v Fleecytex Johannesburg CC and Others* 1998 (2) SA 1143 (CC); 1998 (4) BCLR 415 (CC) at para 4; *Christian Education South Africa v Minister of Education* 1999 (2) SA 83 (CC); 1998 (12) BCLR 1449 (CC) at para 4; *Moseneke and Others v The Master and Another* 2001 (2) SA 18 (CC); 2001 (2) BCLR 103 (CC) at para 19; *National Gambling Board v Premier, Kwazulu-Natal and Others* 2002 (2) SA 715 (CC); 2002 (2) BCLR 156 (CC) at para 29; *Van der Spuy v General Council of the Bar of South Africa (Minister of Justice and Constitutional Development, Advocates for Transformation and Law Society of South Africa Intervening)* 2002 (5) SA 392 (CC) at para 7; 2002 (10) BCLR 1092 (CC) at para 6; *Satchwell v President of the Republic of South Africa and Another* 2003 (4) SA 266 (CC); 2004 (1) BCLR 1 (CC) at para 6.

application further adds fresh insights on difficult issues, including the question of the appropriate remedy.

[**34.**] From the description of the two applicants, it is clear that they are both eminently qualified to be part of the debate on the issues before the Court. By reason of the above considerations, this Court concluded that it was in the interests of justice that the application for direct access should be granted.

The legislative framework

[**35.**] For a proper understanding of the issues, it is necessary to set out in full the legislative provisions which are the subject of the constitutional challenge. Section 23 of the Act provides as follows:

> (1) All movable property belonging to a Black and allotted by him or accruing under Black law or custom to any woman with whom he lived in a customary union, or to any house, shall upon his death devolve and be administered under Black law and custom.
> (2) All land in a tribal settlement held in individual tenure upon quitrent conditions by a Black shall devolve upon his death upon one male person, to be determined in accordance with tables of succession to be prescribed under subsection (10).
> (3) All other property of whatsoever kind belonging to a Black shall be capable of being devised by will.
> (4) . . .
> (5) Any claim or dispute in regard to the administration or distribution of any estate of a deceased Black shall be decided in a court of competent jurisdiction.
> (6) In connection with any such claim or dispute, the heir, or in case of minority his guardian, according to Black law, if no executor has been appointed by a Master of the Supreme Court shall be regarded as the executor in the estate as if he had been duly appointed as such according to the law governing the appointment of executors.
> (7) Letters of administration from the Master of the Supreme Court shall not be necessary in, nor shall the Master or any executor appointed by the Master have any powers in connection with, the administration and distribution of — (a) . . . (b) any portion of the estate of a deceased Black which falls under subsection (1) or (2).
> (8) A Master of the Supreme Court may revoke letters of administration issued by him in respect of any Black estate.
> (9) Whenever a Black has died leaving a valid will which disposes of any portion of his estate, Black law and custom shall not apply to the administration or distribution of so much of his estate as does not fall under subsection (1) or (2) and such administration and distribution shall in all respects be in accordance with the Administration of Estates Act, 1913 (Act No 24 of 1913).
> (10) The Governor-General may make regulations not inconsistent with this Act — (a) prescribing the manner in which the estates of deceased Blacks shall be administered and distributed; (b) defining the rights of widows or surviving partners in regard to the use and occupation of the quitrent land of deceased Blacks; (c) dealing with the disherison of Blacks; (d) . . . (e) prescribing tables of succession in regard to Blacks; and (f) generally for the better carrying out of the provisions of this section.
> (11) Any Black estate which has, prior to the commencement of this Act, been

reported to a Master of the Supreme Court shall be administered as if this Act had not been passed, and the provisions of this Act shall apply in respect of every Black estate which has not been so reported.[35]

[**36.**] For purposes of this discussion, it is necessary to draw attention to regulations 2, 3 and 4 only. Regulation 2 provides as follows:

2. If a Black dies leaving no valid will, so much of his property, including immovable property, as does not fall within the purview of subsection (1) or subsection (2) of section 23 of the Act shall be distributed in the manner following: (a) . . . (b) If the deceased was at the time of his death the holder of a letter of exemption issued under the provisions of section 31 of the Act, exempting him from the operation of the Code of Zulu Law, the property shall devolve as if he had been a European. (c) If the deceased, at the time of his death was — (i) a partner in a marriage in community of property or under antenuptual contract; or (ii) a widower, widow or divorcee, as the case may be, of a marriage in community of property or under antenuptual contract and was not survived by a partner to a customary union entered into subsequent to the dissolution of such marriage, the property shall devolve as if the deceased had been a European. (d) When any deceased Black is survived by any partner— (i) with whom he had contracted a marriage which, in terms of subsection (6) of section 22 of the Act, had not produced the legal consequences of a marriage in community of property; or (ii) with whom he had entered into a customary union; or (iii) who was at the time of his death living with him as his putative spouse; or by any issue of himself and any such partner, and the circumstances are such as in the opinion of the Minister to render the application of Black law and custom to the devolution of the whole, or some part, of his property inequitable or inappropriate, the Minister may direct that the said property or the said part thereof, as the case may be, shall devolve as if the said Black and the said partner had been lawfully married out of community of property, whether or not such was in fact the case, and as if the said Black had been a European. (e) If the deceased does not fall into any of the classes described in paragraphs (b), (c) and (d), the property shall be distributed according to Black law and custom.[36]

[**37.**] In terms of regulation 3, a magistrate in whose jurisdiction the deceased resided may hold an inquiry to determine the identity of the person or people entitled to succeed to the deceased's property. For that purpose, the magistrate may summon anyone able to supply the information necessary to make that decision.

[**38.**] Regulation 4 provides for the appointment of a representative of the estate who may be required to provide security for the due and proper administration of the estate. Once appointed, the representative has an obligation to render a' just, true and exact account of his administration of the estate.'

[**39.**] The above provisions should be read with section 1(4)(b) of the Intestate Succession Act which provides as follows: '''Intestate estate''

[35] Paragraphs not reproduced were deleted by subsequent legislation.
[36] Paragraphs not reproduced were deleted by subsequent legislation.

includes any part of an estate . . . in respect of which section 23 of the Black Administration Act, 1927 (Act 38 of 1927), does not apply.'[37]

[37] S 1 of the Intestate Succession Act provides:
'(1) If after the commencement of this Act a person (hereinafter referred to as the ''deceased'') dies intestate, either wholly or in part, and — (a) is survived by a spouse, but not by a descendant, such spouse shall inherit the intestate estate; (b) is survived by a descendant, but not by a spouse, such descendant shall inherit the intestate estate; (c) is survived by a spouse as well as a descendant — (i) such spouse shall inherit a child's share of the intestate estate or so much of the intestate estate as does not exceed in value the amount fixed from time to time by the Minister of Justice by notice in the *Gazette*, whichever is the greater; and (ii) such descendant shall inherit the residue (if any) of the intestate estate; (d) is not survived by a spouse or descendant, but is survived — (i) by both his parents, his parents shall inherit the intestate estate in equal shares; or (ii) by one of his parents, the surviving parent shall inherit one half of the intestate estate and the descendants of the deceased parent the other half, and if there are no such descendants who have survived the deceased, the surviving parent shall inherit the intestate estate; or (e) is not survived by a spouse or descendant or parent, but is survived– (i) by — (aa) descendants of his deceased mother who are related to the deceased through her only, as well as by descendants of his deceased father who are related to the deceased through him only; or (bb) descendants of his deceased parents who are related to the deceased through both such parents; or (cc) any of the descendants mentioned in subparagraph (aa), as well as by any of the descendants mentioned in subparagraph (bb), the intestate estate shall be divided into two equal shares and the descendants related to the deceased through the deceased mother shall inherit one half of the estate and the descendants related to the deceased through the deceased father shall inherit the other half of the estate; or (ii) only by descendants of one of the deceased parents of the deceased who are related to the deceased through such parent alone, such descendants shall inherit the intestate estate; (f) is not survived by a spouse, descendant, parent, or a descendant of a parent, the other blood relation or blood relations of the deceased who are related to him nearest in degree shall inherit the intestate estate in equal shares.
(2) Notwithstanding the provisions of any law or the common law, but subject to the provisions of this Act and section 5(2) of the Children's Status Act, 1987, illegitimacy shall not affect the capacity of one blood relation to inherit the intestate estate of another blood relation.
(3) A notice mentioned in subsection (1)(c)(i) shall not apply in respect of the intestate estate of a person who died before the date of that notice.
(4) In the application of this section — (a) in relation to descendants of the deceased and descendants of a parent of the deceased, division of the estate shall take place *per stirpes*, and representation shall be allowed; (b) ''intestate estate'' includes any part of an estate which does not devolve by virtue of a will or in respect of which section 23 of the Black Administration Act, 1927 (Act No. 38 of 1927), does not apply; (c) . . . (d) the degree of relationship between blood relations of the deceased and the deceased — (i) in the direct line, shall be equal to the number of generations between the ancestor and the deceased or the descendant and the deceased (as the case may be); (ii) in the collateral line, shall be equal to the number of generations between the blood relations and the nearest common ancestor, plus the number of generations between such ancestor and the deceased; (e) an adopted child shall be deemed — (i) to be a descendant of his adoptive parent or parents; (ii) not to be a descendant of his natural parent or parents, except in the case of a natural parent who is also the adoptive parent of that child or was, at the time of the adoption, married to the adoptive parent of the child; and (f) a child's portion, in relation to the intestate estate of the deceased, shall be calculated by dividing the monetary value of the estate by a number equal to the number of children of the deceased who have either survived him or have died before him but are survived by their descendants, plus one.
(5) If an adopted child in terms of subsection (4)(e) is deemed to be a descendant of his adoptive parent, or is deemed not to be a descendant of his natural parent, the adoptive parent concerned shall be deemed to be an ancestor of the child, or shall be deemed not to be an ancestor of the child, as the case may be.

The approach to customary law

[**40.**] The system that flows from the above legislative framework purports to give effect to customary law. It is a parallel system, different in concept and in effect, to that which flows from the Intestate Succession Act, which is designed to apply to all intestate estates other than those governed by section 23 of the Act.

[**41.**] It is important to appreciate the distinction between the legal framework based on section 23 of the Act and the place occupied by customary law in our constitutional system. Quite clearly the Constitution itself envisages a place for customary law in our legal system. Certain provisions of the Constitution put it beyond doubt that our basic law specifically requires that customary law should be accommodated, not merely tolerated, as part of South African law, provided the particular rules or provisions are not in conflict with the Constitution. Sections 30[38] and 31[39] of the Constitution entrench respect for cultural diversity. Further, section 39(2) specifically requires a court interpreting customary law to promote the spirit, purport and objects of the Bill of Rights. In similar vein, section 39(3)[40] states that the Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by customary law as long as they are consistent with the Bill of Rights. Finally, section 211[41] protects those institutions that are unique to customary law. It

(6) If a descendant of a deceased, excluding a minor or mentally ill descendant, who, together with the surviving spouse of the deceased, is entitled to a benefit from an intestate estate renounces his right to receive such a benefit, such benefit shall vest in the surviving spouse.
(7) If a person is disqualified from being an heir of the intestate estate of the deceased, or renounces his right to be such an heir, any benefit which he would have received if he had not been so disqualified or had not so renounced his right shall, subject to the provisions of subsection (6), devolve as if he had died immediately before the death of the deceased and, if applicable, as if he was not so disqualified.'

[38] S 30 of the Constitution provides that: 'Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.'

[39] S 31 of the Constitution provides that: '(1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community — (a) to enjoy their culture, practise their religion and use their language; and (b) . . . (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.'

[40] S 39 of the Constitution provides that: '(1) . . . (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights. (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.'

[41] S 211 of the Constitution provides that: '(1) The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution. (2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs. (3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.'

follows from this that customary law must be interpreted by the courts, as first and foremost answering to the contents of the Constitution. It is protected by and subject to the Constitution in its own right.

[**42.**] It is for this reason that an approach that condemns rules or provisions of customary law merely on the basis that they are different to those of the common law or legislation, such as the Intestate Succession Act, would be incorrect. At the level of constitutional validity, the question in this case is not whether a rule or provision of customary law offers similar remedies to the Intestate Succession Act. The issue is whether such rules or provisions are consistent with the Constitution.

[**43.**] This status of customary law has been acknowledged and endorsed by this Court. In *Alexkor Ltd and Another v Richtersveld Community and Others,* the following was stated:

> While in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common-law, but to the Constitution. (Footnotes omitted.)[42]

This approach avoids the mistakes which were committed in the past and which were partly the result of the failure to interpret customary law in its own setting but rather attempting to see it through the prism of the common law or other systems of law.[43] That approach also led in part to the fossilisation and codification of customary law which in turn led to its marginalisation. This consequently denied it of its opportunity to grow in its own right and to adapt itself to changing circumstances. This no doubt contributed to a situation where, in the words of Mokgoro J, '[c]ustomary law was lamentably marginalised and allowed to degenerate into a vitrified set of norms alienated from its roots in the community'.[44]

[**44.**] It should however not be inferred from the above that customary law can never change and that it cannot be amended or adjusted by legislation. In the first place, customary law is subject to the Constitution.[45] Adjustments and development to bring its provisions in line with the

[42] 2003 (12) BCLR 1301 (CC) at para 51. See also *Pharmaceutical Manufacturers Association of SA and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 44; *Mabuza v Mbatha* 2003 (4) SA 218 (C); 2003 (7) BCLR 743 (C) at para 32.

[43] In Bennett *Human Rights and African Customary Law under the South African Constitution* (Juta & Co, Ltd, Cape Town 1997) 63 the learned author states in this respect — '[c]ustomary rules were grouped into common-law categories, such as marriage, succession, and property, and common-law concepts were freely used to describe customary institutions. At the same time the devices of precedent, codification, and restatement were used to impose western requirements of certainty and stability.' (Footnote omitted.)

[44] *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC); 1996 (5) BCLR 658 (CC) at para 172 (footnote omitted).

[45] Section 211(3) of the Constitution above n 41.

Constitution or to accord with the 'spirit, purport and objects of the Bill of Rights' are mandated.[46] Secondly, the legislative authority of the Republic vests in Parliament.[47] Thirdly, the Constitution envisages a role for national legislation in the operation, implementation and/or changes effected to customary law.[48]

[**45.**] The positive aspects of customary law have long been neglected. The inherent flexibility of the system is but one of its constructive facets. Customary law places much store in consensus-seeking and naturally provides for family and clan meetings which offer excellent opportunities for the prevention and resolution of disputes and disagreements. Nor are these aspects useful only in the area of disputes. They provide a setting which contributes to the unity of family structures and the fostering of co-operation, a sense of responsibility in and of belonging to its members, as well as the nurturing of healthy communitarian traditions such as ubuntu.[49] These valuable aspects of customary law more than justify its protection by the Constitution.

[**46.**] It bears repeating, however, that as with all law, the constitutional validity of rules and principles of customary law depend on their consistency with the Constitution and the Bill of Rights.

The constitutional rights implicated

[**47.**] In both written and oral submissions before the Court, it was argued that the impugned provisions seriously violate various constitutional rights, primarily, rights to human dignity (section 10 of the Constitution), and to equality (section 9 of the Constitution), as well as the rights of children (section 28 of the Constitution).

(1) Human dignity (section 10 of the Constitution)

[**48.**] Section 10 of the Constitution provides that '[e]veryone has inherent dignity and the right to have their dignity respected and protected.' This Court has repeatedly emphasised the importance of human dignity in our constitutional order. In *S v Makwanyane*[50] Chaskalson P stated that the right to human dignity was, together with the right to life, the source of all other rights. Elsewhere, Ackermann J stated that 'the constitutional protection of dignity requires us to acknowledge the value and worth of all

[46] Section 39(2) of the Constitution above n 40.
[47] Section 43(a) of the Constitution provides that: 'In the Republic, the legislative authority — (a) of the national sphere of government is vested in Parliament, as set out in section 44'.
[48] Section 211(3) of the Constitution above n 41.
[49] See Mogkoro J in *S v Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (2) SACR 1 (CC); 1995 (6) BCLR 665 (CC) at paras 307-8.
[50] Id at para 144.

individuals as members of our society.'[51] As a value, Kriegler J referred to human dignity as one of three 'conjoined, reciprocal and covalent values' which are foundational to this country.[52] In *Dawood and Another v Minister of Home Affairs and Others*, the Court asserted:

> The value of dignity in our Constitutional framework cannot therefore be doubted. The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it too to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings. Human dignity therefore informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. This Court has already acknowledged the importance of the constitutional value of dignity in interpreting rights such as the right to equality, the right not to be punished in a cruel, inhuman or degrading way, and the right to life. Human dignity is also a constitutional value that is of central significance in the limitations analysis. Section 10, however, makes it plain that dignity is not only a *value* fundamental to our Constitution, it is a justiciable and enforceable *right* that must be respected and protected. (Footnotes omitted.)[53]

(2) The right to equality and the prohibition of discrimination (section 9 of the Constitution)

[**49.**] The importance of the right to equality[54] has frequently been emphasised in the judgments of this Court. In *Fraser v Children's Court, Pretoria North, and Others*, Mahomed DP had the following to say:

> There can be no doubt that the guarantee of equality lies at the very heart of the Constitution. It permeates and defines the very ethos upon which the Constitution is premised. In the very first paragraph of the preamble it is declared that there is a '. . . need to create a new order . . . in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms'. (Footnotes omitted.)[55]

[**50.**] The centrality of equality is underscored by references to it in various provisions of the Constitution and in many judgments of this Court.[56] Not

[51] *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) at para 28.

[52] *S v Mamabolo (E TV and Others Intervening)* 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC) at para 41.

[53] 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) at para 35.

[54] Above n 31.

[55] 1997 (2) SA 261 (CC); 1997 (2) BCLR 153 (CC) at para 20. This judgment dealt with section 8 of the interim Constitution but the remarks remain apposite to section 9 of the final Constitution. See also *Makwanyane* above n 49 at paras 155-66 and 262; *Shabalala and Others v Attorney-General of Transvaal, and Another* 1996 (1) SA 725 (CC); 1995 (12) BCLR 1593 (CC) at para 26; *Brink* above n 34 at para 33; *Satchwell v President of the Republic of South Africa and Another* 2002 (6) SA 1 (CC); 2002 (9) BCLR 986 at para 18.

[56] Sections 1, 3, 7, 8, 9, 36 and 39 of the Constitution. See also *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) at para 20; *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC) at paras 41-53; *East Zulu Motors (Pty) Ltd v Empangeni/Ngwelezane Transitional Local Council and Others* 1998 (2) SA 61 (CC); 1998 (1) BCLR 1 (CC) at para 22; *National Coalition* 1999 above n 51 at para 17;

only is the achievement of equality one of the founding values of the Constitution, section 9 of the Constitution also guarantees the achievement of substantive equality to ensure that the opportunity to enjoy the benefits of an egalitarian and non-sexist society is available to all, including those who have been subjected to unfair discrimination in the past. Thus section 9(3) of the Constitution prohibits unfair discrimination by the state 'directly or indirectly against anyone' on grounds which include race, gender and sex.

[**51.**] Nor is the South African Constitution alone in the emphasis it places on the right to equality. The right is cherished in the constitutions and the jurisprudence of many open and democratic societies. A number of international instruments, to which South Africa is party,[57] also underscore the need to protect the rights of women, and to abolish all laws that discriminate against them[58] as well as to eliminate any racial discrimination in our society.[59]

(3) The rights of children

[**52.**] Section 28 of the Constitution provides specific protection for the rights of children.[60] Our constitutional obligations in relation to children

National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 32; *Hoffmann v South African Airways* 2001 (1) SA 1 (CC); 2000 (1) BCLR 1211 (CC) at para 27; *Satchwell* id at para 21.

[57] South Africa became party to the Convention on the Elimination of All Forms of Discrimination against Women on 14 January 1996; to the International Convention on the Elimination of All Forms of Racial Discrimination on 9 January 1999; to the African [Banjul] Charter on Human and Peoples' Rights on 9 July 1996; and to the Protocol to the African [Banjul] Charter on Human and Peoples' Rights on the Rights of Women in Africa on 16 March 2004.

[58] Article 2(c) and (f) of the Convention on the Elimination of All Forms of Discrimination against Women; article 18(3) of the African [Banjul] Charter on Human and Peoples' Rights; articles 2(1)(a), 21 and 25 of the Protocol to the African [Banjul] Charter on Human and Peoples' Rights on the Rights of Women in Africa.

[59] Article 4 of the United Nations Declaration on the Elimination of All Forms of Racial Discrimination.

[60] Section 28 provides that: '(1) Every child has the right— (a) to a name and a nationality from birth; (b) to family care or parental care, or to appropriate alternative care when removed from the family environment; (c) to basic nutrition, shelter, basic health care services and social services; (d) to be protected from maltreatment, neglect, abuse or degradation; (e) to be protected from exploitative labour practices; (f) not to be required or permitted to perform work or provide services that — (i) are inappropriate for a person of that child's age; or (ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development; (g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be — (i) kept separately from detained persons over the age of 18 years; and (ii) treated in a manner, and kept in conditions, that take account of the child's age; (h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and (i) not to be used directly in armed conflict, and to be protected in times of armed conflict. (2) A child's best interests are of paramount importance in every matter concerning the child. (3) In this section ''child'' means a person under the age of 18 years.'

are particularly important for we vest in our children our hopes for a better life for all.[61] The inclusion of this provision in the Constitution marks the constitutional importance of protecting the rights of children, not only those rights expressly conferred by section 28 but also all the other rights in the Constitution which, appropriately construed, are also conferred upon children.[62] Children, therefore, may not be subjected to unfair discrimination in breach of section 9(3) just as adults may not be.

[**53.**] Two prohibited grounds of discrimination are relevant in this case. The first relates to sex, something that I need not discuss further here, except to remark that the importance of protecting children from discrimination on the grounds of sex is acknowledged in the African Charter on the Rights of the Child.[63]

[**54.**] The second relates to the prohibition of unfair discrimination on the ground of 'birth' in section 9(3). To the extent that one of the issues that arises in this case is the question of whether the differential entitlements of children born within a marriage and those born extra-maritally constitutes unfair discrimination, the meaning to be attributed to 'birth' in section 9(3) is important.

[**55.**] In interpreting both section 28 and the other rights in the Constitution, the provisions of international law must be considered.[64] South Africa is a party to a number of international multilateral agreements[65] designed to strengthen the protection of children. The Convention on the Rights of the Child asserts that children, by reason of their 'physical and mental immaturity' need 'special safeguards and care'.[66] Article 2 of the Convention requires signatories to ensure that the rights set forth in the Convention shall be enjoyed regardless of 'race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property,

[61] See the Preamble to the Constitution.

[62] Most of the other rights in the Constitution vest in children. Exceptions to this are the right to vote and the right to stand for public office, both of which are conferred only on adults. See section 19(3) of the Constitution.

[63] Article 21(1)(b) of the Charter provides that — 'States parties to the present Charter shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular: (a) . . . (b) those customs and practices discriminatory to the child on the grounds of sex or other status.'

[64] Section 39(1) of the Constitution in relevant part provides — 'When interpreting the Bill of Rights, a court, tribunal or forum — (a) . . . (b) must consider international law'.

[65] South Africa became a party to the United Nations Convention on the Rights of the Child on 16 July 1995; the International Covenant on Civil and Political Rights on 10 March 1999; the African [Banjul] Charter on Human and Peoples' Rights on 9 July 1996; and to the African Charter on the Rights and Welfare of the Child on 7 January 2000.

[66] See Preamble to the Convention which cites the Declaration of the Rights of the Child which was adopted by the General Assembly in 1959.

disability, birth or other status.'[67] Article 24(1) of the International Covenant on Civil and Political Rights (1966), also provides expressly that:

> Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the state.

Similarly, article 3 of the African Charter on the Rights and Welfare of the Child provides that children are entitled to enjoy the rights and freedoms recognised and guaranteed in the Charter 'irrespective of the child's or his or her parents' or legal guardians' race, ethnic group, colour, sex, . . . birth or other status.'

[**56.**] The European Court on Human Rights has held that treating extra-marital children differently to those born within a marriage constitutes a suspect ground of differentiation in terms of article 14 of the Charter.[68] The United States Supreme Court, too, has held that discriminating on the grounds of 'illegitimacy' is 'illogical and unjust'.[69]

[**57.**] Historically in South Africa, children whose parents were not married at the time they were conceived or born were discriminated against in a range of ways. This was particularly true of children whose family lives were governed by common law.[70] Much of the stigma that attached to extra-marital children was social and religious in origin, rather than legal, but that stigma was deeply harmful. The legal consequences of extra-marital birth at common law flowed from the Dutch principle that 'een wijf maakt geen bastaard',[71] the implications of which were that the extra-marital child was not recognised as having any legal relationship with his or her father, but only with his or her mother. The child therefore took the mother's name, inherited only from his or her mother, and the father of the child had no parental obligations or rights vis-à-vis the child. The law and social practice concerning extra-marital children without doubt conferred a stigma upon them which was harmful and degrading.

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[67] Article 2 of the UN Convention on the Rights of the Child. See also article 24 of the International Covenant on Civil and Political Rights; article 18(3) of the African [Banjul] Charter on Human and Peoples' Rights; articles 3 and 26(3) of the African Charter on the Rights and Welfare of the Child.

[68] See *Marckx v Belgium* [1979] ECHR 2 at paras 38-9; *Inze v Austria* [1987] ECHR 28 at para 41.

[69] See *Weber v Aetna Casualty and Surety Co* 406 US 164 (1972) 175. See also *Levy v Louisiana* 391 US 68 (1968); *Glona v American Guarantee and Liability Insurance Co* 391 US 73 (1968) 76; *Trimble v Gordon* 430 US 762 (1977).

[70] For a full account see Hughes 'Law, religion and bastardy: Comparative and historical perspectives' in Burman and Preston-Whyte (eds) *Questionable Issue: Illegitimacy in South Africa* (Oxford University Press, Cape Town 1992) 1–20.

[71] *Green v Fitzgerald and Others* 1914 AD 88 at 99. See also the full discussion in Van Heerden et al (eds) *Boberg's Law of Persons and the Family* 2 ed. (Juta & Co., Ltd, Kenwyn 1999) 390ff.

[**58.**] It is important, however, in assessing the discrimination and stigma attached to extra-marital birth to distinguish between common law and customary law. As Jones records:

> The African means of dealing with extramarital birth is essentially accommodative in intent and character; it is oriented towards social inclusivity. The mechanism of maternal-filiation provides an extramarital child with a father, with a male ritual and social sponsor, with a place in a conjugal unit, and it manufactures for the child a full lineal identity. Very importantly, these attributes are socially visible — they counter what would otherwise be clearly evident deficits in an extramarital child's social make-up — and are preserved and upheld by way of taboo against reference to the child's real paternity or social position. As far as is possible within the bounds of cultural reason, the effect of the African system is therefore to ensure that an extramarital child's position is *not* compromised by the circumstances of his or her birth.[72]

Nevertheless, extra-marital sons had reduced rights of inheritance under customary law, as they would only inherit in the absence of any other male descendants. Contemporary research suggests too that there is social stigma attached to extra-marital children, though the stigma probably varies depending on the circumstances and community concerned.[73]

[**59.**] The prohibition of unfair discrimination on the ground of birth in section 9(3) of our Constitution should be interpreted to include a prohibition of differentiating between children on the basis of whether a child's biological parents were married either at the time the child was conceived or when the child was born. As I have outlined, extra-marital children did, and still do, suffer from social stigma and impairment of dignity. The prohibition of unfair discrimination in our Constitution is aimed at removing such patterns of stigma from our society. Thus, when section 9(3) prohibits unfair discrimination on the ground of 'birth', it should be interpreted to include a prohibition of differentiation between children on the grounds of whether the children's parents were married at the time of conception or birth. Where differentiation is made on such grounds, it will be assumed to be unfair unless it is established that it is not.

Does section 23 violate the rights contended for?

[**60.**] In argument, section 23 was correctly described as a racist provision which is fundamentally incompatible with the Constitution. It was submitted that the section is inconsistent with sections 9 and 10 of the Constitution because of its blatant discrimination on grounds of race, colour

[72] Jones 'Children on the Move: parenting, mobility, and birth-status among migrants' in Burman and Preston-Whyte (eds) *Questionable Issue: Illegitimacy in South Africa* (Oxford University Press, Cape Town 1992) 247, 251-2. Jones points to only two elements of customary law and practice which disadvantaged the marital child: the first relates to inheritance discussed in the text, and the second relates to clan identity. See also Jones 252-3.

[73] See Burman 'The Category of the illegitimate in South Africa' in Burman and Preston Whyte (eds), id 21, 31-2.

and ethnic origin and its harmful effects on the dignity of persons affected by it. This Court has often expressed its abhorrence of discriminatory legislation and practices which were a feature of our hurtful and racist past and which are fundamentally inconsistent with the constitutional guarantee of equality.

[**61.**] Section 23 cannot escape the context in which it was conceived. It is part of an Act which was specifically crafted to fit in with notions of separation and exclusion of Africans from the people of 'European' descent. The Act was part of a comprehensive exclusionary system of administration imposed on Africans, ostensibly to avoid exposing them to a result which, 'to the Native mind', would be 'both startling and unjust'.[74] What the Act in fact achieved was to become a cornerstone of racial oppression, division and conflict in South Africa, the legacy of which will still take years to completely eradicate. Proponents of the policy of apartheid were able, with comparative ease, to build on the provisions of the Act and to perfect a system of racial division and oppression that caused untold suffering to millions of South Africans. Some parts of the Act have now been repealed and modified; most of section 23 however remains and still serves to haunt many of those Africans subject to the parallel regime of intestate succession which it creates.

[**62.**] The Act has earned deserved criticism which must be seen in the light of the origins of its provisions. The remarks of McLoughlin, made in two of his judgments when he was President of the Native Appeal Court, are instructive in this regard. In *Ruth Matsheng v Nicholas Dhlamini and John Mhaushan*, he stated:

> The attitude of the legislature towards natives and Native Law in the Transvaal is clearly shown by the survey of the history of legislation on the subject since the early Republican days. The natives were placed in a category separate from the Europeans and they were permitted no equality either in the system of law applied to them nor in regard to the courts to which they were accorded access in civil matters. . . . It is the Shepstonian conception of legal segregation

[74] See Whitfield *South African Native Law* 2 ed. (Cape Town, Juta & Co., Ltd 1948) 314. The passage in question reads: 'The extension of Europeans westward and northward carried with it the application to the Bantu of Roman-Dutch law, but the unsuitability of this system to many of the conditions of Native life was not long in making itself felt. In general it allowed no recognition of the marriage union celebrated after annexation by other than the prescribed formalities; but a marriage, entered into with all the ceremonies essential to its recognition in the Native mind as a solemn and binding contract, could not, without injustice, be rigidly regarded as an agreement for illicit intercourse, allowing no rights to the issue against the deceased father's estate. Nor could it be expected that in cases where there was no legal celebration of a marriage between Natives the consequent substitution for Native methods of the inheritance of the Roman-Dutch system, with its community of property between husband and wife, a result, to the Native mind, both startling and unjust, would find voluntary acceptance. Consequently, the legislature has from time to time conceded, at first a partial, and ultimately a complete recognition of the Native system.'

> successfully adopted in Natal and imported into the Transvaal on annexation in 1877.[75]

and later in the same judgment, he remarked as follows:

> The subjection by native law of women to tutelage and the denial of *locus standi in judicio* unaided is neither 'inconsistent with the general principles of civilisation recognised in the civil world' nor is the custom one which occasions evident injustice or which is 'in conflict with the accepted principles of natural justice', for the common law in this country still maintains a similar disability in respect of women married in community of property. Other civilised nations extend the rule much further.[76]

Later still, in *Dukuza Kaula v John Mtimkulu and Madhlala Mtimkulu*,[77] writing on the subject of the exemption of Africans from the operation of 'Native law', he stated:

> The policy of legal segregation dates back to the beginning of the legal history of Natal. To meet the case of Natives 'not so ignorant or so unfitted by habit or otherwise as to render them incapable of exercising and understanding the ordinary duties of civilised life' provision was made to exempt such persons from the operation of Native law — or as stated in the statute 'taken out of the operation of Native Law,' — Natal law 28 of 1865.'[78]

Quite clearly the Act developed from these notions of separation and inequality between Europeans and Africans, and its provisions have not moved much from the 'Shepstonian conception of legal segregation'.[79]

[**63.**] In *DVB Behuising*,[80] Madala J referred to the Act as a' piece of obnoxious legislation not befitting a democratic society based on human dignity, equality and freedom'.[81] In the same case, Ngcobo J described the Act as 'an egregious apartheid law which anachronistically has survived our transition to a non-racial democracy'[82] and referred to proclamations made under it as part of a 'demeaning and racist' system.[83] Ngcobo J went on to comment:

> The Native Administration Act 38 of 1927 appointed the Governor-General (later referred to as the State President) as 'supreme chief' of all Africans. It gave him power to govern Africans by proclamation. The powers given to him were virtually absolute. He could order the removal of an entire African community from one place to another. The Native Administration Act became the most powerful tool in the implementation of forced removals of Africans from the so-called 'white areas' into the areas reserved for them. These removals

[75] 1937 NAC (N & T) 89, 91.
[76] Id 92.
[77] 1938 NAC (N & T) 68.
[78] Id 70.
[79] See above n 75.
[80] *Western Cape Provincial Government and Others: In re DVB Behuising (Pty) Ltd v North West Provincial Government and Another* 2001 (1) SA 500 (CC); 2000 (4) BCLR 347 (CC).
[81] Id at para 93.
[82] Id at para 1.
[83] Id at para 2.

> resulted in untold suffering. This geographical plan of segregation was described as forming part of a' colossal social experiment and a long term policy'. (Footnotes omitted.)[84]

[**64.**] More recently, in *Moseneke,* Sachs J, writing for a unanimous Court, expressed himself as follows:

> It is painful that the Act still survives at all. The concepts on which it was based, the memories it evokes, the language it continues to employ and the division it still enforces are antithetical to the society envisaged by the Constitution. It is an affront to all of us that people are still treated as 'blacks' rather than as ordinary persons seeking to wind up a deceased estate, and it is in conflict with the establishment of a non-racial society where rights and duties are no longer determined by origin or skin colour.[85]

[**65.**] Sachs J went on to discuss section 23(7) of the Act and regulation 3(1) of the regulations. He noted that the Minister and the Master suggested that the administration of deceased estates by magistrates was often convenient and inexpensive, and responded by commenting that even if there are practical advantages for people in the system, the fact remains that it is rooted in racial discrimination. He held that, given our history of racial discrimination, the indignity occasioned by treating people differently as 'blacks' is not rendered fair by the factors identified by the Minister and the Master. He concluded that no society based on equality, freedom and dignity would tolerate differential treatment based on skin colour, particularly where the legislative provisions in question formed part of a broader package of racially discriminatory legislation that systematically disadvantaged Africans. Any convenience the provisions might achieve could be accomplished equally as well by a non-discriminatory provision.[86]

[**66.**] In the *Bhe* and *Shibi* cases, the constitutional attack was directed at particular provisions of subsection (10) of section 23 and the regulations. It is quite clear though that the subsections which constitute section 23, read with the regulations, together constitute a scheme of intestate succession. The subsections are interlinked and, in my view, they all stand or fall together. They provide a scheme whereby the legal system that governs intestate succession is determined simply by reference to skin colour. The choice of law is thus based on racial grounds without more. In so doing, section 23 and its regulations impose a system on all Africans irrespective of their circumstances and inclinations. What it says to Africans is that if they wish to extricate themselves from the regime it creates, they must make a will. Only those with sufficient resources, knowledge, education or opportunity to make an informed choice will be able to benefit from that provision. Moreover, the section provides that some categories

[84] Id at para 41.
[85] *Moseneke* above n 34 at para 21.
[86] Id at paras 22-3.

of property are incapable of being devised by will but must devolve according to the principles of 'Black law and custom'.[87]

[**67.**] The racist provenance of the provision is illustrated in the reference in the regulations to the distinction drawn between estates that must devolve in terms of 'Black law and custom' and those that devolve as though the deceased 'had been a European'.[88] The purported exemption of certain Africans — who qualify — from the operation of 'Black law and custom' to the status of a 'European' is not only demeaning, it is overtly racist. This provision is to be found in the regulations, not in the statute itself. It nevertheless provides a contextual indicator of the purpose and intent of the overall scheme contemplated by section 23 and the regulations.

[**68.**] I conclude, then, that construed in the light of its history and context, section 23 of the Act and its regulations are manifestly discriminatory and in breach of section 9(3) of our Constitution. The discrimination they perpetuate touches a raw nerve in most South Africans. It is a relic of our racist and painful past. This Court has, on a number of occasions, expressed the need to purge the statute book of such harmful and hurtful provisions.[89] The only question that remains to be considered is whether the discrimination occasioned by section 23 and its regulations is capable of justification in terms of section 36 of our Constitution.

Justification inquiry

[**69.**] Section 36 of the Constitution requires that a provision that limits rights should be a law of general application and that the limitation should be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

[**70.**] As was said in *S v Manamela and Another (Director-General of Justice Intervening)*:

> [T]he Court must engage in a balancing exercise and arrive at a global judgment on proportionality . . . . As a general rule, the more serious the impact of the measure on the right, the more persuasive or compelling the justification must be. Ultimately, the question is one of degree to be assessed in the concrete legislative and social setting of the measure, paying due regard to the means which are realistically available in our country at this stage, but without losing sight of the ultimate values to be protected.[90]

[**71.**] The rights violated are important rights, particularly in the South African context. The rights to equality and dignity are of the most valuable of rights in any open and democratic state. They assume special

[87] Section 23(1) and (2) of the Act above at para 35.
[88] Section 23(10) of the Act above at para 35; regulation 2(b) above at para 36.
[89] *DVB Behuising* above n 80 at para 2. See also *Moseneke* above n 34 at para 23.
[90] 2000 (3) SA 1 (CC); 2000 (5) BCLR 491 (CC) at para 32. See also *Prince v President, Cape Law Society, and Others* 2001 (2) SA 388 (CC); 2001 (2) BCLR 133 (CC).

importance in South Africa because of our past history of inequality and hurtful discrimination on grounds that include race and gender.

[**72.**] It could be argued that despite its racist and sexist nature, section 23 gives recognition to customary law and acknowledges the pluralist nature of our society.[91] This is however not its dominant purpose or effect. Section 23 was enacted as part of a racist programme intent on entrenching division and subordination. Its effect has been to ossify customary law. In the light of its destructive purpose and effect, it could not be justified in any open and democratic society.

[**73.**] It is clear from what is stated above that the serious violation by the provisions of section 23 of the rights to equality and human dignity cannot be justified in our new constitutional order. In terms of section 172(1)(a) of the Constitution,[92] section 23 must accordingly be struck down.

[**74.**] The effect of the invalidation of section 23 is that the rules of customary law governing succession are applicable. The applicants in both the *Bhe* and *Shibi* cases, however, launched an attack on the customary law rule of primogeniture. It is to that attack that I now turn.

The customary law of succession

[**75.**] It is important to examine the context in which the rules of customary law, particularly in relation to succession, operated and the kind of society served by them. The rules did not operate in isolation. They were part of a system which fitted in with the community's way of life. The system had its own safeguards to ensure fairness in the context of entitlements, duties and responsibilities. It was designed to preserve the cohesion and stability of the extended family unit and ultimately the entire community. This served various purposes, not least of which was the maintenance of discipline within the clan or extended family. Everyone, man, woman and child had a role and each role, directly or indirectly, was designed to contribute to the communal good and welfare.

[**76.**] The heir did not merely succeed to the assets of the deceased; succession was not primarily concerned with the distribution of the estate of the deceased, but with the preservation and perpetuation of the family unit. Property was collectively owned and the family head, who was the

[91] See section 15(3)(a)(ii) of the Constitution which recognises 'systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.' See also section 30 of the Constitution above n 38, section 31 of the Constitution above n 39 and section 211 of the Constitution above n 41.

[92] Section 172(1) of the Constitution provides that: '(1) When deciding a constitutional matter within its power, a court — (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and (b) may make any order that is just and equitable, including — (i) an order limiting the retrospective effect of the declaration of invalidity; and (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.'

nominal owner of the property, administered it for the benefit of the family unit as a whole. The heir stepped into the shoes of the family head and acquired all the rights and became subject to all the obligations of the family head. The members of the family under the guardianship of the deceased fell under the guardianship of his heir. The latter, in turn, acquired the duty to maintain and support all the members of the family who were assured of his protection and enjoyed the benefit of the heir's maintenance and support. He inherited the property of the deceased only in the sense that he assumed control and administration of the property subject to his rights and obligations as head of the family unit. The rules of the customary law of succession were consequently mainly concerned with succession to the position and status of the deceased family head rather than the distribution of his personal assets.[93]

[**77.**] Central to the customary law of succession is the rule of primogeniture, the main features of which are well established.[94] The general rule is that only a male who is related to the deceased qualifies as intestate heir. Women do not participate in the intestate succession of deceased estates. In a monogamous family, the eldest son of the family head is his heir. If the deceased is not survived by any male descendants, his father succeeds him. If his father also does not survive him, an heir is sought among the father's male descendants related to him through the male line.[95]

[**78.**] The exclusion of women from heirship and consequently from being able to inherit property was in keeping with a system dominated by a deeply embedded patriarchy which reserved for women a position of subservience and subordination and in which they were regarded as perpetual minors under the tutelage of the fathers, husbands, or the head of the extended family.

The position of the extra-marital child

[**79.**] Extra-marital children are not entitled to succeed to their father's estate in customary law.[96] They however qualify for succession in their mother's family, but subject to the principle of primogeniture. The eldest male extramarital child qualifies for succession only after all male intramarital children and other close male members of the family.

The effect of changing circumstances

[**80.**] The setting has however changed. Modern urban communities and families are structured and organised differently and no longer purely along traditional lines. The customary law rules of succession simply determine succession to the deceased's estate without the accompanying

[93] *Mthembu* (SCA) above n 22 at para 8.
[94] Id.
[95] Olivier *et al Indigenous Law* (Butterworths, Durban 1995) 147 at para 142.
[96] *Mthembu* (SCA) above n 22 at paras 19-20.

social implications which they traditionally had. Nuclear families have largely replaced traditional extended families. The heir does not necessarily live together with the whole extended family which would include the spouse of the deceased as well as other dependants and descendants. He often simply acquires the estate without assuming, or even being in a position to assume, any of the deceased's responsibilities.[97] In the changed circumstances, therefore, the succession of the heir to the assets of the deceased does not necessarily correspond in practice with an enforceable responsibility to provide support and maintenance to the family and dependants of the deceased.

Customary law has not kept pace

[**81.**] In *Richtersveld*,[98] this Court noted that 'indigenous law is not a fixed body of formally classified and easily ascertainable rules. By its very nature it evolves as the people who live by its norms change their patterns of life.'[99] It has throughout history 'evolved and developed to meet the changing needs of the community.'[100]

[**82.**] The rules of succession in customary law have not been given the space to adapt and to keep pace with changing social conditions and values. One reason for this is the fact that they were captured in legislation, in text books, in the writings of experts and in court decisions without allowing for the dynamism of customary law in the face of changing circumstances. Instead, they have over time become increasingly out of step with the real values and circumstances of the societies they are meant to serve and particularly the people who live in urban areas.

[**83.**] It is clear that the application of the customary law rules of succession in circumstances vastly different from their traditional setting causes much hardship. This is described in the report of the South African Law Reform Commission (the Law Reform Commission)[101] which cites three reasons for the plight in which African widows find themselves in the changed circumstances: (a) the fact that social conditions frequently do not make 'living with the heir' a realistic or even a tolerable proposition; (b) the fact, frequently pointed out by the courts, that the African woman 'does not have a right of ownership'; and (c) the prerequisite of a 'good working relationship with the heir' for the effectiveness of 'the widow's right to maintenance'. In this regard, the report concludes that:

> Unfortunately, circumstances do not favour this relationship. Widows are all too often kept on at the deceased's homestead on sufferance or they are simply

[97] *Chihowa v Mangwende* 1987 (1) ZLR 228 (SC) 233-4E.
[98] Above n 42.
[99] Id at para 52.
[100] Id at para 53.
[101] South African Law Reform Commission, *The Harmonisation of the Common Law and the Indigenous Law: Succession in Customary Law*, Issue Paper 12, Project 90 (April 1998) 6-9. For similar views, see also Bennett above n 43, 126-7.

> evicted. They then face the prospect of having to rear their children with no support from the deceased's family.[102]

[**84.**] Because of this, the official rules of customary law of succession[103] are no longer universally observed. In her affidavit, Likhapha Mbatha, a researcher at the Gender Research Project at the Centre for Applied Legal Studies, observes that the formal rules of customary law have failed to keep pace with changing social conditions as a result of which they are no longer universally observed. These changes have required of customary rules that they adapt, and therefore change. Bennett also refers to trends that reflect a basic social need to sustain the surviving family unit rather than a general adherence to male primogeniture.[104]

[**85.**] The report of the Law Reform Commission makes the point that the rule of primogeniture is evolving to meet the needs of changing social patterns. It states that the order of succession is the theory and that in reality different rules may well be developing, such as the replacement of the eldest son with the youngest for purposes of inheritance, and the fact that widows often take over their husbands' lands and other assets, especially when they have young children to raise.[105]

[**86.**] What needs to be emphasised is that, because of the dynamic nature of society, official customary law as it exists in the text books and in the Act is generally a poor reflection, if not a distortion of the true customary law. True customary law will be that which recognises and acknowledges the changes which continually take place. In this respect, I agree with Bennett's observation that:

> [A] critical issue in any constitutional litigation about customary law will therefore be the question whether a particular rule is a mythical stereotype, which has become ossified in the official code, or whether it continues to enjoy social currency.[106]

[**87.**] The official rules of customary law are sometimes contrasted with what is referred to as 'living customary law', which is an acknowledgement of the rules that are adapted to fit in with changed circumstances. The problem with the adaptations is that they are *ad hoc* and not uniform. However, magistrates and the courts responsible for the administration of intestate estates continue to adhere to the rules of official customary law, with the consequent anomalies and hardships as a result of changes which have occurred in society. Examples of this are the manner in which the *Bhe* and *Shibi* cases were dealt with by the respective Magistrates.

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[102] The Harmonisation of the Common Law and the Indigenous Law id 9.
[103] For the purposes of this judgment, ''official rules'' refers to the rules of customary law set in statute, case law and various writings.
[104] Bennett above n 43, 140.
[105] Above n 101, 4-5.
[106] Bennett above n 43, 64.

The problem with primogeniture

[**88.**] The basis of the constitutional challenge to the official customary law of succession is that the rule of primogeniture precludes (a) widows from inheriting as the intestate heirs of their late husbands;[107] (b) daughters from inheriting from their parents;[108] (c) younger sons from inheriting from their parents,[109] and (d) extra-marital children from inheriting from their fathers.[110] It was contended that these exclusions constitute unfair discrimination on the basis of gender and birth and are part of a scheme underpinned by male domination.

[**89.**] Customary law has, in my view, been distorted in a manner that emphasises its patriarchal features and minimises its communitarian ones. As Nhlapo indicates:

> Although African law and custom has always had [a] patriarchal bias, the colonial period saw it exaggerated and entrenched through a distortion of custom and practice which, in many cases, had been either relatively egalitarian or mitigated by checks and balances in favour of women and the young. . . . Enthroning the male head of the household as the only true person in law, sole holder of family property and civic status, rendered wives, children and unmarried sons and daughters invisible in a social and legal sense. . . . The identification of the male head of the household as the only person with property-holding capacity, without acknowledging the strong rights of wives to security of tenure and use of land, for example, was a major distortion. Similarly, enacting the so-called perpetual minority of women as positive law when, in the pre-colonial context, everybody under the household head was a minor (including unmarried sons and even married sons who had not yet established a separate residence), had a profound and deleterious effect on the lives of African women. They were deprived of the opportunity to manipulate the rules to their advantage through the subtle interplay of social norms, and, at the same time, denied the protections of the formal legal order. Women became 'outlaws'.[111]

Nhlapo concludes that protecting people from distortions masquerading as custom is imperative, especially for those they disadvantage so gravely, namely, women and children.

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[107] *Madolo v Nomawu* (1896) 1 NAC 12; *Makholiso and Others v Makholiso and Others* 1997 (4) SA 509 (TkS) 519E. See also Kerr *The Customary Law of Immovable Property and of Succession* 2 ed (Grocott and Sherry, Grahamstown 1990) 99.

[108] *Makholiso* id; *Mthembu* (SCA) above n 22, 876C. See also Robinson 'The minority and subordinate status of women under customary law' (1995) 11 *SA Journal on Human Rights* 457-76.

[109] *Mthembu* id; Bekker *Seymour's Customary Law in Southern Africa* 5 ed (Juta & Co, Ltd, Cape Town 1989), 274; Bennett *A Sourcebook of African Customary law for Southern Africa* 1 ed (Juta & Co, Ltd, Cape Town 1991) 399-400.

[110] *Mthembu* id; *Zondi v President of RSA and Others* 2000 (2) SA 49 (N); 1999 (11) BCLR 1313 (N).

[111] Nhlapo 'African customary law in the interim Constitution' in Liebenberg (ed) *The Constitution of South Africa from a Gender Perspective* (Community Law Centre, University of the Western Cape in association with David Philip, Cape Town 1995) 162.

[**90.**] At a time when the patriarchal features of Roman-Dutch law[112] were progressively being removed by legislation,[113] customary law was robbed of its inherent capacity to evolve in keeping with the changing life of the people it served, particularly of women. Thus customary law as administered failed to respond creatively to new kinds of economic activity by women, different forms of property and household arrangements for women and men, and changing values concerning gender roles in society. The outcome has been formalisation and fossilisation of a system which by its nature should function in an active and dynamic manner.

[**91.**] The exclusion of women from inheritance on the grounds of gender is a clear violation of section 9(3)[114] of the Constitution. It is a form of discrimination that entrenches past patterns of disadvantage among a vulnerable group, exacerbated by old notions of patriarchy and male domination incompatible with the guarantee of equality under this constitutional order.

[**92.**] The principle of primogeniture also violates the right of women to human dignity as guaranteed in section 10 of the Constitution as, in one sense, it implies that women are not fit or competent to own and administer property. Its effect is also to subject these women to a status of perpetual minority, placing them automatically under the control of male heirs, simply by virtue of their sex and gender. Their dignity is further affronted by the fact that as women, they are also excluded from intestate succession and denied the right, which other members of the population have, to be holders of, and to control property.

[**93.**] To the extent that the primogeniture rule prevents all female children and significantly curtails the rights of male extra-marital children from inheriting, it discriminates against them too. These are particularly vulnerable groups in our society which correctly places much store in the well-being and protection of children who are ordinarily not in a position to

[112] See Zaal 'Origins of gender discrimination in SA Law' in Liebenberg id 34, where he concludes that — 'Roman-Dutch law, like the Roman law upon which it was founded, was neither humanitarian nor egalitarian. In its gender bias, it was similar to other European systems of its time, and its effects on both the South African legal system and South African society have been enormous.'

[113] It was only as late as 1993 when the General Law Fourth Amendment Act 132 of 1993 came into operation that the marital power was abolished from all existing marriages in which it was operating. The same Act substituted section 13 of the Matrimonial Property Act 88 of 1984 which section was later repealed by section 4 of the Guardianship Act 192 of 1993. The effect of this was the deletion of the reference to the husband's position as head of the family. As stated in Sinclair *The Law of Marriage* vol 1 (Juta & Co., Ltd, Kenwyn 1996) 69: 'the unambiguous premise of the South African law was that the husband is pre-eminent. After years of government obduracy and unsuccessful campaigning by champions of women's rights, changes to these discriminatory rules were suddenly effected to produce conformity between the content of this branch of the private law and the growing public demand for constitutional guarantees of equality between the sexes.'

[114] Above n 31.

protect themselves.[115] In denying female and extra-marital children the ability and the opportunity to inherit from their deceased fathers,[116] the application of the principle of primogeniture is also in violation of section 9(3) of the Constitution.

[**94.**] In view of the conclusion reached later in this judgment, that it is not possible to develop the rule of primogeniture as it applies within the customary law rules governing the inheritance of property, it is not necessary or desirable in this case for me to determine whether the discrimination against children, who happen not to be the eldest, necessarily constitutes unfair discrimination. I express no view on that question. Nor, I emphasise again, does this judgment consider at all the constitutionality of the rule of male primogeniture in other contexts within customary law, such as the rules which govern status and traditional leaders.

Justification inquiry: primogeniture

[**95.**] The primogeniture rule as applied to the customary law of succession cannot be reconciled with the current notions of equality and human dignity as contained in the Bill of Rights. As the centrepiece of the customary law system of succession, the rule violates the equality rights of women and is an affront to their dignity. In denying extra-marital children the right to inherit from their deceased fathers, it also unfairly discriminates against them and infringes their right to dignity as well. The result is that the limitation it imposes on the rights of those subject to it is not reasonable and justifiable in an open and democratic society founded on the values of equality, human dignity and freedom.

[**96.**] I have already observed that with the changing circumstances, the connection between the rules of succession in customary law and the heir's duty to support the dependants of the deceased is, at best, less than satisfactory.[117] Compliance with the duty to support is frequently more apparent than real. There may well be dependants of the deceased who would lay claim to the heir's duty to support them; they would however be people who, in the vast majority, are so poor that they are not in a position to ensure that their rights are protected and enforced. The heir's duty to support cannot, in the circumstances, constitute justification for the serious violation of rights.

[115] See generally Fraser above n 55; *Fraser v Naude and Others* 1999 (1) SA 1 (CC); 1998 (11) BCLR 1357 (CC); *Minister of Welfare and Population Development v Fitzpatrick and Others* 2000 (3) SA 422 (CC); 2000 (7) BCLR 713 (CC); *Government of the RSA and Others v Grootboom and Others* 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC); *Bannatyne v Bannatyne (Commission for Gender Equality as Amicus Curiae)* 2003 (2) SA 363 (CC); 2003 (2) BCLR 111 (CC).

[116] Female children are denied the right to inherit altogether, while only the eldest male descendant may inherit. Male extra-marital children are not entitled to inherit if there is any other male descendant, even if he is younger than the extra-marital child.

[117] Above para 80.

[**97.**] In conclusion, the official system of customary law of succession is incompatible with the Bill of Rights. It cannot, in its present form, survive constitutional scrutiny.

The decisions in *Mthembu v Letsela*

[**98.**] The relationship between customary law and the Constitution was considered in the two *Mthembu* decisions, firstly in the Pretoria High Court and lastly in the appeal heard by the Supreme Court of Appeal.[118] The appellants brought an application in the High Court for an order, declaring the customary law rule of primogeniture and regulation 2(e) to be invalid on the grounds that they gratuitously discriminate against women, children who are not the eldest and extra-marital children in a manner that offends the equality guarantee under section 8 of the interim Constitution. The High Court dismissed the application, holding that neither the rule nor the regulation was inconsistent with the equality protection under the interim Constitution. On appeal, the Supreme Court of Appeal was invited to set aside the order of the High Court and to develop, as required by section 35(3) of the interim Constitution, the rule of primogeniture in order to allow all descendants to participate in intestacy. The Supreme Court of Appeal declined to decide the constitutional challenge or to develop the rule on the ground that the interim Constitution does not operate retroactively. It reasoned that the rights of the heir in the estate had vested on the death of the deceased, which was on 13 August 1993 and before the interim Constitution took effect.[119]

[**99.**] In an alternative argument, the Supreme Court of Appeal was urged to conclude that the rule of primogeniture and regulation 2(e) are bad under the common law because they are offensive to public policy or natural justice which are premised on the fundamental value of equality. The Court rejected this contention and dismissed the appeal. It held that neither the rule nor the regulation offended the common law. The regulation, it held, is neither unreasonable nor '*ultra vires* at common law'.[120] It merely gives legislative recognition to a well established principle of male primogeniture according to which 'many blacks, even to this day, would wish their estates to devolve'.[121]

[**100.**] I have held that section 23 is inconsistent with the Constitution and invalid. As a result, regulation 2(e) falls away. I have also found that the customary law rule of primogeniture, in its application to intestate succession, is not consistent with the equality protection under the Constitution. It follows therefore that any finding in *Mthembu* which is at odds with this judgment cannot stand.

[118] Above n 22.
[119] Id.
[120] Id at para 24.
[121] Id at para 23.

Remedy

[**101.**] Perhaps the most difficult aspect of this composite case is the issue of remedy. It will be as well, though to keep a few salutary principles in mind. In *S v Bhulwana; S v Gwadiso*, the Court expressed two important principles, namely that:

> Central to a consideration of the interests of justice in a particular case is that successful litigants should obtain the relief they seek. . . . In principle, too, the litigants before the Court should not be singled out for the grant of relief, but relief should be afforded to all people who are in the same situation as the litigants.[122]

[**102.**] Factors relevant to any order made by this Court include speed, practicality, clarity and the mitigation of any potential damage resulting from the relief of a temporary nature which this Court may give. Further, as was suggested in the second *National Coalition* case,[123] the Court should not shy away from forging innovative remedies should this be required by the circumstances of the case.

[**103.**] In the *Bhe* case before the Cape High Court, paragraphs 1 and 2 of the order given declared section 23(10)(a), (c) and (e) of the Act as unconstitutional and invalid, with the consequence that regulation 2(e) fell away. Section 1(4)(b) of the Intestate Succession Act was also found to be unconstitutional and invalid in so far as it excludes from the application of section 1, any estate or part of any estate in respect of which section 23 of the Act applies. The order goes on to declare that 'until the aforegoing defects are corrected by competent legislature, the distribution of intestate Black estates is governed by [section] 1 of the Intestate Succession Act'.[124] The corresponding part of the order in the *Shibi* application is to similar effect.[125] As pointed out earlier, the application by the South African Human Rights Commission and the Women's Legal Centre Trust has broadened the ambit of the inquiry considerably.[126]

[**104.**] What needs to be determined is the nature and form of the wider relief that should be granted pursuant to the finding that section 23 of the Act is unconstitutional and invalid in its entirety. In terms of section 172(1)(a)[127] of the Constitution, such a finding by the Court must be followed by a declaration of invalidity, to the extent of the inconsistency. Thereafter, the Court 'may make any order that is just and equitable.'[128]

[**105.**] In considering an appropriate remedy in this case, various courses present themselves. They are: (a) whether the Court should simply strike

[122] 1996 (1) SA 388 (CC); 1995 (12) BCLR 1579 (CC) at para 32.
[123] *National Coalition* 2000 above n 56 at para 65.
[124] *Bhe* above n 9 at para 3.
[125] *Shibi* above n 10 at para 3.
[126] Above para 31.
[127] Above n 92.
[128] Section 172 (1)(b) above n 92.

the impugned provisions down and leave it to the legislature to deal with the gap that would result as it sees fit; (b) whether to suspend the declaration of invalidity of the impugned provisions for a specified period; (c) whether the customary law rules of succession should be developed in accordance with the 'spirit, purport and objects of the Bill of Rights',[129] or (d) whether to replace the impugned provisions with a modified section 1 of the Intestate Succession Act or with some other order.

[**106.**] The question of polygynous marriages and whether or not the order by this Court should accommodate them must also be considered. These are complex issues and that is why it is regrettable that the opportunity given to the Chairperson of the House of Traditional Leaders by the Chief Justice to provide their view did not receive a positive response.

Declaration of constitutional invalidity and suspension

[**107.**] In the circumstances of this case it will not suffice for the Court to simply strike down the impugned provisions. There is a substantial number of people whose lives are governed by customary law and their affairs will need to be regulated in terms of an appropriate norm. It will therefore be necessary to formulate an order that incorporates appropriate measures to replace the impugned framework in order to avoid an unacceptable *lacuna* which would be to the disadvantage of those subject to customary law.

[**108.**] Nor can this Court afford to suspend the declaration of invalidity to a future date and leave the current legal regime in place pending rectification by the legislature. The rights implicated are important; those subject to the impugned provisions should not be made to wait much longer to be relieved of the burden of inequality and unfair discrimination that flows from section 23 and its related provisions. That would mean that the benefits of the Constitution would continue to be withheld from those who have been deprived of them for so long.

Development of the customary law and the notion of the 'living' customary law

[**109.**] I have found that the primogeniture rule as applied to inheritance in customary law is inconsistent with the constitutional guarantee of equality. The question whether the Court was in a position to develop that rule in a manner which would 'promote the spirit, purport and objects of the Bill of Rights'[130] evoked considerable discussion during argument. In order to do so, the Court would first have to determine the true content of customary law as it is today and to give effect to it in its order. There is however insufficient evidence and material to enable the Court to do this. The difficulty lies not so much in the acceptance of the notion of 'living' customary law, as distinct from official customary law, but in determining its

[129] Section 39(2) of the Constitution above n 40.
[130] Section 39(2) of the Constitution above n 40.

content and testing it, as the Court should, against the provisions of the Bill of Rights.[131]

[**110.**] It was suggested in argument that if the Court is not in a position to develop the rules of customary law in this case, it should allow for flexibility in order to facilitate the development of the law. The import of this was that since customary law is inherently flexible with the ability to permit compromise settlements,[132] courts should introduce into the system those constitutional principles that the official system of succession violates. It was suggested that this could be done by using the exceptions in the implementation of the primogeniture rule which do occur in the actual administration of intestate succession as the applicable rule for customary law succession in order to avoid unfair discrimination and the violation of the dignity of the individuals affected by it. Those exceptions would, according to this view, constitute the 'living' customary law which should be implemented instead of official customary law.

[**111.**] There is much to be said for the above approach. I consider, however, that it would be inappropriate to adopt it as the remedy in this case. What it amounts to is advocacy for a case by case development as the best option. It is true that there have been signs of evolution in court decisions in recent times, where some courts have shown a willingness to recognise changes in customary law.[133] In *Mabena v Letsoalo*,[134] for instance, it was accepted that a principle of living, actually observed law had to be recognised by the court as it would constitute a development in accordance with the 'spirit, purport and objects' of the Bill of Rights contained in the interim Constitution.[135]

[**112.**] The problem with development by the courts on a case by case basis is that changes will be very slow; uncertainties regarding the real rules of customary law will be prolonged and there may well be different solutions to similar problems. The lack of uniformity and the uncertainties it causes is obvious if one has regard to the fact that in some cases, courts have applied the common law system of devolution of intestate estates.[136] Magistrates and courts responsible for the administration of intestate

[131] In this regard Kerr asks (Kerr 'Role of the courts in developing customary law' 1999 *Obiter* 41, 49-50): '[I]s there a sufficient basis for the declaration by a court of a new legal rule to be applied in all future cases if a few learned authors state that a divergence from an existing rule has been observed in a few instances in practice, and the only evidence on the point before the court is that of one of the parties to the case who is, even though sincere and not dissembling in any way, by virtue of being a party to the case vitally interested in the outcome? With respect I suggest that it is not sufficient.'

[132] See Bennett above n 43, 61.

[133] See for example *Mabuza v Mbatha* 2003 (4) SA 218 (C); 2003 (7) BCLR 743 (C).

[134] 1998 (2) SA 1068 (T).

[135] Id, 1075B-C.

[136] See for example *Makholiso* above n 107.

estates would also tend to adhere to formal rules of customary law as laid down in decisions such as *Mthembu*[137] and its predecessors.

[**113.**] I accordingly have serious doubts that leaving the vexed position of customary law of succession to the courts to develop piecemeal would be sufficient to guarantee the constitutional protection of the rights of women and children in the devolution of intestate estates. What is required, in my view, is more direct action to safeguard the important rights that have been identified.

[**114.**] The Court was urged not to defer to the legislature to make the necessary reforms because of the delays experienced so far in producing appropriate legislation. This was an invitation to the Court to make a definitive order that would solve the problem once and for all. That there have been delays is true and that is a concern this Court cannot ignore. The first proposal by the Law Reform Commission for legislation in this field was made more than six years ago. According to the Minister, the need for broad consultation before any Bill was finalised has been the cause of the delays. Moreover, he was unable to give any guarantee as to when the Bill would become law.

[**115.**] I consider, nevertheless, that the legislature is in the best position to deal with the situation and to safeguard the rights that have been violated by the impugned provisions. It is the appropriate forum to make the adjustments needed to rectify the defects identified in the customary law of succession.[138] What should however be borne in mind is that the task of preventing ongoing violations of human rights is urgent. The rights involved are very important, implicating the foundational values of our Constitution. The victims of the delays in rectifying the defects in the legal system are those who are among the most vulnerable of our society.

[**116.**] The Court's task is to facilitate the cleansing of the statute book of legislation so deeply rooted in our unjust past,[139] while preventing undue hardship and dislocation. The Court must accordingly fashion an effective and comprehensive order that will be operative until appropriate legislation is put in place. Any order by this Court should be regarded by the legislature as an interim measure. It would be undesirable if the order were to be regarded as a permanent fixture of the customary law of succession.

The appropriateness of substituting the Intestate Succession Act

[**117.**] The effect of the High Court orders, in both the *Bhe* and *Shibi* cases is that a modified form of section 1 of the Intestate Succession Act[140]

[137] Above n 22.
[138] See Kerr 'Inheritance in customary law under the interim Constitution and under the present Constitution' 1998 (115) *SA Law Journal* 262, 270.
[139] *Moseneke* above n 34 at para 26.
[140] Section 1 of the Intestate Succession Act is fully set out in n 37.

should be put in place as a substitute for the impugned legislative framework pending appropriate legislation by Parliament. Reservations were however expressed in this Court about whether the Intestate Succession Act was the correct mechanism for this purpose. It will be useful at this stage to give a broad indication of the effect of the detailed provisions of section 1 of the Intestate Succession Act. The section provides for the surviving spouse to inherit in the absence of descendants,[141] for descendants to inherit in the absence of a surviving spouse[142] and for the surviving spouse to inherit the share of a single child (subject to a minimum if there is too little in the estate) if the deceased is survived by both the surviving spouse and descendants.[143] Where the deceased is survived neither by descendants nor by a surviving spouse, the parents of the deceased and, in some circumstances, the parents' descendants and blood relations will benefit. It must be noted that the Intestate Succession Act makes provision for a single surviving spouse only and that extra-marital children are included under the term 'descendants'.[144]

[**118.**] The objection against resorting to the Intestate Succession Act was that its provisions would be inadequate to cater for the various factual situations that arise in customary law succession as the Intestate Succession Act was premised on the nuclear family model. The suggestion was that it would, for instance, not naturally accommodate extended families which are a feature of the customary environment, nor would it have regard to polygynous unions.[145] It was contended that the provisions of the Intestate Succession Act would also have a negative impact upon vulnerable groups such as poor rural women.

[**119.**] A further concern was the fear that the utilisation of the Intestate Succession Act would amount to an obliteration of the customary law of succession, a development that would be undesirable, having regard to the status customary law enjoys under the Constitution. In considering the views above, I must also have regard to the proposals contained in the report of the Law Reform Commission which are set out below.

The proposals of the South African Law Reform Commission

[**120.**] The Law Reform Commission's proposals in this regard are based on the assumption that the Intestate Succession Act, suitably adjusted,[146] is capable of accommodating much of the customary law of succession. In addition, the proposals suggest changes to other statutes, apart from the

[141] Section 1(1)(a).
[142] Section 1(1)(b).
[143] Section 1(1)(c), with the calculation to be made in accordance with section 1(4)(f).
[144] Above n 37.
[145] See Mbatha 'Reforming the customary law of succession' 2002 (18) *SA Journal on Human Rights* 259, 285.
[146] An example would be to give the Master of the High Court powers to resolve a dispute among parties (South African Law Commission Project 90 *Customary Law of Succession* 2004, 65).

Act and the Intestate Succession Act, that have an impact on succession as a whole.[147] What the proposals amount to is that provisions of other legislation should be taken into account, together with the Intestate Succession Act, in fashioning appropriate legislation to replace the current legislative framework.[148] The report recommends that the provisions should ensure that spouses and children should enjoy preference over other dependants of the deceased. It further recommends the extension of the application of the Intestate Succession Act to enable it to accommodate categories of Africans who are presently subject to the customary law of succession. This however does not extend to persons who are not subject to customary law, namely: (a) parties who entered into a civil marriage; (b) those persons who entered into a customary union after the coming into operation of the Recognition of Customary Marriages Act 120 of 1998 (the Recognition Act); and (c) those who have changed their matrimonial property regime in terms of section 7(4) of the Recognition Act, and (d) persons who made a will.[149]

[**121.**] It should be noted that the recommendations of the Law Reform Commission are meant for the consideration of the legislature. However, in fashioning an appropriate order for this case, I have had due regard to the objections against the replacement of the impugned provisions with the Intestate Succession Act as well as to the Law Reform Commission's proposals.

Polygynous unions

[**122.**] In light of the wider relief requested by the South African Human Rights Commission and the Women's Legal Centre Trust, the relief given by the High Courts in both the *Bhe* and the *Shibi* cases falls to be reconsidered. It is now necessary to deal also with the applicability of the order by this Court to polygynous marriages.

[**123.**] Although the Court must be circumspect in taking decisions on issues when those affected have not been heard, the exclusion of spouses in polygynous unions from the order would prolong the inequalities suffered by those subject to the customary law of succession. An order that best fits the circumstances must accordingly be made to protect rights.

[**124.**] An appropriate order will therefore be one that protects partners to monogamous and polygynous customary marriages as well as unmarried

[147] Id 67-8 where it is suggested that the Administration of Estates Act 66 of 1965 be amended as part of the repeal of all the regulations regarding intestate succession by Africans.

[148] In this respect, the South African Law Reform Commission refers to the impact of the Recognition of Customary Marriages Act 120 of 1998, section 7 of which provides for community of property in every customary marriage. It proposes that widows of such customary unions be treated as spouses of their late husbands and that children born from such unions be regarded as dependants of the deceased, id 70.

[149] Id 77.

women and their respective children. This will ensure that their interests are protected until Parliament enacts a comprehensive scheme that will reflect the necessary development of the customary law of succession. It must, however, be clear that no pronouncement is made in this judgment on the constitutional validity of polygynous unions. In order to avoid possible inequality between the houses in such unions, the estate should devolve in such a way that persons in the same class or category should receive an equal share.

[**125.**] The advantage of using section 1 of the Intestate Succession Act as the basic mechanism for determining the content of the interim regime is that extra-marital children, women who are survivors in monogamous unions, unmarried women and all children would not be discriminated against.[150] However, as has been pointed out, the section provides for only one surviving spouse and would need to be tailored to accommodate situations where there is more than one surviving spouse because the deceased was party to a polygynous union. This can be done by ensuring that section 1(1)(c)(i)[151] and section 1(4)(f)[152] of the Intestate Succession Act which are concerned with providing for a child's share of the single surviving spouse and its calculation should apply with three qualifications if the deceased is survived by more than one spouse. First, a child's share would be determined by having regard to the fact that there is more than one surviving spouse. Second, provision should be made for each surviving spouse to inherit the minimum if there is not enough in the estate. Third, the order must take into account the possibility that the estate may not be enough to provide the prescribed minimum to each of the surviving spouses. In that event, all the surviving spouses should share what is in the estate equally. These considerations will be reflected in the order.

Retrospectivity

[**126.**] Section 172(1) of the Constitution empowers this Court, upon a declaration of invalidity to make any order that is just and equitable, including an order to limit the retrospective effect of that invalidity. The statutory provisions and customary law rules that have been found to be inconsistent with the Constitution are so egregious that an order that renders the declaration fully prospective cannot be justified. On the other hand, it seems to me that unqualified retrospectivity would be unfair because it could result in all transfers of ownership that have taken place over a considerably long time being reconsidered. However, an order which exempts all completed transfers from the provisions of the Constitution would also not accord with justice or equity. It would make it impossible to re-open a transaction even where the heir who received transfer knew at the time that the provisions which purport to benefit

[150] The provisions are summarised at para 117 above.
[151] Above n 37.
[152] Above n 37.

him or her were to be challenged in a court. That was the position in the *Shibi* case.

[**127.**] To limit the order of retrospectivity to cases in which transfer of ownership has not yet been completed would enable an heir to avoid the consequences of any declaration of invalidity by going ahead with transfer as speedily as possible. What will accordingly be just and equitable is to limit the retrospectivity of the order so that the declaration of invalidity does not apply to any completed transfer to an heir who is *bona fide* in the sense of not being aware that the constitutional validity of the provision in question was being challenged. It is fair and just that all transfers of ownership obtained by an heir who was on notice ought not to be exempted.

[**128.**] The next issue to be decided is whether it is just and equitable that the order of invalidity should date back to 4 February 1997 when the Constitution became operative. The question is relevant because the deceased in *Shibi* died during 1995, while the interim Constitution was in force. The impugned provisions in this case became inconsistent with the interim Constitution in 1994 when it came into force. It would accordingly be neither just nor equitable for affected women and extra-marital children to benefit from a declaration of invalidity only if the deceased had died after 4 February 1997, but not if the deceased had died after the interim Constitution had come into force but before the final Constitution was operative. I am accordingly of the view that the declaration of invalidity must be retrospective to 27 April 1994 in order to avoid patent injustice.

[**129.**] To sum up, the declaration of invalidity must be made retrospective to 27 April 1994. It must however not apply to any completed transfer of ownership to an heir who had no notice of a challenge to the legal validity of the statutory provisions and the customary law rule in question. Furthermore, anything done pursuant to the winding up of an estate in terms of the Act, other than the identification of heirs in a manner inconsistent with this judgment, shall not be invalidated by the order of invalidity in respect of section 23 of the Act and its regulations.

The facilitation of agreements

[**130.**] The order made in this case must not be understood to mean that the relevant provisions of the Intestate Succession Act are fixed rules that must be applied regardless of any agreement by all interested parties that the estate should devolve in a different way. The spontaneous development of customary law could continue to be hampered if this were to happen. The Intestate Succession Act does not preclude an estate devolving in accordance with an agreement reached among all interested parties but in a way that is consistent with its provisions. There is, for example, nothing to prevent an agreement being concluded between both surviving wives to the effect that one of them would inherit all the deceased's immovable property, provided that the children's interests are not affected

by the agreement. Having regard to the vulnerable position in which some of the surviving family members may find themselves, care must be taken that such agreements are genuine and not the result of the exploitation of the weaker members of the family by the strong. In this regard, a special duty rests on the Master of the High Court, the magistrates and other officials responsible for the administration of estates to ensure that no one is prejudiced in the discussions leading to the purported agreements.

The effect of this judgment

[**131.**] It needs to be emphasised that this judgment is concerned with intestate deceased estates which were governed by section 23 of the Act only. All such estates will henceforth be administered in terms of this judgment. The question arises as to the role of the Master of the High Court, magistrates and other officials appointed by the Master. Section 4(1A) of the Administration of Estates Act[153] provides that the Master shall not have jurisdiction over estates that devolve in terms of customary law.[154] The effect of this judgment is to bring about a change in this respect. The Master is no longer precluded from dealing with intestate deceased estates that were formerly governed by section 23 of the Act since they will now fall under the terms of this judgment and not customary law.

[**132.**] The procedure under the Administration of Estates Act is somewhat different to the procedure under the Act and its regulations. The Administration of Estates Act was recently amended to permit the Master to designate posts in the Department of Justice to exercise the powers and perform the duties delegated to them on behalf of, and under the direction of the Master.[155] The same provision requires service points to be established where these officials may exercise the powers referred to. The Court has not been informed what steps have been taken by the Master in terms of these provisions. Section 18(3) of the Administration of Estates Act (somewhat similarly to section 23(6) of the Act) permits the Master to dispense with the appointment of an executor if the estate does not exceed a stipulated amount (currently set at R125,000).[156] Section 18(3) also permits the Master to 'give directions as to the manner in which any such estate shall be liquidated and distributed.' The terms of this provision are broad enough to permit the Master to hold an inquiry to facilitate the liquidation of the estate as is currently the practice under regulation 3. In the circumstances, I do not think it inappropriate to order

[153] Act 66 of 1965.
[154] Section 4(1A) reads: 'The Master shall not have jurisdiction in respect of any property if the devolution of the property is governed by the principles of customary law, or of the estate of a person if the devolution of all the property of the person is governed by the principles of customary law, and no documents in respect of such property or estate shall be lodged with the Master, except a will or a document purporting to be a will.'
[155] Section 2A(1) and (2) introduced into the Administration of Estates Act by Act 47 of 2002.
[156] Government Gazette 25456 GN R1318, 19 September 2003.

that in future all new estates shall be wound up in terms of the provisions of the Administration of Estates Act. However, in case such an order causes dislocation or harm, I include in the order a provision permitting any interested person to approach this Court on an urgent basis, in the event of serious administrative or practical problems being experienced as a result of this order.

[**133.**] It will be necessary, however, that estates that are currently being wound up under section 23 of the Act and its regulations, continue to be so administered to avoid dislocation. The order will accordingly provide that the provisions of the Act and its regulations shall continue to be applied to those estates in the process of being wound up. All estates that fall to be wound up after the date of this judgment shall be dealt with in terms of the provisions of the Administration of Estates Act.

[**134.**] Finally, a word or two about the High Court judgments in the *Bhe* and *Shibi* cases. Both dealt extensively with the difficult issues which were the subject of the two applications and were of great assistance to this Court. It will however be necessary to set aside the two High Court orders in order to accommodate the broadened ambit of the issues canvassed as a result of the application to this Court by the South African Human Rights Commission and the Women's Legal Centre Trust.

Costs

[**135.**] No costs have been asked for in this matter and there will accordingly beno order for costs made.

The order

[**136.**] The following order is accordingly made:

1. The orders of:

(a) the Cape High Court in the matter of *Bhe and Others v The Magistrate, Khayelitsha and Others*, and
(b) the Pretoria High Court in the matter of *Charlotte Shibi v Mantabeni Freddy Sithole and Others* are hereby set aside.

2. Section 23 of the Black Administration Act 38 of 1927 is declared to be inconsistent with the Constitution and invalid.

3. The Regulations for the Administration and Distribution of the Estates of Deceased Blacks (R200) published in *Government Gazette* no 10601 dated 6 February 1987, as amended, are declared to be invalid.

4. The rule of male primogeniture as it applies in customary law to the inheritance of property is declared to be inconsistent with the Constitution and invalid to the extent that it excludes or hinders women and extra-marital children from inheriting property.

5. Section 1(4)(b) of the Intestate Succession Act 81 of 1987 is declared to be inconsistent with the Constitution and invalid.

6. Subject to paragraph 7 of this order, section 1 of the Intestate Succession Act 81 of 1987 applies to the intestate deceased estates that would formerly have been governed by section 23 of the Black Administration Act 38 of 1927.

7. In the application of sections 1(1)(c)(i) and 1(4)(f) of the Intestate Succession Act 81 of 1987 to the estate of a deceased person who is survived by more than one spouse:

(a) A child's share in relation to the intestate estate of the deceased, shall be calculated by dividing the monetary value of the estate by a number equal to the number of the children of the deceased who have either survived or predeceased such deceased person but are survived by their descendants, plus the number of spouses who have survived such deceased;
(b) Each surviving spouse shall inherit a child's share of the intestate estate or so much of the intestate estate as does not exceed in value the amount fixed from time to time by the Minister for Justice and Constitutional Development by notice in the *Gazette*, whichever is the greater; and
(c) Notwithstanding the provisions of sub-paragraph (b) above, where the assets in the estate are not sufficient to provide each spouse with the amount fixed by the Minister, the estate shall be equally divided between the surviving spouses.

8. In terms of section 172(1)(b) of the Constitution, the orders in paragraphs 2, 3, 4, 5 and 6 of this order, shall not invalidate the transfer of ownership prior to the date of this order of any property pursuant to the distribution of an estate in terms of section 23 of the Black Administration Act 38 of 1927 and its regulations, unless it is established that when such transfer was taken, the transferee was on notice that the property in question was subject to a legal challenge on the grounds upon which the applicants brought challenges in this case.

9. In terms of section 172(1)(b) of the Constitution, it is declared that any estate that is currently being administered in terms of section 23 of the Black Administration Act 38 of 1927 and its regulations shall continue to be so administered, despite the provisions of paragraphs 2 and 3 of this order, but subject to paragraphs 4, 5 and 6 of this order, until it is finally wound up.

10. Any interested person may approach this Court for a variation of this order in the event of serious administrative or practical problems being experienced.

11. (a) In the matter of *Bhe and Others v The Magistrate, Khayelitsha and Others:*

(i) it is declared that Nonkululeko Bhe and Anelisa Bhe are the sole heirs of the deceased estate of Vuyo Elius Mgolombane, registered at Khayelitsha Magistrates' Court under reference no 7/1/2-484/2002; (ii) Maboyisi Nelson Mgolombane is ordered to sign all documents and to take all other steps reasonably required of him to transfer the entire residue of the said estate to Nonkululeko Bhe and Anelisa Bhe in equal shares; (iii) The Magistrate, Khayelitsha, is ordered to do everything required to give effect to the provisions of this judgment.

(b) In the matter of *Charlotte Shibi v Mantabeni Freddy Sithole and Others:*

(i) it is declared that Charlotte Shibi is the sole heir of the deceased estate of Daniel Solomon Sithole registered at Pretoria North Magistrate District of Wonderboom under the reference no 7/1/2-410/95; (ii) Mantabeni Freddy Sithole is ordered to pay Charlotte Shibi the sum of R11,505.50; (iii) Jerry Sithole is ordered to pay Charlotte Shibi the sum of R11,468.02.

UGANDA

Obbo and Another v Attorney-General

(2004) AHRLR 256 (UgSC 2004)

Charles Onyango Obbo and Andrew Mujuni Mwenda v Attorney-General
Supreme Court of Uganda, constitutional appeal 2 of 2002, 11 February 2004
Judges: Odoki, Oder, Tsekooko, Karokora, Mulenga, Kanyeihamba, Byamugisha
Extract: Judgment of Mulenga. Full text on www.chr.up.ac.za

Fair trial (precision and clarity in definition of criminal offence, 8; presumption of innocence, 35)
Limitations of rights (acceptable in a democratic society, 9, 12, 13, 19, 28, 48, 49; balancing competing interests, 28-31, 42, 45-47, 50; proportionality, 51; predictability, 52-56; onus on state to prove that limitations are justified, 62)
Interpretation (international standards, 15, 16, 25)
Expression (false news, 18, 21, 22, 33-35, 39, 52, 53; democratic society, 19, 24, 26, 53; law of defamation, 44; public figures must face a higher degree of criticism than others, 53, 54)
Democracy (protection of human rights, 23, 24, 48)
Judicial review (construction of statutes, 44)

Mulenga JSC

[**1.**] This appeal is against a decision of the Constitutional Court in a petition seeking to invoke constitutional protection for the freedom of the press. The Constitution of the Republic of Uganda 1995 (the Constitution) in article 29, guarantees protection of the individual right of freedom of expression, which includes freedom of the press. The central issue in this appeal is whether section 50 of the Penal Code Act (section 50), which makes publication of false news a criminal offence, contravenes that protection.

[**2.**] Charles Onyango Obbo and Andrew Mujuni Mwenda, the appellants in this appeal, are practising journalists. At all the material times, they were, respectively, an editor and a senior reporter of the *Monitor* newspaper. On 24 October 1997, the two were jointly charged in the Magistrates' Court on two counts of the criminal offence of 'publication of false news' contrary to section 50. The charges arose out of a story that the

appellants extracted from a foreign paper called *The Indian Ocean Newsletter*, and published in the *Sunday Monitor* of 21 September 1997, under the headline: 'Kabila paid Uganda in gold, says report'. The particulars of offence in one count recited the following excerpt from the story as the alleged false news:

> President Laurent Kabila of the newly named Democratic Republic of the Congo (formerly Zaire) has given a large consignment of gold to the government of Uganda as payment for 'services rendered' by the latter during the struggle against the former military dictator, the late Mobutu Sese Seko.

[**3.**] The alleged false news recited in the other count was:

> The commander of Uganda Revenue's (URA) Anti Smuggling Unit (ASU) Lt Col Andrew Lutaya, played a key role in the transfer of the gold consignment from the Democratic Republic of Congo to Uganda.

[**4.**] On 24 November 1997, the appellants who believed that their prosecution was a violation of their several rights guaranteed by the Constitution, decided to seek legal relief through a joint petition to the Constitutional Court, under article 137 of the Constitution, seeking, *inter alia*, declarations:

(a) That the action of the Director of Public Prosecutions (DPP) in prosecuting them under section 50, was inconsistent with the provisions of articles 29(1)(a) and (e), 40(2) and 43(2)(c) of the Constitution; and
(b) That section 50 is inconsistent with the provisions of articles 29(1)(a) and (b), 40(2) and 43(2)(c) of the Constitution.

[**5.**] The Court postponed consideration of the petition pending conclusion of the criminal case in the Magistrates' Court. I will revert to that postponement later in this judgment. It suffices to say here, that the trial Court acquitted the appellants of the criminal charges.

[**6.**] Subsequently, the Constitutional Court considered the petition and decided:

(a) Unanimously, that the DPP's action in prosecuting the appellants was not inconsistent with the Constitution; and
(b) By majority of four to one, that section 50 is not inconsistent with article 29(1)(a) of the Constitution;

and accordingly, dismissed the petition. In their appeal to this Court, the appellants do not challenge the unanimous decision that the DPP's action was not inconsistent with the Constitution. They also do no pursue the original allegations that the prosecution and the law it was based on, infringed upon their rights to the freedoms of thought, conscience, belief, and association, and/or freedom to practice their profession, which rights are protected under article 29(1)(b) and (e), and article 40(2) of the Constitution. The appeal to this Court is solely against the majority decision that section 50 is not inconsistent with article 29(1)(a) of the Constitution.

In substance, the three grounds of appeal are that, the learned Justices of Appeal erred:

1. In (failing to find) that section 50 is not demonstrably justifiable in a free and democratic society within the meaning of article 43;
2. In holding that section 50 is part of the existing laws saved by article 273; and
3. In not addressing their minds to the vagueness of section 50.

[**7.**] To my mind, the issues in grounds 2 and 3 are inseparable from the issue in ground 1, and so it is unnecessary to consider the grounds separately. I will explain briefly. The submission in support of ground 2, is on the premise that section 50 was 'rooted' in the provisions of article 17(2) of 'the 1967 Constitution', which provisions were not re-enacted in the current Constitution when the former was repealed. Counsel for the appellants argued that in absence of those provisions, section 50 ceased to have constitutional roots, and therefore, ceased to exist. That is not correct. Section 50 did not originate from the repealed Constitution. Article 17 of the 1967 Constitution guaranteed the right to freedom of expression in clause 1 and in clause 2, it gave an omnibus 'cover of constitutionality' to any law derogating from that right, if the law was 'reasonably required in the interests of ... public safety, public order ...'. It is arguable that section 50 enjoyed that 'cover of constitutionality', as a law reasonably required in the interests of public safety and public order. However, neither that particular clause, nor the 1967 Constitution as a whole, was the source of its existence. Section 50 existed long before Uganda acquired a Constitution entrenching a Bill of Rights. It has never been repealed, notwithstanding the loss of the 'cover of constitutionality' in 1995. It remains a law that existed 'immediately before the coming into force' of the Constitution, which under article 273, like all other existing law, has to be construed, in a manner that brings it into conformity with the Constitution. Whether it can be so construed, to conform with article 43 is the underlying question in ground 1.

[**8.**] The substance of ground 3 is criticism of the construction of section 50. The gist of the criticism is that the section is too imprecise for a legal legislation. I must say that much of the criticism is quite valid. Precision and clarity in the definition of a criminal offence is essential, if a person accused of the offence is to have a fair trial. This Court has held that to be the import of clause 12 of article 28 of the Constitution. See *Attorney General v Silvatori Abuki* constitutional appeal 1 of 1998 (SCD (Const) 1999/2000 245). In their petition, however, the appellants did not allege that section 50 contravened the right to a fair hearing guaranteed under article 28; nor did they seek a declaration to that effect. In their written submissions to the Constitutional Court, they did not canvass the point, and in this appeal, the thrust of their contention remained that section 50 was inconsistent with the freedom of expression, with emphasis on freedom of the press. In that context, the criticism in ground 3 as presented,

would be irrelevant to the issue in this appeal. This appeal is not concerned with fairness or otherwise of the appellants' trial in the criminal Court. I hasten to acknowledge, however, that in defining any derogation of a right guaranteed by the Constitution, precision and clarity are of the essence. To that extent, the content of section 50 is relevant in considering if it is within the parameters of permissible limitation. That aspect of the criticism in ground 3 is an integral part of ground 1.

[**9.**] Mr Nangwala, learned lead counsel for the appellants, submitted that the source of the error in the court decision was the failure, on the part of the majority of the learned Justices of Appeal, to address the import of the provision in paragraph (c) of article 43(2). Under that provision, a limitation on the enjoyment of a constitutional right, on the ground of public interest, is valid only if it is 'acceptable and demonstrably justifiable in a free and democratic society'. Counsel correctly found section 50 to be a limitation on the right of freedom of expression; it failed to consider whether the section was within the parameters of that provision. He submitted that section 50, as such limitation, is not acceptable and demonstrably justifiable in a free and democratic society. He criticised the learned Justices of Appeal for failure to consider, and take leaf from, judicial precedents on the subject from other jurisdictions, which were referred to the Court. He contended that Uganda as a democratic society, must apply the universal standards of a democratic society; and that under those standards, it is not justifiable to criminalize publication of false news. Mr Rezida, the learned second counsel for the appellants focussed on what he called the vagueness of section 50, and highlighted its very wide applicability, which makes it difficult to determine its scope.

[**10.**] In response, Mr Cheborion Barishaki, Commissioner for Civil Litigation, submitted that it was necessary to use criminal law for excluding from the range of free choice, those acts that are incompatible with maintenance of public peace and order. Section 50 is such necessary criminal law. It prohibits excesses in the exercise of the freedom of expression. It prohibits publication of statements, which are false and are likely to cause public fear or alarm or to disturb peace. He submitted that the prohibition was proportional to the danger it is intended to prevent. The learned Commissioner submitted that in determining if that prohibition is 'acceptable and demonstrably justified' in the context of article 43, this Court should apply a subjective interpretation, because it is local circumstances that dictate what is acceptable and justified. A law may be acceptable and justifiable in the circumstances of Uganda, while it is unacceptable and unjustifiable in circumstances of another country, even though both countries are democratic societies. He invited this Court to uphold the majority decision of the Constitutional Court.

[**11.**] In his judgment, with which the majority of the Constitutional Court concurred, Berko JA considered the merits of the appellants' petition under two broad heads. Under the first, he considered the complaint against the

DPP's decision to prosecute the appellants. His conclusion on that complaint is not subject of this appeal. The second was the complaint that section 50 is inconsistent with the Constitution. I will review in some detail how he handled it. First he dealt with a couple of preliminary points, which he concluded by holding

- that in order for section 50 to conform to article 43(1), it has to be construed as if the offence is constituted when the *false statement . . . is likely to prejudice the rights and freedoms of others or the public interest*; and
- that sub-section (2) of section 50, which requires the accused to prove that he tried to verify the truth of the statement, is in accord with criminal procedure and is not unconstitutional.

[**12.**] The learned Justice of Appeal then dealt with the principal issue in the following passage of his judgment:

> I do agree that article 29(1) of the Constitution guarantees free speech and expression and also secures press freedom. These are fundamental rights. It can be said that tolerating offensive conduct and speech is one of the prices to be paid for a reasonably free and open society. Therefore in my view, the functions of the law, and particularly criminal law, should (be to) exclude from the range of individual choice those acts that are incompatible with the maintenance of public peace and safety and rights of individuals. Freedom of speech and expression cannot be invoked to protect a person 'who falsely shouts fire, fire, in a theatre and causing panic'. In my opinion *where there are no constraints on freedom of speech and expression, the difficulty would arise that one of the objects of upholding free expression — truth — would be defeated.* It is therefore important to regulate or limit the extent to which this can happen. That is reason for the justification for enacting article 43 of the Constitution. A citizen is entitled to express himself freely except where the expression would *prejudice the fundamental or other human rights and freedoms of others or the public interest. I find that section 50 of the Penal Code is necessary to cater for such excesses. Clearly the democratic interest cannot be seen to require citizens to make demonstrably untrue and alarming statements under the guise of freedom of speech and expression. The section prohibits illegal and criminal conduct under the cover of freedom of speech and expression.* I do not subscribe to the argument . . . that the truth or falsehood of the article is not the issue. In my view the truth or falsehood of the article is one of the ingredients of the offence the state has to prove. *It may well be that no adverse consequences to public interest resulted in the publication of this particular article. That was the reason why the state could not prove the charges against the petitioners. There is no guarantee that such an eventuality could not occur in future. That is the justification for having such laws in place.* In my view section 50 of the Penal Code Act is not inconsistent with the Constitution. (Emphasis is added).

[**13.**] There are a number of flaws in this passage. To start with, I will highlight two major flows, which closely touch on the scope of the right to freedom of expression. The first is that the learned Justice of Appeal omitted to consider if section 50 was within the parameters of article 43(2)(c). He only focussed on rationalising the need for limitation on

the freedom of expression by law, and was content to hold that section 50 was a necessary legal limitation. However, the appellants' case in the Constitutional Court, as in this Court, was not that the freedom of expression is absolute. They acknowledge that the enjoyment of the freedom of expression is subject to article 43, which provides for general limitation on the enjoyment of human rights and freedoms prescribed in the Constitution. Their contention is that section 50 is inconsistent with the Constitution because the limitation it imposes on the enjoyment of the right to freedom of expression, is beyond what is permitted under article 43. There is no finding on that contention in the majority judgment. It is therefore imperative for this Court to consider the contention to make a finding on it.

Falsity and freedom of expression

[**14.**] The second flaw is implicit in the observation that in absence of constraints on the freedom of expression, the objective of upholding truth would be defeated. This presupposes that to extend the constitutional protection of freedom of expression to false statements is incompatible with 'upholding truth'. In my view, there is no such incompatibility. Extending protection of the freedom of expression to false statements does not necessarily defeat the objective of upholding the truth, because while truth and falsity are mutually exclusive, the purposes for protecting both are not. I will return to that later in this judgment. I will first consider whether the constitutional provision pertaining to the protection of the right to freedom of expression, and to the limitation of its enjoyment, lend any credence to the supposition that the protection does not extend to false expressions.

[**15.**] The Constitution, declares the right to freedom of expression in article 29 thus: '(1) Every person shall have the right to (a) freedom of speech and expression, which shall include freedom of the press and other media'. That declaration does not stipulate or specify what a person is free to say or express. The Constitution, unlike its 1967 predecessor, does not provide a definition of the freedom of expression or of the press. Nor does it describe the scope of that freedom. Even the Press and Journalist Act (Cap 105), which was enacted in 1995 'to ensure the freedom of the press', does not define that freedom. Nevertheless, there is not dispute as to what that freedom encompasses. In the 1967 Constitution, and before that, in the Independence Constitution of 1962, the freedom of expression was defined as 'freedom to hold opinions and to receive and impart ideas and information without interference . . .' I do not think that the omission to include that definition in the Constitution altered the meaning or character of the freedom as previously defined. The definition still holds good. It is also instructive to look at definitions of the same freedom in international instruments, to which Uganda is party. The African Charter on Human and Peoples' Rights simply states in article 9 that '1. Every individual shall have the right to receive information; 2. Every

individual shall have the right to express and disseminate his opinions within the law.'

[**16.**] However, in order 'to elaborate and expound on the nature, content and extent of the right provided for under article 9', the African Commission on Human and Peoples' Rights in its 32nd ordinary session in October 2002, adopted the Declaration of Principles on Freedom of Expression in Africa, and recommended to the African States to guarantee the freedom thus

> 1. Freedom of expression and information, including the right to seek, receive and impart information and ideas, either orally, in writing or in print, in the form of art, or through any other form of communication, including across frontiers, is a fundamental and inalienable human right and an indispensable component of democracy.
> 2. Everyone shall have an equal opportunity to exercise the right to freedom of expression and to access information without discrimination.

[**17.**] In the International Covenant on Civil and Political Rights, article 19 provides

> 1. Everyone shall have the right to hold opinions without interference.
> 2. Everyone shall have the right to freedom of expression, this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

[**18.**] From the foregoing different definitions, it is evident that the right to freedom of expression extends to holding, receiving and imparting all forms of opinions, ideas and information. It is not confined to categories, such as correct opinions, sound ideas or truthful information. Subject to the limitation under article 43, a person's expression or statement is not precluded from the constitutional protection simply because it is thought by another or others to be false, erroneous, controversial or unpleasant. Everyone is free to express his or her views. Indeed, the protection is most relevant and required when a person's views are opposed or objected to by society or any part thereof, as 'false' or 'wrong'. I think, with due respect, to the learned Berko JA, he misconstrued what was in issue when he said

> the democratic interest cannot be seen to require (sic) citizens to make demonstrably untrue and alarming statements under the guise of freedom of speech and expression. The section prohibits illegal and criminal conduct under the cover of speech and expression.

[**19.**] First, it is inaccurate to assert that section 50 prohibits 'illegal and criminal conduct'. Rather, the section criminalizes conduct that is otherwise legitimate exercise of the constitutionally protected right to freedom of expression. It is for that reason that the appellants came to court to challenge the section as inconsistent with the Constitution. Secondly, the issue is not whether under democracy citizens are required or permitted to make demonstrably untrue and alarming statements under any guise. A

democratic society respects and promotes the citizens' individual right to freedom of expression, because it derives benefit from the exercise of that freedom by its citizens. In order to maintain that benefit, a democratic society chooses to tolerate the exercise of the freedom even in respect of 'demonstrably untrue and alarming statements', rather than to suppress it. I think the point is well articulated in the following excerpt from an article by Archibald Cox in *Society* vol 24 p 8 no 1 Nov/Dec 1986:

> Some propositions seem true or false beyond rational debate. Some false and harmful political and religious doctrines gain wide public acceptance. Adolf Hitler's brutal theory of a 'master race' is sufficient example. *We tolerate such foolish and sometimes dangerous appeals not because they may prove true but because freedom of speech is indivisible.* The liberty cannot be denied to some ideas and saved for others. The reason is plain enough, no man, no committee, and surely no government, has the infinite wisdom and disinterestedness accurately and unselfishly to separate what is true from what is debatable, and both from what is false. (Emphasis is added).

[**20.**] There is support for this view in judicial precedents from diverse jurisdictions that uphold and enforce the right to freedom of expression. The Supreme Court of Canada upheld the view in *R v Zundel* (1992) 10 CRR (2nd) 193. McLachlin J, as she then was, writing the majority judgment, had this to say:

> Tests of free expression frequently involve a contest between the (majority) view of what is true or right and an unpopular minority view. As Holmes J stated over 60 years ago, the fact that the particular content of a person's speech might 'excite popular prejudice' is no reason to deny it protection for 'if there is any principle of the Constitution that more imperatively call for attachment than any other it is the principle of free thought — not free thought for those who agree with us but freedom for the thought that we hate' . . . Thus the guarantee of freedom expression serves . . . to preclude the majority's perception of truth or public interest from smothering the minority's perception.

[**21.**] Rejecting an argument raised in that case, that a deliberate lie is not protected because it is an illegitimate form of expression, which does not serve any of the values for which the freedom of expression is guaranteed, she said in conclusion, at 209:

> Before we deny a person the protection which the most fundamental law of this land on its face accords to the person, we should, in my belief, be entirely certain that there can be no justification for offering protection. *The criterion of falsity falls short of this certainty given that false statements can some times have value and given the difficulty of conclusively determining total falsity.* Applying the broad, purposive interpretation of the freedom of expression guaranteed by s 2(b) hitherto adhered to by this court, I cannot accede to the argument that those who deliberately publish falsehoods are for that reason alone precluded from claiming the benefit of the constitutional guarantees of free speech. (Emphasis is added).

[**22.**] I respectfully agree with the view. I should stress that applying the constitutional protection to false expressions is not to 'uphold falsity' as

implied in the majority judgment. The purpose is to avoid the greater danger of 'smothering alternative views' of fact or opinion.

Freedom of expression in democracy

[**23.**] Democratic societies uphold and protect fundamental human rights and freedoms, essentially on principles that are in line with JJ Rousseau's version of the social contract theory. In brief, the theory is to the effect that the pre-social humans agreed to surrender their respective individual freedom of action, in order to secure mutual protection, and that consequently, the *raison d'être* of the state is to provide protection to the individual citizens. In that regard, the state has the duty to facilitate and enhance the individual's self-fulfilment and advancement, recognising the individual's rights and freedoms as inherent in humanity. Uganda acknowledges this in article 20 of the Constitution, which reads:

> 1. Fundamental rights and freedoms of the individual are inherent and not granted by the state.
> 2. The rights and freedoms of the individual and groups enshrined in this Chapter shall be respected, upheld and promoted by all organs and agencies of government and by all persons.

[**24.**] Protection of the fundamental human rights therefore, is a primary objective of every democratic constitution, and as such is an essential characteristic of democracy. In particular, protection of the right to freedom of expression is of great significance to democracy. It is the bedrock of democratic governance. Meaningful participation of the governed in their governance, which is the hallmark of democracy, is only assured through optimal exercise of the freedom of expression. This is as true in the new democracies as it is in the old ones. In *R v Zundel* (*supra*) at 205, the following excerpt from an earlier judgment in *Edmonton Journal v Alberta (AG)* (1989) 2 SCR 1326, was cited with approval:

> It is difficult to imagine a guaranteed right more important to democratic society than freedom of expression. Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over-emphasised. . . . It seems that the rights enshrined in s 2(b) should therefore only be restricted in the clearest of circumstances.

[**25.**] The European Convention for the Protection of Human Rights and Fundamental Freedoms, protects the right to freedom of expression under article 10. In its judgment in the *Lingens* case, [application 9185/82, decided 8 July 1986], the European Court of Human Rights said:

> Freedom of expression, as secured in paragraph 1 of article 10, constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference but also to those that offend, shock or disturb. Such are the demands of that pluralism,

> tolerance and broadmindedness without which there is no 'democratic society'. . . . These principles are of particular importance so far as the press is concerned. Whilst the press must not overstep the bounds set, *inter alia*, for the 'protection of the reputation of others', it is nevertheless incumbent on it to impart information and ideas on political issues just as those in other areas of public interest. Not only does the press have the task of imparting such information and ideas; the public also has a right to receive them. (See para 41).

[**26.**] Uganda, like any other democratic society, is committed to upholding the right to freedom of expression. That commitment, and indeed our adherence to democratic practices may not be as long standing as in the older democracies, but it is as real and it is for that reason that it is entrenched in the most binding instrument of the land. The Constitution guarantees to everyone in Uganda the right of freedom to hold opinions and to receive and impart ideas and information without interference. I should add that the commitment is not evident in the constitutional provisions only. The enactment in 1995, of the Press and Journalist statute, to ensure press freedom, is additional evidence of the commitment. The statute, *inter alia*, repealed the Press Censorship and Correction Act of 1915, and introduced a good measure of self-regulatory mechanism for the promotion of professional and responsible exercise of press freedom. However, the strongest evidence, which is without doubt common knowledge, is the outpouring vigour and enthusiasm with which not only the media, but also the public at large, exercise the freedom of expression in practice. In my view, it is because of that commitment, and the importance of the freedom of expression to democracy, that restriction on the exercise of the freedom is permitted only in special circumstances.

Limitation on freedom of expression

[**27.**] It is common ground that the protection of the right to freedom of expression is subject to article 43, which provides for permissible restriction as follows:

> 1. In the enjoyment of the rights and freedoms prescribed in this Chapter, no person shall *prejudice* the fundamental or other human rights and freedoms of others or the public interest.
> 2. Public interest under this article shall not permit — (a) political persecution; (b) detention without trial; (c) any limitation of the enjoyment of the rights and freedoms prescribed by this Chapter *beyond what is acceptable and demonstrably justifiable in a free and democratic society*, or what is provided in this Constitution. (Emphasis is added).

[**28.**] The provision in clause (1) is couched as a prohibition of expressions that 'prejudice' rights and freedoms of others and public interest. This translates into a restriction on the enjoyment of one's rights and freedoms in order to protect the enjoyment by 'others', of their own rights and freedoms, as well as to protect the public interest. In other words, by virtue of the provision in clause (1), the constitutional protection of one's enjoyment of rights and freedoms does not extend to two scenarios, namely: (a) where the exercise of one's right or freedom 'prejudices' the human right

of another person; and (b) where such exercise 'prejudice' the public interest. It follows therefore, that subject to clause (2), any law that derogates from any human right in order to prevent prejudice to the rights or freedoms of others or the public interest, is not inconsistent with the Constitution. However, the limitation provided for in clause (1) is qualified by clause (2), which in effect introduces a' limitation upon the limitation'. It is apparent from the wording of clause (2) that the framers of the Constitution were concerned about a probable danger of misuse or abuse of the provision in clause (1) under the guise of defence of public interest. For avoidance of that danger, they enacted clause (2), which expressly prohibit the use of political persecution and detention without trial, as means of preventing, or measures to remove, prejudice to the public interest. In addition, they provided in that clause a yardstick, by which to gauge any limitation imposed on the rights in defence of public interest. The yardstick is that the limitation must be acceptable and demonstrably justifiable in a free and democratic society. This is what I have referred to as a' limitation upon the limitation'. The limitation on the enjoyment of a protected right in defence of public interest is in turn limited to the measure of that yardstick. In other words, such limitation, however otherwise rationalised, is not valid unless its restriction on a protected right is acceptable and demonstrably justifiable in a free and democratic society.

[**29.**] The co-existence in the same Constitution, of protection and limitation of the rights, necessarily generates two competing interests. On the one hand, there is the interest to uphold and protect the rights guaranteed by the Constitution. On the other hand, there is the interest to keep the enjoyment of the individual rights in check, on social considerations, which are also set out in the Constitution. Where there is conflict between the two interests, the court resolves it having regard to the different objectives of the Constitution.

[**30.**] As I said earlier in this judgment, protection of the guaranteed rights is a primary objective of the Constitution. Limiting their enjoyment is an exception to their protection, and is therefore a secondary objective. Although the Constitution provides for both, it is obvious that the primary objective must be dominant. It can be overridden only in the exceptional circumstances that give rise to that secondary objective. In that eventuality, only minimal impairment of enjoyment of the right, strictly warranted by the exceptional circumstance is permissible. The exceptional circumstances set out in clause (1) of article 43 are the prejudice or violation of protected rights of others and prejudice or breach of social values categorised as public interest. In *Rangarajan v Jagjivan Ram and Others; Union of India and Others v Jagvan Ram and Others* (1990) LRC (Const) 412, the Supreme Court of India put the point this way, at 427:

> There does indeed have to be a compromise between the interest of freedom of expression and social interest. But we cannot simply balance the two interests as if they were of equal weight. Our commitment to freedom of expression demands that it cannot be suppressed unless the situations created by allowing the

> freedom are pressing and the community interest is endangered. The anticipated danger should not be remote, conjectural or farfetched. It should be proximate and (have) direct nexus with the expression. The expression of thought should be intrinsically dangerous to the public interests. In other words the expression should be inseparably locked up with the action contemplated like the equivalent of a 'spark in a powder keg'.

[**31.**] I agree with the proposition that the freedom of expression ought not to be suppressed except where allowing its exercise endangers community interest. It is in that context that I have to consider whether section 50 is a valid limitation under the Constitution.

Section 50

[**32.**] As I have already indicated, the validity of section 50 now depends on whether its provisions fit within the parameters set down in article 43. Section 50 reads thus:

> 1. Any person who publishes any false statement, rumour or report which is likely to cause fear and alarm to the public or to disturb the public peace is guilty of a misdemeanour.
> 2. It shall be a defence to a charge under sub-section (1) if the accused proves that prior to publication, he took such measures to verify the accuracy of the statement, rumour and or report as to lead him to believe that it was true.

[**33.**] In order to establish the offence under section 50, the prosecution has to prove the following ingredients:

- That the accused published the statement, rumour or report;
- That the statement, rumour or report is false;
- That the published statement, rumour or report is likely to cause fear and alarm to the public or to disturb the public peace.

[**34.**] Significantly, to establish the guilt of the person accused of the offence, the prosecution does not have to prove that the accused knew the statement to be false. Instead, in order to establish his innocence the accused has the onus to prove that he tried to verify the accuracy of the statement. In this regard, I do not share the view expressed in the majority judgment of the Constitutional Court, where it was said:

> I do not find anything offensive about the requirement for the accused to establish his defence or offer an explanation after a *prima facie* case has been established against him. That is what obtains in an adversarial criminal justice system. An accused person is only required to enter into his defence after the court has found a *prima facie* case . . . against him. This procedure is provided for by section 71 of the Trial on Indictment Decree . . . That requirement cannot therefore make the section unconstitutional.

[**35.**] With due respect, the suggestion that the provision in section 50(2) is merely procedural, regulating the time for presentation of the defence case is erroneous. The provision places on a person on trial for that offence the onus of providing lack of guilty knowledge. Far from being 'what

obtains in adversarial criminal justice system', it is an exception to the general rule that in a criminal trial, the onus of proof remains on the prosecution throughout, and does not shift to the defence. Furthermore, I should point out and stress that by the definition of the offence, liability for conviction, let alone for prosecution, does not depend on any actual occurrence of public fear or alarm or disturbance of public peace. Liability for prosecution depends on the state prosecutor's perception of the impact the expression is likely to have on the public; and liability for conviction depends on whether the court is persuaded to share the same perception.

[**36.**] In my view, although those two characteristics of the offence *per se* do not make the provision unconstitutional, they must be considered in determining if the limitation section 50 imposes on the constitutionally guaranteed right, is acceptable and demonstrably justifiable in a free and democratic society.

Objective of section 50

[**37.**] It is important to identify the objective and effect of section 50, to the extent they are discernable. Much as counsel on both sides exhibited commendable effort in presentation of argument, neither addressed us on that aspect. I also have not been able to access the contemporary legislative materials that would have helped me to identify the 'mischief' that the legislature sought to remedy in enacting section 50. In his minority judgment in the Constitutional Court, the learned Twinomujuni JA, traced the origin of the false statement offences to a 13th century English statute that created the offence of *scandalis magnatum*. The offence was to tell or publish false news or tales that could cause 'discord or slander between the King and his people or the great men of the realm'. He also referred to the judgment in *R v Zundel* (*supra*), in which it was said that the primary aim of *scandalis magnatum* had been 'the prevention of false statements, which in a society dominated by extremely powerful landowners could threaten the security of the state'. It was also observed therein that: 'This was no vain fear at a time when the offended great one was only too ready to resort to arms to redress a fancied injury'.

[**38.**] England abolished the offence in 1887. Going by the timing and definition of the offence under section 50, however, I think its objective cannot have been the same as that of *scandalis magnatum*. The aim of the colonial legislature, in enacting section 50, is more likely to have been akin to that of the legislature in the former colony of Southern Rhodesia, for enacting a similar law, of which Gubbay CJ, in *Mark Gova Chavunduka & Another v Minister of Home Affairs & Another*, (SC 36/2000: civil application 156/99) had this to say:

> It was, however justified by the government ... on the basis that it would provide a safeguard against the attempts of irresponsible journalists and rumourmongers 'to create chaos out of order'; no instance of any such occurrence

was mentioned — only a rumour circulating in the then Northern Rhodesia that cigarettes had been poisoned.

[**39.**] I think it is reasonable to infer from the wording of section 50, that at the time, when political agitation for self governance was in early stages, the colonial legislature in Uganda would have wanted to provide a legal safeguard against the spreading of news, rumours or reports that could destabilise the populace, with probable effect of undermining the authority of the colonial regime. As for the retention of that law subsequent to the colonial administration, the probable reason is that the process of law reform has not been vigorous or extensive enough to review the relevance of laws, such as section 50, in the changed circumstances since their enactment. In the circumstances, one cannot with certainty, point to the purpose for which section 50 is retained in the Penal Code today. The effect of section 50, however, is evident. It makes any person who publishes a statement, rumour or report, which the prosecution holds out to be 'false' and to be 'likely' to cause public fear or alarm, or a disturbance of public peace, liable to criminal prosecution, and to imprisonment if convicted. What can be said with certainty therefore, is that section 50 is supposed to protect the public against false statements, rumours and reports that are likely to cause any of the stated mischief.

[**40.**] It is not in dispute that the impugned section 50 is a limitation on the enjoyment of the right to the freedom of expression; and that it is concerned with public interest rather than the rights of others. What is in contention is whether, as such a limitation, it fits within the parameters of article 43. To fit within those parameters, it must satisfy two conditions; namely:

- It must be directed to prevent or remove 'prejudice to public interest' (clause 1); and in addition,
- It must be a measure that is acceptable and demonstrably justifiable in a free and democratic society (clause 2).

[**41.**] These conditions, which are interrelated, in effect constitute the sub-issues in this appeal.

Prejudice to public interest

[**42.**] I will consider the first sub-issue from two complimentary perspectives, namely the form and the substance of section 50. Clause (1) of article 43 allows for derogation of rights, or limitation of their enjoyment, in respect of two exceptional circumstances or scenarios, namely, where the enjoyment, of one's right 'prejudices' either the personal rights of others or the public interest. Those are grave circumstances presenting actual mischief or danger to 'the rights of others' or to 'the public interest'. In those exceptional circumstances, the Constitution allows for derogation or limitation in order to avert or remove real mischief or danger. The clause does not expressly or implicitly extend to a third scenario, where the

enjoyment of one's right is 'likely to cause prejudice'. I do not understand the clause to permit derogation of guaranteed rights or limitation of their enjoyment, in order to avert speculative or conjectural mischief or danger to public interest. Section 50, however, relates precisely to that third scenario. It is directed to a danger, if it is a danger at all, which is remote, and even uncertain. At most, section 50 aims at pre-empting danger to the public interest. It is in that regard distinguishable from a law directed to prevent, for example, expressions that amount to threatening or inciting violence. The danger to the public interest in such circumstances is proximate to the act of the expression, and therefore the expression 'prejudices' the public interest. A recent example in recent history is the use of the mass media to ignite genocide in Rwanda. On the face of it therefore, section 50 in its current form does not fall within the description of the purposes for which limitation on enjoyment of rights is permissible under article 43(1). Is it plausible then, pursuant to article 273, to construe the section in a manner that would make it conform to article 43(1)?

[**43.**] The majority view in the Constitutional Court was that section 50 would conform to article 43 by transplanting into it words from clause (1), to rephrase the definition of the offence. The learned Berko JA put it thus:

> In view of the above provision (article 43), in order to obtain conviction under section 50(1) of the Penal Code Act the state has to prove that 'the false statement, rumour or report is likely to prejudice the fundamental or other human rights and freedoms of others or the public interest'.

[**44.**] With due respect, that definition would not produce the desired conformity, as it still would not fit within the two scenarios envisaged in clause (1) of article 43. It would remain in the third scenario. What I have said about the offence in its current definition would apply with equal force to it as so redefined. I have instead considered an option, which neither party canvassed in the lower Court or in this Court, namely to remove the conjectural element and construe the offence as confined to publishing an expression, which 'causes' public fear or alarm or disturbance of public peace. After all, the prohibition in section 50 applies to a publication that 'causes' as much as to that which is 'likely to cause' any of the stated mischief. However, I have concluded that such construction is not plausible for two reasons. First, it is tantamount to restructuring the legislation in a manner that goes beyond modification, adaptation, qualification and exception envisaged in article 273. Given the uncertainty about the objective of enacting and/or retaining section 50, the Court is ill suited to redefine it. The task is best left in the hands of Parliament, which is more suited: (a) to determine if in that area there is substantial concern, which justifies a limiting legislation; (b) to identify the strict objective of that legislation; and (c) to design the minimum measure and means for achieving that objective. Secondly, it appears to me that there is ample law, both criminal and civil, which covers the special circumstances envisaged under clause (1) of article 43, for example law of defamation, criminal libel and inciting violence. Parliament may discover on inquiry,

that there is no pressing or substantial concern to warrant any more restriction on the enjoyment of the freedom than is already in place. Alternatively, it may recognise on such inquiry, that the concern such as there may be, would best be dealt with under provisions of the Press and Journalist Act, rather than under the Penal Code. In the circumstances, I have to consider the impugned section as it is.

[**45.**] In regard to competing interests that I alluded to earlier, the competition in the instant case is between the interest of upholding the right to the freedom of expression, on the one hand, and the interest of protecting the public against such exercise of the freedom as is 'likely to cause public fear or alarm, or disturbance of public peace', on the other. Ultimately, in the context of clause (1) of article 43, the question to answer is whether the danger, against which section 50 protects the public is so substantial, as to prejudice public interest and warrant limitation of enjoyment of the guaranteed right to freedom of expression. In his judgment, Berko JA rationalised the limitation imposed by section 50 as an end in itself. He did not contemplate the notion of balancing the limitation against the protection of the right. That is evident *inter alia*, from the following assertions in the judgment:

> [T]he function of the law, and particularly criminal law, should (be to) exclude from the range of individual choice those acts that are incompatible with the maintenance of public peace and the safety and rights of individuals. Freedom of speech and expression cannot be invoked to protect a person 'who falsely shouts fire, fire, in a theatre *and causing panic*'. (Emphasis is added).

[**46.**] In principle, I accept that the law should be utilised 'to exclude from the range of individual choice' (ie prohibit) acts incompatible with maintenance of public peace and the safety and rights of individuals. However, I am constrained to say, with due respect, that in his illustration, the learned Justice misconstrued or overlooked pertinent issues. In the first place, the issue in this case is not whether law should be utilised to prohibit those acts. That is a given. The issue is whether the prohibition imposed by section 50 is valid under the Constitution. Where a law prohibits an act, which is otherwise an exercise of a protected right, that prohibition is valid only if it fits within the parameters of article 43. In that regard, a law prohibiting the 'false fire alarm', would fit within the parameters of clause (1) of article 43 only on the premise, and to the extent, that the alarm 'causes panic', and the 'panic' so caused, prejudices public interest. Secondly, the illustration falls short of applying the full scope of section 50.

[**47.**] A court applying section 50 to the false fire alarm would convict and sentence to imprisonment, the person who shouted the false alarm, if it is satisfied that at the time the alarm was expressed, it was 'likely' to cause panic, notwithstanding that no panic was actually caused. That would mean overriding the right to the freedom of expression, when the public interest is not prejudiced at all. In those circumstances can it be said that the danger, against which section 50 protects the public is substantial and

prejudices the public interest? In my view, the answer must be in the negative. My conclusion is that both in form and in substance, section 50 does not fit within the parameters of clause (1) of article 43. It goes beyond what is permissible under, and is therefore not saved by, that clause. That is sufficient ground for me to hold that section 50 does not pass the first test of validity. Nevertheless, because of the importance of this case, I will also test the impugned legislation against what I have called the constitutional yardstick.

Standard of limitation

[**48.**] In clause (2)(c) of article 43, the Constitution sets out an objective standard against which every limitation on the enjoyment of rights is measured for validity. Counsel for the respondent urged the Court to construe that standard subjectively, on the premise that what is 'acceptable and justifiable' varies from one democratic society to another. I do not agree. That approach would distort the standard set out by the Constitution. The provision in clause (2)(c) clearly presupposes the existence of universal democratic values and principles, to which every democratic society adheres. It also underscores the fact that by her Constitution, Uganda is a democratic state committed to adhere to those values and principles and therefore to that set standard. While there may be variations in application, the democratic values and principles remain the same. Legislation in Uganda that seeks to limit the enjoyment of the right to freedom of expression is not valid under the Constitution, unless it is in accord with the universal democratic values and principles that every free and democratic society adheres to. The Court must construe the standard objectively. In *R v Oakes* 26 DLR (4th) 200, the Supreme Court of Canada elaborated on that standard in relation to section 1 of the Canadian Charter of Rights and Freedoms, which in similar terms as article 43, sets out the standard of justification of limitation on the enjoyment of rights guaranteed by the said Canadian Charter. In his judgment, with which all other members of the Court concurred, Dickson CJC said:

> Inclusion of these words ('free and democratic society') as the final standard of justification for limits on rights and freedoms refers the court to the very purpose for which the Charter was originally entrenched in the Constitution: Canadian society is to be free and democratic. The court must be guided by the values and principles essential to a free and democratic society, which I belief embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality . . . The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the Charter and the ultimate standard against which a limit on a right or freedom must be shown . . . to be reasonable and demonstrably justified . . . s 1 provides criteria of justification for limits on the rights and freedoms guaranteed by the Charter. These criteria impose a stringent standard of justification . . . The onus of providing that a limit on a right or freedom guaranteed by the Charter is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation. It is clear from the text of s 1 that the limits on the rights and freedoms enumerated in the Charter are

exceptions to their guarantee. The presumption is that the rights and freedoms are guaranteed unless the party invoking s 1 can bring itself within the exceptional criteria which justify their being limited.

[**49.**] Similarly, under article 43(2) democratic values and principles are the criteria on which any limitation on the enjoyment of rights and freedoms guaranteed by the Constitution has to be justified. In determining the validity of the limitation imposed by section 50 on the freedom of expression, the Court must be guided by the values and principles essential to a free and democratic society. In *Mark Gova Chavunduka & Another v Minister of Home Affairs & Another supra*; the Supreme Court of Zimbabwe formulated the following summary of criteria, with which I agree, for justification of law imposing limitation on guaranteed rights:

- The legislative objective which the limitation is designed to promote must be sufficiently important to warrant overriding a fundamental right.
- The measures designed to meet the objective must be rationally connected to it and not arbitrary, unfair or based on irrational considerations.
- The means used to impair the right or freedom must be no more than necessary to accomplish the objective.

[**50.**] I have already indicated my view that the apparent objective, which section 50 promotes is not sufficiently important to warrant overriding the right to freedom of expression. In order to illustrate the reason for that view, however, let me revert to balancing the competing interests in the instant case. In the one balancing scale, are two benefits in real terms that are derived from upholding the right to freedom of expression. First, the individual derives self-fulfilment from the exercise of the freedom, or from receiving information or ideas from those who impart it. This is particularly true of the right to freedom of the press, because the essence of the media's existence is to impart knowledge to the public. Secondly, the country as a democratic society derives the benefit of promoting and maintaining democratic governance. In the second scale to balance against all that, is the non-quantifiable benefit derived from protecting the public, not against real or actual danger, but in effect against the speculative or conjectural danger of 'likely public fear, alarm or disturbance of public peace'. Clearly, the benefit in the second scale is so obviously outweighed that I have to conclude that it cannot justify overriding the benefit in the first scale.

[**51.**] Other considerations support the same conclusion that the limitation imposed by section 50 on the right to freedom of expression is not justified. The first is that the effect of section 50 is not proportional to the apparent objective it is supposed to achieve. Given that the objective of section 50 is to prevent publication of expressions likely to cause public fear, alarm or disturbance of peace even if it does not cause any such

mischief, to criminalize the publication and make it punishable with imprisonment, is akin to the proverbial killing of a mosquito with a sledgehammer. This is exacerbated by the special characteristics of the offence whereby the prosecution does not have to prove guilty knowledge but instead, to avoid liability, one has to take 'provable measures to verify' the accuracy of every statement, rumour or report before publishing it. Without in any way condoning reckless or even negligent publications, I think the provision thereby imposes a graver impediment on the freedom of expression than is necessary. The measure is clearly not proportional to the mischief, and that makes it that much less acceptable and/or justifiable in a free and democratic society.

[**52.**] A related difficulty inherent in section 50, is that its very wide applicability makes it extremely difficult to determine ahead of publication, what expression will be perceived as likely to cause the mischief guarded against. I have already alluded to the difficulties in determining falsity. Similar, if not worse, difficulties confront those who have to guess before deciding to publish, what perception a publication might evoke. In the *Mark Gova Chavunduka* case, Chief Justice Gubbay put the point graphically thus:

> The expression 'fear, alarm or despondency' is over-broad. Almost anything newsworthy is likely to cause, to some degree at least, in a section of the public or in a single person, one or other of these subjective emotions. A report of a bus accident which mistakenly informs that fifty instead of forty-nine passengers were killed, might be considered to fall foul of s 50(2)(a).

[**53.**] In practical terms, the broadness can lead to grave consequences especially affecting the media. Because the section is capable of very wide application, it is bound to frequently place news publishers in doubt as to what is safe to publish and what is not. Some journalists will boldly take the plunge and publish, as the appellants did, at the risk of suffering prosecution, and possible imprisonment. Inevitably, however, there will be the more cautious who, in order to avoid possible prosecution and imprisonment, will abstain from publishing. Needless to say, both the prosecution of those who dare, and the abstaining by those who are cautious, are gravely injurious to the freedom of expression and consequently to democracy. Additionally, the wide applicability of section 50 has the adverse effect of placing in the state prosecutor correspondingly vast discretion in determining for what publication to institute a prosecution. The form and degree of fear, alarm or disturbance of peace; the fraction of the public perceived to be likely to incur any of the mischief guarded against; are all aspects of the offence left to the unfettered discretion of the state to determine on individual cases basis. This unfettered discretion opens the way for those in power to perceive criticism and all expressions that put them in bad light, to be likely to cause mischief to the public. In that regard, I find the following observation of the Judicial Committee of the Privy Council in *Hector v Attorney General of Antigua*

and Barbuda (1990) 2 AC 312, at 318 pertinent. Lord Bridge of Harwich said:

> In a free democratic society it is almost too obvious to need stating that those who hold office in government and who are responsible for public administration must always be open to criticism. Any attempt to stifle or fetter such criticism amounts to political censorship of the most insidious and objectionable kind. At the same time it is no less obvious that the very purpose of criticism levelled at those who have the conduct of public affairs by their political opponents is to undermine public confidence in their stewardship and to persuade the electorate that the opponents would make a better job of it than those presently holding office. In the light of these considerations their Lordships cannot help viewing a statutory provision which criminalizes statements likely to undermine public confidence in the conduct of public affairs with the utmost suspicion.

[**54.**] That was said in respect of an express statutory provision, which made the printing and distribution of any false statement likely to undermine public confidence in the conduct of public affairs a criminal offence. In my view, it applies to situations where, under the guise of protecting public interest, section 50 is applied to expressions, which in essence amount to criticism of government conduct. Some particulars of the appellants' criminal prosecution help to illustrate the problem.

[**55.**] The charge sheet alleged that the appellants published false news, citing the excerpts reproduced earlier in this judgment, but without particularising the mischief that the publication was likely to cause. That, of course, was a defect because publishing false news *per se* is not an offence even under section 50. However, no one addressed that defect. At the trial, the prosecution called four witnesses, who had read the offending article, to testify on their respective perceptions. In her ruling, the learned trial Magistrate observed that there was considerable diversity in the evidence of those witnesses. Only one, the Senior Presidential Advisor on the Media, testified that upon reading the story he was extremely alarmed because he thought there was going to develop tension between Uganda and a neighbouring country. Two of the witnesses feared for personal reasons. The officer who allegedly escorted the gold feared because people would regard him as very rich; and an official of the Bank of Uganda, from whom the second appellant had sought information before publication, feared having been misquoted. The fourth witness, another official of the Bank of Uganda testified that the news elated her because she thought Uganda's foreign reserves would increase. The learned trial Magistrate herself said in the ruling: 'It would be going beyond reason if I were to hold that the mere writing that Uganda was paid in gold which was transferred to Uganda by Lt Col Lutaya could cause fear or alarm'. All this goes to show that a simple story can evoke diverse emotional reactions from different individuals. Similarly, the perception of the likely effect of a simple story on the public would differ from one prosecutor to another. It is even conceivable that another court, sharing the same perception as the state prosecutor in the instant case, could have convicted on

the same facts. The effect of the offending statements in the instant case could hardly be different from that in the case of *Haruna Kanabi v Uganda* criminal appeal 12/95, where the High Court upheld a conviction under section 50 in respect of a false publication that the President of Uganda had visited Rwanda described as 'the 40th district of Uganda', to solicit votes for the impending presidential elections. I am constrained to wonder, whether countering such 'false news' by publishing 'the truth' would not be a more effective measure than prosecution under the Penal Code.

[**56.**] Clearly, because of its broad applicability, section 50 lacks sufficient guidance on what is, and what is not, safe to publish, and consequently places the intending publisher, particularly the media, in a dilemma. In my view, given the important role of the media in democratic governance, a law that places it into that kind of dilemma, and leaves such unfettered discretion in the state prosecutor to determine, from time to time, what constitutes a criminal offence, cannot be acceptable, and is not justifiable in a free and democratic society.

[**57.**] I find support for my conclusions, in several judicial precedents referred to in this appeal, in which courts in different jurisdictions considered legislation similar to section 50. It will suffice to highlight only two, in each of which the Court declared the questioned legislation inconsistent with the Constitution. The impugned legislation in *R v Zundel* (*supra*) was section 181 of the Canadian Criminal Code, which made it an indictable offence to '(a) wilfully and knowingly publish any false news or tale, which (b) occasions or is likely to occasion injury or mischief to any public interest.' The Canadian Charter of Rights and Freedoms, protects the right to freedom of expression under section 2(b) in similar terms as our article 29(1)(a), and under section 1 it provides for justified limitation like our article 43.

[**58.**] McLachlin J, as she then was, writing the majority judgment, carefully analysed the said section 181 showing its incompatibility with principles governing limitation of rights that is acceptable under section 1 of the Charter. In concluding, she said at 222:

> The value of liberty of speech, one of the most fundamental freedoms protected by the Charter, needs no elaboration. By contrast, the objective of s 181, in so far as an objective can be ascribed, falls short of constituting a countervailing interest of the most compelling nature. In *Oakes* (*supra*), Dickson CJC made it clear that the less important the provisions objective, the less tolerable is an adverse effect upon the fundamental freedom. Section 181 could support criminalization of expression only on the basis that the sanction was closely confined to situation serious concern. In fact, s 181 extends the sanction of the criminal law to virtual any statement adjudged to be falsely made which might be seen as causing mischief or likely to cause mischief to virtually any public interest. I cannot conclude that it has been shown to be 'demonstrably justified' in a' free and democratic society'. To summarise, the restriction on expression effected by s 181 of the Criminal Code, unlike that imposed by the hate propaganda provision at issue in *Keegstra*, cannot be justified under s 1 of the Charter as a

'reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society'.

[**59.**] Accordingly the Court held by majority that section 181 of the Canadian Criminal Code infringed the right of free expression guaranteed by section 2(b) of the Charter, and that the infringement was not saved by section 1 of the Charter.

[**60.**] The Supreme Court of Zimbabwe in *Mark Gova Chavunduka and Another v Minister of Home Affairs and Another* (*supra*), considered section 50(2)(a) of the Law and Order (Maintenance) Act, a piece of legislation that is almost identical to our impugned section 50. That legislation similarly made it an offence, punishable with imprisonment for seven years, for a person to make, publish or reproduce any false statement, rumour or report '(a) likely to cause fear, alarm or despondency among the public or any part of the public; or (b) likely to disturb the public peace'. In his judgment, with which all the other members of the Court concurred, Chief Justice Gubbay said:

> [I]t has been emphasised that even stricter standards of permissible statutory vagueness must be applied where freedom of expression is at issue; for at jeopardy are not just the rights of those who may wish to communicate and impart ideas and information but also those who may wish to receive them . . . Does s 50(2)(a) of the Act overcome this threshold test? It is obvious that the provision does not just criminalize false statements; nor false statements which actually cause fear, alarm or despondency. There is no requirement of proof of any consequences — of damage to the state or impact upon the public. What the lawmaker has provided for is a speculative offence. An offence has been created out of a conjectural likelihood of fear, alarm or despondency which may arise out of the publication of any statement, rumour or report, even to a single person. It matters not that no fear, alarm or despondency actually eventuates. Because s 50(2)(a) is concerned with likelihood rather than reality and since the passage of time between the dates of publication and trial is irrelevant, it is, to my mind, vague, being susceptible of too wide interpretation. It places persons in doubt as to what can lawfully be done and what cannot. As a result, it exerts an unacceptable 'chilling effect' on freedom of expression, since people will tend to steer clear of the potential zone of application to avoid censure, and liability to serve a maximum period of seven years' imprisonment.

[**61.**] The Court declared that section 50(2)(a) of the Law and Order (Maintenance) Act of Zimbabwe infringed the right to freedom of expression, and so contravened the Constitution.

[**62.**] The respondent in the instant case had the onus to show that the limitation imposed by section 50 on the right to the freedom of expression, is necessary to prevent prejudice to the public interest, and that the limitation is 'acceptable and demonstrably justifiable in a free and democratic society'. In my view, he did not discharge that onus.

[**63.**] In the result, I would allow this appeal and set aside the majority decision and orders of the Constitutional Court. I would grant the declaration that section 50 of the Penal Code Act (Cap 120) is inconsistent with

article 29(1)(a) of the Constitution and is consequently void. I would order that the appellants have the costs of the appeal in this Court and of the proceedings in the Constitutional Court.

[**64.**] Before taking leave of the case, I should, for guidance, comment on the preliminary order made by the Constitutional Court to stay hearing of the petition pending disposal of the criminal case against the appellants in the Magistrate's Court. The Court made the order at its own initiative, notwithstanding the unanimous view expressed by counsel on both sides that the petition should proceed before the criminal trial. The Court stated the reason for the order as follows:

> It seems clear to us therefore that the purpose of this petition is to circumvent or even pre-empt the criminal prosecution. But as this Court held in const petition no 4/97 *Arutu John v Attorney General* where criminal proceedings are pending in another court and a petition is brought to this Court in respect to the same matter, then the petition should be stayed pending the determination of the criminal matter in the trial Court. Accordingly we order that the petition be stayed pending determination of Buganda Road Court criminal case no U 2636/97 against the petitioners.

[**65.**] With the greatest respect to the Constitutional Court, that order was misconceived. It is inconsistent with the letter and spirit of the Constitution. Under article 137, any person may access the Constitutional Court in one of two ways. First, a person may petition the Constitutional Court directly for a declaration that any law, act or omission is inconsistent with, or in contravention of a provision of the Constitution. Secondly, a party to any proceedings in a court of law, in which a question arises as to the interpretation of the Constitution, may request that court to refer the question to the Constitutional Court for decision. Clause (7) of article 137 provides that in either case, the Court 'shall proceed to hear and determine the petition as soon as possible and may, for that purpose, suspend any other matter pending before it.'

[**66.**] Where a court refers a question that arises in proceedings before it, it must await the decision of the question by the Constitutional Court, and 'dispose of the case in accordance with that decision'. The rationale for these provisions is obvious. The Constitution is the basic law from which all laws and actions derive validity. Where the constitutional validity of any law or action awaits determination by the Constitutional Court, it is important to expedite the determination in order to avoid applying a law or taking action whose validity is questionable.

* * *

Rwanyarare and Others v Attorney-General

(2004) AHRLR 279 (UgCC 2004)

Dr James Rwanyarare, Haji Badru Kendo Wegulo, Hon Yusufu Nsubuga Nsambu, Hon Ken Lukyamuzi, James Garuga Musinguzi, Major Rubaramira Ruranga, Karuhanga Chaapa, Hussein Kyanjo, Dr John Jean Barya v Attorney-General of Uganda
Constitutional Court of Uganda, 17 November 2004, constitutional petition 7 of 2002
Judges: Mpagi-Bahigeine, Engwau, Twinomujuni, Kitumba, Byamugisha

Interpretation (constitution to be given generous and purposive construction, human rights provisions take precedence over other constitutional provisions, 4)
Association (unequal treatment between political parties, 6, 11, 12; registration of political parties, 13, 20; requirement that political party shall have national character, 23, 24; election of party organs, 35-38; limitations on political activity at district level, 40, 43)
Limitations of rights (public interest, 17, 19, 20)
Political participation (right to stand for political office, 44, 47, 48)

[**1.**] This petition was filed in July 2002 to challenge the constitutionality of various sections of the Political Parties and Organisations Act 2002. Before it could be heard on merit, a number of preliminary matters were raised. A ruling on one of them resulted in an appeal to the Supreme Court. As a result, the petition could not be heard until the appeal was disposed of. This is why the hearing of this petition appears to have been delayed. The causes of the delay were regrettably beyond our control.

[**2.**] In the meantime this Court heard constitutional petition 5 of 2002 *Paul K Ssemogerere and Others v The Attorney-General of Uganda* which challenged the constitutionality of sections 18 and 19 of the Political Parties and Organisations Act 2002. We held that those sections were null and void as they contravened the Constitution. Although this petition also contained a challenge of the same sections, the challenge has now been overtaken by events and it no longer stands. What remains of this petition was framed into agreed issues as follows:

1. Whether the definition of a 'political organisation' under section 2(1) and (2) of the Political Parties and Organisations Act 18 of 2002 is inconsistent with and contravenes article 21 and 75 of the Constitution and is null and void.
2. Whether section 6(2)(3) and (4) of the Political Parties and Organisations Act 18 of 2002 is inconsistent with and contravenes articles 20, 21, 29(1)(a)(b)(d) & (e) and 38 and 270 of the Constitution and is null and void.
3. Whether sections 5(1)(c) (4) and 7(1)(b) of the Political Parties and Organisa-

tions Act 18 of 2002 are inconsistent with and contravenes articles 20, 21(1)(2) and (4)(c); 29(1)(a)(b)(d) and (e), 38, 43, 75 and 270 of the Constitution and are null and void.

4. Whether section 8 of the Political Parties and Organisations Act 18 of 2002 is inconsistent with and contravenes articles 20, 21, 29(1)(a) (b) & (e), 38, 43 and 270 of the Constitution and is null and void.

5. Whether section 10(4) of the Political Parties and Organisations Act 18 of 2002 is inconsistent with and contravenes articles 1, 20, 21(1)(2) and (4)(c), 29(1)(a), (b)(d) and (e), 38, 43, 71(c), 75 and 270 of the Constitution and is null and void.

6. Whether section 10(8) and (9) of the Political Parties and Organisations Act 18 of 2002 is inconsistent with and contravenes articles 20, 21(1), (4) 29(1), (a), (b) (d) and (e), 29(2), 38, 43, 71(c), 75 and 270 of the Constitution and is null and void.

7. Whether section 13(b) of the Political Parties and Organisations Act 18 of 2002 is inconsistent with and contravenes articles 1(4), 20, 21, 29(1)(a)(b), (d) and (e) 29(2) and (b), 38, 43, 71(c) and 270 of the Constitution and is null and void.

[**3.**] The petition was supported by affidavits sworn by the petitioners. The learned Attorney-General filed an answer to the petition in which he opposed the entire petition. The answer is also supported by affidavits of several witnesses, many of them being Ministers, senior officials of the Movement and members of Parliament. At the hearing of the petition, all affidavit evidence was admitted as non-controversial and the parties did not seek to cross-examine any witness.

[**4.**] The petitioners were represented by Mr Peter Walubiri, Mr Kiyemba-Mutale and Mr Moses Ojakol. The respondent was represented by Mr Joseph Matsiko, the learned Acting Director of Civil Litigation, Mr Alfred Oryem Okello, State Attorney and Ms Victoria Ssekandi, a State Attorney. It was common ground that the following principles would guide this Court in the interpretation of the Constitution to resolve the above issues:

1. The onus was on the petitioners to show a *prima facie* case of violation of the petitioners' constitutional rights. Thereafter, the burden shifts to the respondent to justify that the limitations to the rights contained in the impugned statute were justified within the meaning of articles 43 and 73(2) of the Constitution.
2. Both purpose and effect of an impugned legislation are relevant in the determination of its constitutionality.
3. The Constitution is to be looked at as a whole. It has to be read as an integrated whole with no one particular provision destroying another but each supporting the other. All provisions concerning an issue should be considered together so as to give effect to the purpose of the instrument. See *South Dakota v North Carolina* 192 US 268 (1940).
4. The Constitution should be given a generous and purposive construction especially the part which protects the entrenched fundamental rights and freedoms. See *Attorney-General v Momoddon Jobo* (1984) AC 689.

5. Where human rights provisions conflict with other provisions of the Constitution, human rights provisions take precedence and interpretation should favour enjoyment of the human rights and freedoms. See constitutional petition 5 of 2002 (*supra*).

[**5.**] We now turn to the determination of the issues as framed.

Issue 1

[**6.**] This is whether the definition of a political party or political organisation in section 2 of the Political Parties and Organisations Act 2002 (herein after referred to as the Act) is inconsistent with and contravenes articles 21 and 75 of the Constitution. Arguing this issue, Mr Walubiri contended that the definitions of 'political party' and 'political organisation' do not include the political system mentioned in article 70 of the Constitution. As a result, the provisions of the Act, most of which the petitioners object to, do not apply to the Movement political system. The Act in effect gives unequal treatment to political parties and organisations to their disadvantage. In his view, this contravenes article 21(1) of the Constitution which guarantees equality under the law. This leaves the Movement political system as the only organisation with freedom to operate in contravention of article 75 of the Constitution which prohibits Parliament from enacting legislation establishing a one party state.

[**7.**] Mr Walubiri submitted further that the Movement set up by the Movement Act 1997 is a political organisation with all the attributes of a political party and should have been included within the definition of political party and political organisation so that the Act equally applies to it.

[**8.**] In reply, Mr Joseph Matsiko submitted that the petitioners had not produced evidence to prove:

(a) That the Movement political system referred to in article 70 is a political organisation.
(b) That the operation of the Act accorded the system unequal treatment contrary to article 21(1) of the Constitution.
(c) That the operation of the Act had the effect of making the Movement system a one party state.

[**9.**] In Mr Matsiko's view, the Movement political organisation system did not exist. What existed was the Movement political system in article 70 which clearly defines what the system means. In defining 'political party' and political 'organisation' in section 2 of the Act, Parliament was aware that the system had already been defined in the Constitution. Mr Matsiko invited us to hold that the definitions in issue here do not accord unequal treatment to the Movement political system and neither do they have the effect of creating a one party state.

[**10.**] The impugned definitions are as follows:

2(1) In this Act unless the content otherwise requires 'political party' means a

> political organisation the objects of which include the sponsoring of, or offering a platform to, candidates for election to a political office and participation in the governance of Uganda at any level. 'Political organisation' means any free association or organisation of persons the objects of which include the influencing of the political process or sponsoring a political agenda whether or not it also seeks to sponsor or offer a platform to a candidate for election to a political office or to participate in governance of Uganda at any level.
>
> (2) The definition of political organisation in subsection (1) shall not include the following: (a) The Movement political system referred to in article 70 of the Constitution and the organs under the Movement political system.

[**11.**] To us, this definition clearly excludes the Movement political system referred to in article 70 of the Constitution. This is correct because the political system as defined therein is not a political party or organisation. However, the political organs of that system set up by the Movement Act are quite different. We had occasion to deal with this issue in constitutional petition 5 of 2002 (*supra*). We held that the Movement set up by the Movement Act was a political organisation as defined by the impugned Act despite disclaimer contained in section 2(2) thereof. This is because we found credible overwhelming evidence to the effect that: a) It had a political agenda to obtain and retain political power; b) It was a statutory body corporate; c) It sponsored candidates for political offices; d) It participated in the governance of Uganda at all levels; e) It was no longer inclusive or non-partisan; f) It had abandoned the principle of individual merit as a basis for election to political offices: g) It has a caucus in Parliament.

[**12.**] That decision of this Court still stands. In that judgment we referred to the organisation set up by the Movement Act, 1997 as a Movement political organisation. We made it very clear that it no longer operates as a Movement political system as defined by article 70 of the Constitution. Therefore, the Movement political organisation set up by the Movement Act is a political organisation or political party within the meaning of section 2 of the Act. All the provisions of the Act do apply to the Movement political organisation as they apply to all other political parties and organisations. There is no discrimination, unequal treatment or creation of a one party state by the definitions in section 2 of the Act. We answer the first issue in the negative.

Issue 2

[**13.**] This is whether section 6(2)(3) and (4) of the Act which require existing political parties to register as bodies corporate within six months is inconsistent with any articles of the Constitution mentioned in the issue.

[**14.**] Mr Walubiri contended that the provisions of section 6(2)(3) and (4) of the Act contravened the Constitution in the following ways:

(a) That existing political parties were being compelled to register as corporate bodies and not in any other form. This was not consistent

with the freedoms granted by the Constitution under articles 20, 21, 29, 38 and 270.

(b) That the requirement for the old political parties to register within six months was not only unreasonable but also discriminatory in that only old parties were being subjected to that treatment which contravenes equal treatment provisions of article 21(1) and infringes on the freedom to associate in article 29(1)(e) of the Constitution.

[**15.**] Mr Walubiri submitted that political parties should be free to associate in any form and should be free to register whenever they want, when they are ready. He contended that the respondent had not given any single reasonable justification for imposing such restrictions on existing political parties. He invited us to hold that they were not justified under articles 43 and 73 of the Constitution.

[**16.**] In reply, Mr Matsiko submitted that the requirement for old parties to register as corporate bodies did not contravene the Constitution. He contended that it was in line with the requirement in articles 71 and 72 of the Constitution which requires political parties to be accountable and to register. It is difficult to make an entity which is not corporate to account for its actions and its resources. However, Mr Matsiko did not respond on why the registration had to be done in six months, in default of which the party would cease to exist or operate.

[**17.**] The rights and freedoms under Chapter four of the Constitution are inherent and not given by the state. This however, does not mean that they are absolute. Their enjoyment is subject to article 43 of the Constitution which states:

> 1. In the enjoyment of the rights and freedoms prescribed in this Chapter, no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest.
> 2. Public interest under this article shall not permit: (a) political persecution; (b) detention without trial; (c) any limitation of the enjoyment of the rights and freedoms prescribed by this Chapter beyond . . . what is provided in this Constitution.

[**18.**] It is only the rights and freedoms mentioned in article 44 which are absolute and non-derogable. That article states:

> Notwithstanding anything in this Constitution, there shall be no derogation from the enjoyment of the following rights and freedoms: (a) freedom from torture, cruel, inhuman or degrading treatment or punishment; (b) freedom from slavery or servitude; (c) the right to fair hearing; (d) the right to an order of *habeas corpus*.

[**19.**] It should be noted here that all the articles of the Constitution mentioned in this issue are not covered by article 44. They can be derogated from provided that the restrictions imposed are within what is allowed by article 43(2) (*supra*) and article 73(2) which gives power to Parliament to make regulations which must not 'exceed what is necessary for enabling the political system adopted to operate'. The issue now is whether the

requirement for existing political parties to register as corporate bodies within six months is a reasonable condition acceptable under articles 43 and 72.

[**20.**] We deal first with the requirement to register as a body corporate. We observe that the requirement does not apply to existing political parties alone. It is a requirement for all political parties to register under the Act. Mr Walubiri did not articulate reasons why this is objectionably except to say that parties should be allowed to associate in any form. In our view, any organisation which hopes to compete for political power in this country and to be accountable to the country and its members should be a body corporate. It should be able to own and to hold property and to sue and sued in its own name. This will also help to reduce trifling abode or address. This will also reduce proliferation of numerous political parties which are capable of creating political instability in the country. In our view, this condition for registration is quite reasonable. It applies to all political organisations and is not a derogation to any rights and freedoms granted by the Constitution.

[**21.**] Regarding the requirement for old political parties to register in six months, we think that there must be a time frame within which the registration must take place. The Constitution requires that all political parties register. The parties are already recognised by article 270 of the Constitution. They are deemed to have structures and membership. They should find it easier to register as long as obnoxious provisions of this Act are removed. We think that if the parties hope to start operating, the Constitution requires that they should register. This is so, so that their existence becomes a certainty and a reality and not just presumed. The six months requirement is not unreasonable. We answer this issue in the negative.

Issue 3

[**22.**] This is where section 5 requires that political parties and organisations should be of a national character. National character is defined as one which 'has in its membership at least fifty representatives from each of at least half of all the districts of Uganda'.

[**23.**] Section 7 requires that to register, a political party or organisation shall provide full names and addresses of at least fifty members of the party or organisation from each of at least one third of all the districts of Uganda, being members ordinarily resident or registered as voters in the district. Mr Walubiri contends that this requirement is not consistent with articles 20, 21, 29, 38, 43, 75 and 270. In his view, 'national character' is not a question of numbers. The party should have objectives that foster the national good. The provisions prevent individuals who are unable to travel the whole country from forming political parties. Yet even two people should be able and free to associate. In reply, Mr Matsiko submitted that the requirement is neither unreasonable nor unconstitutional. The

Constitution requires that political parties and organisations be of national character.

[**24.**] Article 71(a) requires that every political party shall have a national character. The Constitution leaves Parliament with the power to define 'national character' which has been done in section 5 of the Act. We do not see anything unreasonable in this definition. We think that an organisation which hopes to take political power under this Constitution should be representative of the people of Uganda. The requirement will also prevent the registration of opportunistic political parties and organisations. The numbers required both in terms of membership and districts are not unreasonable. For the reasons we gave in issue 2 above, we think political parties and organisations should be reasonably a reflection of Uganda. We think the requirements are within the spirit of the Constitution and they neither contravene nor are they inconsistent with any of its articles. We answer this issue in the negative.

Issue 4

[**25.**] The issue here is whether section 8 of the Act prohibits political parties and organisations from registering 'any identifying symbol, slogan, colour, name or initials' of any existing political party or organisation continued in existence under article 270 of the Constitution, and if so, whether that restriction renders the section unconstitutional. Mr Walubiri submitted that this section bars parties which existed before 1995, ie UPC, DP, UPM and CP from registering their parties under their names, symbols, slogans, colours and initials. The effect of the prohibition is that the parties will have to choose names, colours, and symbols etc before they are allowed to register. The parties are forced completely abandon their identities and to put on an entirely new identity. In his view, this restriction is intended to completely destroy the old political parties and the section is therefore inconsistent with articles 20, 21, 29, 38, 43 and 270 of the Constitution. He submitted that there was no acceptable reason, in terms of article 43 of the Constitution, why in Uganda of today, we should have such a provision.

[**26.**] In reply, Mr Joseph Matsiko did not agree with Mr Walubiri's interpretation of section 8 of the Act. He submitted that section 6(3) provided that political parties continued in existence under article 270 of the Constitution must continue to exist but must apply for registration within six months. This clearly means that they are allowed to register their own identity. In his view, section 8 of the Act is only intended to protect the identities of old parties from encroachment by the new parties who might wish to use their names, colours, and symbols etc. There was nothing unconstitutional about such a requirement. It is aimed at protecting the old parties rather than destroying them.

[**27.**] Section 8 of the Act provides:

> No political party or organisation shall submit to the Registrar-General for the purpose of registration under section 7 of this Act, any identifying symbol, slogan, colour or name which is the same as or similar to the symbol, slogan, colour or name or initials of: (a) any registered political party or organisation; or (b) any existing political party or organisation continued in existence under article 270 of the Constitution; or (c) the Republic of Uganda; or (d) statutory corporation or other body the whole or the greater part of the proprietary interest in which is held by or on behalf of the state, or in which the state has a controlling interest.

[**28.**] We think that this section read together with section 6(3) of the Act cannot, and should not be construed to have the meaning that Mr Walubiri attributed to it. In our view, the section provides protection to the existing political parties to stop their names, colours, symbols, slogans and initial from being adopted and registered by any new political parties and organisations as their own. This is the only natural meaning of section 8 of the Act.

[**29.**] We cannot construe it as a restriction but as a protection which is justified because the parties in existence do own these names, symbols etc. We hold that the section neither contravenes nor is it inconsistent with any article of the Constitution. We agree with Mr Matsiko's interpretation of the section and we answer this issue in the negative.

Issue 5

[**30.**] This is whether section 10(4) of the Act which restricts political parties and organisations to elect members of their National Conference only during the fourth year of the life of any Parliament contravenes articles 1, 20, 21, 29, 38, 43, 71(c), 75 and 270 of the Constitution. Mr Walubiri complained that although article 1 of the Constitution vests sovereignty in the people of Uganda, yet section 10(4) restricts their political parties to a body called a 'National Conference' whose members can only be elected in the fourth year of Parliament. Mr Walubiri wondered why the political parties are compelled to have an organ called the National Conference and why they cannot choose freely the organs to manage their political parties. He wondered why the parties cannot elect their leaders at any time other than during the fourth year of Parliament. He could not comprehend what it was in the fourth year of Parliament that made it the only suitable time to hold elections for the National Conference. He contended that this was an attempt by the state to give all the political parties and organisations a uniform constitution so that they are managed by regimentation like in state imposed one party states. He invited us to hold that the section contravenes and is inconsistent with articles 1, 20, 21, 29, 38, 43, 71(c), 75 and 270 of the Constitution.

[**31.**] In reply, Mr Matsiko could not agree that the section contravened any part of the Constitution. He gave two justifications for the section:

(a) The rationale was to give political parties and organisations opportunity to prepare themselves for elections.
(b) It is intended to limit disruptions of the population as a result of political activities to only one year before parliament elections.

[**32.**] Mr Matsiko contended that political activity can cause disruptions in society and Parliament, in its wisdom, deemed it necessary to limit it to only the fourth year of the life of any Parliament. He invited us to decide this issue in the negative.

[**33.**] In order to put section 10(4) of the Act in its proper context, we reproduce here below the first four sub-sections of that section:

> 1. A political party or organisation shall, in its internal organisation, comply with the provisions of the Constitution, in particular articles 71 and 72 of the Constitution.
> 2. Every political party or organisation shall elect such persons as may be determined by the members of the political party or organisation as members of the executive committee of the political party or organisation with due consideration for gender equity.
> 3. The election of members of the executive committee of every political party or organisation shall be conducted at regular intervals.
> 4. Apart from the first election held after the registration of a political party or organisation, the election of members to the national conference of a political party or organisation shall take place only in the fourth year of the term of Parliament.

[**34.**] Article 71 referred to in section 10(1) above provides:

> A political party in the multi-party political system shall conform to the following principles: (a) every political party shall have a national character; (b) membership of a political party shall not be based on sex, ethnicity, religion, or other sectional division; (c) the internal organisation of a political party shall conform to the democratic principles enshrined in this Constitution; (d) members of the national organs of a political party shall be regularly elected from citizens of Uganda in conformity with the provisions of paragraphs (a) and (b) of this article and with due consideration for gender.

[**35.**] It will be seen that from the above provisions, political parties must be of a national character, must not be sectarian, must be democratic, must elect their party organs regularly and in particular members of the Executive Committee must be elected at regular intervals. It is against this background that section 10(4) becomes difficult to appreciate. The word 'Conference' is defined in section 2 of the Act to mean a 'meeting of a political party or organisation lasting one or more days to discuss matters concerning the political party or organisation'.

[**36.**] We presume that a national conference is such a conference but composed of members of the party of all sexes and diversities from the whole country. We believe this is intended to be the top most policy-making organ of every political party or organisation. Why then is this organ singled out to be elected in the fourth year of every Parliament? Why are political parties and organisations, which are free associations of

persons, being forced to elect this top policy making organ of the party only once in five years? Would it interfere with the operation of any political system if a party or an organisation decided to elect its national conference say, every two years? What is the rationale of tying the election to the life span of Parliament? Is it consistent with the freedom of association in article 29(1)(e) or is it a justifiable restriction within the meaning of article 43 of the Constitution?

[**37.**] We have given anxious consideration to this issue. We are not persuaded by Mr Matsiko's argument that it is a reasonable and justifiable restriction on the freedom of association in order to prevent what he called 'disruptions in the population' or 'to give political parties and organisations opportunity to prepare for elections'.

[**38.**] We do not see how a single orderly meeting of a political party in one place can cause disruptions, even if it is held once every year. Parties are enjoined by the Constitution to hold elections at regular intervals. The phrase 'regular intervals' is not synonymous with 'five years'. The parties and organisations should be free to determine for themselves what period is suitable for electing their top organ. We do not appreciate why the election must occur in the fourth year of Parliament. We do not see why a National Conference elected at any other time cannot prepare its party or organisation for election (whatever that means). We hold that the restriction contained in section 10(4) of the Act is totally unjustified and unjustifiable in a free and democratic society. It is far in excess of what is reasonably necessary for enabling any political system adopted, whether Movement or multiparty, to operate. It contravenes and is not consistent with article 29(1)(e) of the Constitution. A political party contending for ascendancy should not be made subject to legislative measures that limit its capacity to associate, engage in dialogue and communication. It is therefore null and void.

Issue 6

[**39.**] This is whether section 10(8) and (9) of the Act is inconsistent and contravenes articles 20, 21(1) and (4), 29(1)(a)(b)(d) and (e), 29(2)(a), 38, 43, 71(c), 75 and 270 of the Constitution. Section 10(8) and (9) provides:

> 8. After the issue of the certificate of registration to a political party or organisation under section 7 of this Act, the political party or organisation may, within one months after the issue to it of the certificate of registration, hold only one meeting in each district to elect members to the national conference for the purpose of electing its first members of the executive committee; and after the election of the members at the district, any structures established for the purpose of that election shall cease to exist.
>
> 9. Any political party or organisation which holds a meeting contrary to subsection (8) of this section or otherwise acts contrary to that subsection, commits an offence and is liable on conviction to a fine not exceeding three hundred currency points, and every officer of the political party or organisation who contributes in any way to the contravention, also commits an offence and is

liable on conviction to a fine not exceeding three hundred currency points or imprisonment not exceeding three years or both.

[**40.**] According to Mr Walubiri, after registration of the party or organisation, it can only hold one meeting in the district to elect the District Executive of the party. Thereafter all structures set up for that purpose must be dismantled. The implications of these provisions are:

(a) Only one meeting at the district is permitted.
(b) The meeting must take place after one month of the issue of a registration certificate.
(c) The purpose of the meeting is restricted to one agenda, ie electing the National Conference and nothing else.
(d) All structures set up in order to elect the National Conference must be dismantled after the election of the National Conference.
(e) A very heavy penalty is imposed in case of any default.
(f) A party which defaults risks being de-registered under section 20(1) of the Act.

[**41.**] Mr Walubiri submitted that these provisions were intended to kill political parties by alienating them from the people so that they only remain at the district headquarters without grassroots support. Yet the Movement, under the Movement Act has got branches from the village up to its national headquarters. In his view, this provision was similar to sections 18 and 19 of the Act which this Court has already struck down as being unconstitutional. He invited this Court to do the same with section 10(8) and (9) of the Act.

[**42.**] In reply, Mr Matsiko denied that the section restricted meetings of parties and political organisations. He stated that it is only meetings aimed at electing the National Conference which were restricted. Mr Matsiko did not say why this was necessary. He did not explain why it was necessary to dismantle all party structures formed for electing the National Conference but he insisted that the restriction did not contravene the Constitution.

[**43.**] We shall be brief on this issue because section 10 is very similar to sections 18 and 19 of the Act. This Court has already condemned those sections as unconstitutional and a flagrant violation of the freedom of association enshrined in the Constitution. It has not been shown to be justified or justifiable under article 43 of the Constitution and it exceeds by far what is necessary to enable any political system which may be in power to operate. It is a monstrosity in a free and democratic society and it should not stand. We declare that it is not consistent with the spirit and letter of the Constitution and it contravenes articles 29(1)(e), 38, 71(c) and 73(2) of the Constitution. It is therefore null and void.

Issue 7

[**44.**] Whether section 13(b) of the Act is inconsistent with and contra-

venes articles 1(4), 20, 21, 29(1)(a)(b) and (e), 29(2)(a) and (b), 38, 43, 71(e) and 270 of the Constitution. The section states:

> No person shall be appointed nor accept any political office in a political party or organisation in Uganda if he or she: (a) Is not a citizen of Uganda; (b) Has immediately before he or she is to be appointed, lived outside Uganda continuously for more than three years.

[**45.**] Mr Walubiri could not comprehend why the right of a citizen to participate in the affairs of government is being denied merely because such a citizen has lived outside Uganda, for any reason, for three or more years. He submitted that section 13(b) cannot be justified and should be declared null and void.

[**46.**] Mr Matsiko did not agree. His justification for the provision was that Parliament had powers to make such a restriction under articles 72 and 73 of the Constitution and section 13(b) of the Act was a product of the exercise of that power. He did not say whether the restriction was justified under article 43 of the Constitution or whether it was needed in order to protect the political system in operation. In fact Mr Matsiko appeared to be at a loss as to what purpose the provision was designed to serve.

[**47.**] Section 3(2) of the Act provides that every citizen of Uganda has a right to join a political party or organisation. This implies the right to hold a political office in that organisation. So we are equally at a loss to understand why Parliament enacted such a draconian provision. We agree that subject to the Constitution, Parliament has the power to enact such a provision. However, the Constitution requires that if the enactment infringes on a human right or freedom, it must be justified under article 43 or 73(2) of the Constitution.

[**48.**] In our view, section 13(b) contravenes the right and freedom to associate (article 29(1)(e)) and the right to participate in the affairs of government, individually or through representatives in accordance with the law (article 38(1)). Yet no justification has been made as to why a citizen who has resided out of Uganda continuously for three years or more should be denied those rights and freedoms. We have no doubt that the provision contains a restriction on the sacrosanct rights and freedoms of a citizen that should not be permitted to stand in a free and democratic country like ours, at this point in time. It is therefore null and void.

[**49.**] In the result, we make the following declarations and orders:

1. This petition fails on issues 1, 2, 3 and 4.
2. The petition succeeds on issues 5, 6 and 7.
3. Our order dated 16 January 2003 in constitutional application 6 of 2002 staying the operation of section 6(3) and (4) of the Act is hereby vacated.
4. Owing to the fact that:
   (a) Article 269 of the Constitution expired when this Act was enacted.

(b) Sections 18 and 19 of the Act were nullified in constitutional petition 5 of 2002.
(c) The meaning of section 8 of this Act has been clarified in this petition.
(d) Restrictions imposed by sections 10(4), (8) and (9), and 13(b) have been nullified in this petition, the political parties referred to in article 270 of the Constitution have no more legitimate reason to resist registration as required by article 72(2) of the Constitution and section 6(2)(3) and (4) of the Act. They should now register within six months from the date of this judgment.

5. In view of our orders (1) and (2) above, it is only fair that each party bears its own costs of this petition.

ZIMBABWE

The Law Society of Zimbabwe v The Minister of Transport and Communications and Another

(2004) AHRLR 292 (ZwSC 2004)

The Law Society of Zimbabwe v The Minister of Transport and Communications and the Attorney-General of Zimbabwe
Supreme Court of Zimbabwe, judgment SC 59/03, 3 March 2004
Judges: Chidyausiku, Sandura, Cheda, Malaba, Gwaunza

Expression (limitations, 5, 9, 17; lawyer-client privilege, interception of communications, 11-14)
Fair trial (lawyer-client privilege, 11-14; interception of communications, 9)
Limitations of rights (predictability, 21, 22; democratic society, 22)

Chidyausiku CJ

[**1.**] The applicant in this case is the Law Society of Zimbabwe, established in terms of the Law Society of Zimbabwe (Private) Act (Chapter 223) of 1974. It has capacity to institute legal proceedings in terms of section 51 of the Legal Practitioners Act (Chapter 27:07). Although the papers do not expressly allege this, this application is brought in terms of section 24 of the Constitution of Zimbabwe (the Constitution). In terms of section 24 of the Constitution an applicant is entitled to approach this Court directly on the basis that the applicant's fundamental right has been, is, or is about to be, violated. The applicant represents over 600 practising legal practitioners. The applicant's case is that its members' right to freedom of expression as enshrined in section 20 of the Constitution is threatened by the provisions of section 98(2) and section 103 of the Postal and Telecommunications Act (Chapter 12:05) (the Act). The applicant seeks an order declaring sections 98(2) and 103 of the Act invalid and of no legal force or effect because they are inconsistent with section 20 of the Constitution.

[**2.**] It is the applicant's case that its members, legal practitioners, are in law entitled to free and unhindered communication between themselves and their clients and amongst each other. The applicant contends that the privileged status of legal communications between legal practitioner and client goes beyond the general protection to all persons by the Constitution. The privileged status of lawyer-client communication is time honoured and enshrined in common law and in section 8 of the Civil

Evidence Act (Chapter 8:01). The applicant contends that legal practitioners receive from their clients, private, personal and confidential information. Their clients must of necessity disclose to them information that has not yet been made public or which is of a private and confidential nature and should not be disclosed to the public. In order for legal practitioners to advise their clients effectively they must receive full information and instructions from their clients. Often the discrimination of such information to third parties or the public would cause potential or actual loss, harm and/or prejudice to clients. It is for the protection of clients that the legal privilege accorded to legal practitioner and client communication is recognised and enforced by law.

[**3.**] Subsection (2) of section 98 of the Act allows the President to give a direction that postal articles shall be intercepted and detained. The Act defines 'postal services' in very broad terms and the Act does not impose any restriction on the manner in which, or the persons by whom, such interception or detention may be effected. In terms of the Act the President is allowed to give a direction that any article shall be delivered to an employee of the state to be disposed of in such a manner as the President may direct. The Act allows the President to give a direction that communications shall be intercepted or monitored. The President may give any of the directions referred to above if, in his opinion, it is necessary in the interests of national security or the maintenance of law and order.

[**4.**] Section 103 of the Act similarly allows the President to give such directions to any licensee as appears to him to be requisite or expedient in the interests of national security or relations with the government of a country or territory outside Zimbabwe. Section 20(1) of the Constitution expressly provides that no person shall be hindered in the enjoyment of his freedom of expression which includes freedom from interference with correspondence.

[**5.**] Subsection 20(2) of the Constitution provides for the derogation of the freedom of expression if it is necessary to do so in the interests of defence, public safety, public order etc, but such derogation has to be reasonably justifiable in a democratic society.

[**6.**] The applicant contends, firstly, that the impugned sections do not fall within any of the exceptions permissible under section 20(2) of the Constitution.

[**7.**] Secondly, and in the alternative, the applicant contends that even if the impugned sections fall within the exceptions set out in section 20(2) they are too vague to satisfy the requirement as provided by law and are not reasonably justifiable in a democratic society.

[**8.**] The respondent, on the other hand, concedes that sections 98(2) and 103 of the Act are a derogation on the guaranteed freedom of expression but argued that both provisions fall within the permissible exceptions

under section 20(2) of the Constitution and are reasonably justifiable in a democratic society, and therefore constitutional.

[**9.**] It is apparent form the stance of the parties that the facts of this case are common cause. The issue that falls for determination is whether sections 98(2) and 103 of the Act are consistent with section 20 of the Constitution. The applicant has submitted that the issue here relates in general terms, to the interception of communications, but more specifically relates to interference with lawyer-client privilege which would result from the interception of mail and telecommunications between a lawyer and his client. The concern of the applicant is that the right of the state to intercept communications in terms of sections 98 and 103 of the Act put at risk the privilege of such communication and this constitutes an interference with the constitutional rights of both the lawyer and the client in terms of section 20 of the Constitution. The applicant contends that sections 98 and 103 of the Act place at risk the confidentiality of the communications and thus negate the privilege that is granted to those communications.

Lawyer-client privilege

[**10.**] Mr de Bourbon, for the applicant, argued strenuously that the lawyer-client privilege was fundamental to the proper administration of justice. He argued that the existence of the privilege is in the interests of all sectors of the community including the state itself. It was also argued that at the heart of this privilege are two fundamental rights. Firstly, the right of person freely to communication with one another and, secondly, the right to fair justice. If this privilege is destroyed or threatened then these rights become meaningless.

[**11.**] The Court was referred to a wide range of authorities that underpinned the importance and significance of the lawyer-client privilege. In the case of *Baker v Campbell* (1983) 153 CLR 52 (HCA) it was held that the privilege existed not simply in relation to litigation but to advice sought between a client and a lawyer so that the client can regulate his affairs. In another case cited to this Court it was held that the privilege between lawyer and client even overrode the policy consideration that no innocent man should be convicted of a crime, see *S v Safatser* 1988 (1) SA 868 (A) at pages 878-887. In this regard see also *Mohamed v President of the Republic of South Africa and Others* 2001 (2) SA 1145 (C) at pages 1151 and 1152 — 1155. The sanctity of the lawyer-client privilege and the need to minimise in-roads into that privilege is emphasised in a number of Canadian cases that were cited by the applicant: *Solosky v The Queen* (1979) 105 DLR (3d) 745 (SCC) at p 760; *R v McClure* (2001) 151 CCC (3d) 321 (SCC) at p 332; *Dexoteaux v Mierzwinski* (1982) 141 DLR (3d) 590 (SCC).

[**12.**] It is also very clear from the cited authorities that the privilege is not absolute. The following are some of the recognised exceptions to the rule: (a) the right of the accused to fully defend themselves; (b) communications that are criminal in themselves or that are intended to obtain legal

advice to facilitate criminal activities; (c) when safety of the public is at risk. *Smith v Jones* (1999) 169 DLR 385 SCC paragraphs 52, 55 and 57.

[**13.**] In Zimbabwe the lawyer-client privilege is provided for in a statute. Section 8 of the Civil Evidence Act (Chapter 8:01), which protects the lawyer-client privilege provides as follows:

> 1. In this section — 'client', in relation to a legal practitioner, means a person who consults or employs the legal practitioner in his professional capacity; 'confidential communication' means a communication made by such a method or in such circumstances that, so far as the person making it is aware, its contents are disclosed to no one other than the person to whom it was made; 'legal practitioner' means a person entitled to practise in Zimbabwe as a legal practitioner or entitled to practice outside Zimbabwe in an equivalent capacity; 'third party', in relation to legal proceedings, means a person who is not a party to those proceedings.
> 2. No person shall disclose in evidence any confidential communication between (a) a client and his legal practitioner or the legal practitioner's employee or agent; or (b) a client's employee or agent and the client's legal practitioner or the legal practitioner's employee agent; where the confidential communication was made for the purpose of enabling the client to obtain, or the legal practitioner to give the client, any legal advice.
> 3. No person shall disclose in evidence any confidential communication between a client, or his employee or agent, and a third party, where the confidential communication was made for the dominant purpose of obtaining information or providing information to be submitted to the client's legal practitioner in connection with pending or contemplated legal proceedings which the client is or may be a party.
> 4. No person shall disclose in evidence any confidential communication between a client's legal practitioner, or his employee or agent, and a third party, where the confidential communication was made for the dominant purpose of obtaining information or providing information for the client's legal practitioner in connection with pending or contemplated legal proceedings in which the client is or may be a party.
> 5. The privilege from disclosure specified in this section shall not apply — (a) if the client consents to disclosure or waives the privilege; or (b) if the confidential communication was made to perpetrate a fraud, an offence or an act of omission rendering a person liable to any civil penalty or forfeiture in favour of the state in terms of any enactment in force in Zimbabwe; or (c) after the death of the client, if the disclosure is relevant to any question concerning the intention of the client or his legal competence.
> 6. Any evidence given in contravention of this section shall be inadmissible.

[**14.**] It is quite clear from the cited authorities and section 8 of the Civil Evidence Act that the sanctity of lawyer-client privilege is largely applicable in the domain of litigation or court proceedings. Indeed a proper reading of section 20 of the Constitution reveals that the lawyer-client privilege, as such, is not constitutionally guaranteed. It is only constitutionally guaranteed to the extent that the lawyer-client privilege is subsumed in the right to freedom of expression which includes freedom from interference with one's correspondence. I have no doubt that a breach of the lawyer-client privilege almost invariably leads to the violation of one's entitlement to a

fair trial guaranteed under section 18 of the Constitution but that is not the basis of the present application.

Are sections 98(2) and 103 of the Act inconsistent with section 20 of the Constitution

[**15.**] Section 20 of the Constitution provides as follows:

> *Protection of freedom of expression*
> 1. Except with his own consent or by way of parental discipline, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence.
> 2. Nothing contained in or done under the authority of any law shall be held to be in contravention of subsection (1) to the extent that the law in question makes provision — (a) in the interests of defence, public safety, public order, the economic interests of the state, public morality or public health; . . . except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

[**16.**] The impugned sections of the Act provide as follows:

> 98(2) If, in the opinion of the President it is necessary in the interests of national security or the maintenance of law and order, he may give a direction that (a) any postal article or class of postal articles or any telegram or class of telegrams shall be intercepted or detained and shall be delivered to an employee of the state specified in the direction to be disposed of in such manner as the President may direct; or (b) any communication or class of communication transmitted by means of a cellular telecommunication or telecommunication service shall be intercepted or monitored in a manner specified in the direction; or (c) any cellular telecommunication or telecommunication service established, maintained or worked by a cellular telecommunication or telecommunication licensee or any class of such services shall be suspended or that such service shall be suspended in respect of a person named in the direction.
>
> 103. Directions to licensees in the interests of national security
> (1) The President may, after consultation with the Minister and the licensee concerned, give that licensee such directions of a general character as appear to the President to be requisite or expedient in the interests of national security or relations with the government or territory outside Zimbabwe.
> (2) If it appears to the President to be requisite or expedient to do so in the interests of national security or relations with the government of a country or territory outside Zimbabwe, he may, after consultation with the Minister and the licensee concerned, give to that licensee a direction requiring him to do, or not to do, a particular thing specified in the direction.
> (3) A licensee shall give effect to any direction given to him in terms of this section notwithstanding any other duty imposed on him by or under this Act.
> (4) The President shall, at the earliest opportunity, publish in the *Gazette* every direction given under this section, unless he is of the opinion that such publication is against the interests of national security or relations with the government of a country or territory outside Zimbabwe, or the commercial interests of any person.
> (5) A person shall not disclose, or be required by virtue of any enactment or otherwise to disclose, anything done by virtue of this section if the President has

notified him that the President is of the opinion that disclosure of that thing is against the interests of national security or relations with the government of a country or territory outside Zimbabwe, or the commercial interests of some other person.
(6) The President may make *ex gratia* payments to licensees for the purpose of defraying or contributing towards any losses they may sustain by reason of compliance with any direction given in terms of this section.
(7) Any licensee who refuses to comply with a direction given in terms of this section shall be guilty of an offence and liable to a fine not exceeding two hundred thousand dollars or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment.

[**17.**] It is quite clear from a reading of the above provisions that sections 98(2) and 103 are a derogation of the right to freedom of expression conferred by section 20 of the Constitution.

[**18.**] It is also clear that the protection given, under the Constitution, to freedom from interference with correspondence is not an absolute right but may be restricted, as with freedom of expression, in certain circumscribed circumstances:

(a) The interference with the right must be in accordance with a law;
(b) It must be, *inter alia*, in the interest of defence, public safety, public order, the economic interests of the state, public morality or public health;
(c) The interference must be reasonably justifiable in a democratic society.

[**19.**] The impugned sections 98(2) and 103 of the Act confer on the President unfettered powers to intercept correspondence and communications. The only limitation to the exercise of that power is that the President has to hold the 'opinion' that it is necessary in the interests of national security or necessary for the maintenance of law and order. It is not a legal requirement that the holding of the opinion be based on reasonable grounds or good cause. In terms of section 103 of the Act the only restriction on the President before he gives certain directives is that he should consult the Minister, an appointee of the President, who is accountable to him .

[**20.**] Sections 98(2) and 103 of the Act have no built-in mechanism restricting or limiting

(a) Who the President may authorise to make the interception;
(b) What is to become of the mail or other communication once it has been intercepted;
(c) Who has access to the contents in the intercepted communication;
(d) What steps are to be taken to ensure that any lawyer-client privilege is not unduly interfered with.

[**21.**] The net effect of the failure to provide statutory mechanisms to control or limit the exercise of the power conferred by the Act on the President leads to an unfettered discretion to intercept mail and communication. The impugned sections provide no guidance as to what a citizen

should not do to avoid conduct that might lead to the exercise of the powers conferred by the impugned sections. The Act provides no legal recourse or safeguard for the innocent. The Act does not provide any mechanisms for accountability. Similar legislation in other jurisdictions provides or is required to provide, for prior scrutiny, independent supervision of the exercise of such powers and effective remedies for possible abuse of the powers, *Klass and Others v Federal Republic of Germany* (1978) 2 EHRR 211. The Act provides for no such safeguards.

[**22.**] The issue here is not that the powers have been abused or are likely to be abused by the President but rather that there are no mechanisms in the act to prevent such an abuse. In the absence of such limitations and control mechanisms the powers conferred on the President are too broad and overreaching to be reasonably justified in a democratic society. The impugned sections, as I have already stated, are so vague that the citizen is unable to regulate his conduct in such a way as to avoid the interception of his mail or communication. Thus, in this regard, the impugned sections of the Act are too vague and do not satisfy the constitutional requirement of 'provided by law'.

[**23.**] In the result the application succeeds and sections 98(2) and 103 of the Postal and Telecommunications Act (Chapter 12:05) are hereby declared unconstitutional and are struck down. The costs of this application shall be paid by the respondents, jointly and severally, the one paying the other to be absolved.