

Born with the appearance and anatomical features of a female child, Fatma, the applicant, noticed at puberty relatively visible differences that distinguished her from her sisters and her fellow female students. Suffering from the ambiguity of the situation, Fatma finally underwent genetic testing to determine actual sex. An expert medical report described the case of Fatma Mlaieh as ‘male pseudo-hermaphroditism.’ On this basis, [Fatma] entered the Court of First Instance of Tunis to obtain leave to amend the birth certificate to change the name to Mohamed Ali. The judge deferred to the medical report and issued a laconic judgment authorizing the applicant to change the name and gender on the birth certificate.¹¹⁰

Finally, articles published online show the criminal repression of homosexuality in Cameroon, illustrated in the cases of “Jonas and Franky” and “Roger Mbede.” Both cases are currently pending before the Supreme Court of Cameroon. The “Jonas and Franky” case is about two young people, considered men by the Court, convicted of homosexuality after having been found wearing women’s clothes and make-up, and drinking Bailey’s liqueur (which the judge considered a woman’s drink). They were sentenced to five years’ imprisonment, but acquitted on appeal after one year in prison.¹¹¹ The Government has appealed to the Supreme Court. Roger Jean-Claude Mbede was found guilty of homosexual conduct after he sent a text to a man saying “I am very much in love with you.” The Court of Appeal upheld his conviction. Mbede has since died, but an appeal to Supreme Court has been made by his lawyer.¹¹²

Many African countries have recently adopted progressive constitutions that include a Bill of Rights. We can observe a move to leave behind obscurantist traditional rules and customs in order to recognise the universal human rights norms codified in various international instruments. This can point towards the progressive realisation of every person’s human rights on the African continent. For example, while the penal codes of Burundi and Tunisia criminalise homosexuality,¹¹³ the constitutions of both states recognise the rights to physical integrity and human dignity,¹¹⁴ as well as strict conditions as to the limitation of rights and freedoms.¹¹⁵ The gap between the constitutional recognition of rights and their realisation opens a space for opportunities in which constitutional advocacy can play the role of a catalyst for change. The three decisions summarised below therefore offer hope that Francophone courts, as well as the rest of Africa, will continue to advance towards the full realisation of sexual and reproductive rights.

ADULTERY

Decision DCC 09-081 of July 30, 2009 **Benin, Constitutional Court**

COURT HOLDING

The Constitutional Court of the Republic of Benin declares that sections 336 to 339 of the Penal Code of Benin, which criminalise adultery, are unconstitutional because they discriminate on the basis of sex.

Summary of Facts

This is the case of a constitutional trial of provisions of the Penal Code in the context of an ordinary trial. Specifically, the unconstitutional exception raised before the Cotonou Court of First Instance arises from the following context: In February 2007, Ms. Nelly HOUSSOU come before Porto-Novo's Trial Court in order to obtain a divorce on the grounds of serious abuse and mistreatment. The husband responds by bringing his wife before a criminal judge of the Cotonou Court of First Instance – more than a year after her application for divorce – accusing her of committing adultery. “While the procedure initiated by the wife had recorded no useful hearing because of the empty-chair policy adopted by the defendant [i.e. the husband's refusal to attend court hearings], the procedure instituted by the husband was conducted full speed ahead. The goal was simple: to get a criminal judgment noting the wife's adultery, and to have it added to the Porto-Novo file in order to obtain a divorce blaming solely the wife.”¹¹⁶ Therefore, on May 15, 2009, Ms. HOUSSOU and her alleged accomplice, Mr. Akanbi Kamarou AKALA, file, through their lawyers, a request to the Constitutional Court. The applicants claim that the provisions mentioned above are unconstitutional in that they constitute a different legal regime according to whether a man or a woman commits adultery.

Applicants' argument

Through the objection raised before the Cotonou Court of First Instance, the applicants submit that sections 336 to 339 of the Penal Code are contrary to the principle of equality guaranteed by section 26 of the Constitution of Benin and sections 2 and 3 of the African Charter on Human and Peoples' Rights. The alleged incompatibility between the provisions would result from the more favourable conditions for the man than for the woman, which are demonstrated in three different aspects: first, the elements of the offence, then, its prosecution, and lastly, the penalty incurred.

Issues

Whether sections 336 to 339 of the Penal Code are unconstitutional for infringing upon the principle of equality.

Decision of the Court

For the Constitutional Court of Benin, a reading of the challenged legal provisions shows that they have established a disparity of treatment between men and women as to the elements of the crime of adultery. Specifically, the Court notes that while the husband's adultery may be punished only when committed in the marital home, the woman is punished regardless of where the act is committed. Consequently, the Constitutional Court declares sections 336 to 339 to be unconstitutional.

Significance

The July 30 decision shows a constitutional court ingeniously open to current realities of the world and to the desired changes in a society concerned with the protection of human rights. Thus, the Court states that the criminalization or non-criminalization of adultery are not contrary to the Constitution, but that any different treatment between men and women who commit adultery is contrary to sections 26, 2, and 3 of the African Charter on Human and Peoples' Rights. In Benin,

the African Charter became law upon ratification and is of greater normative value than domestic laws.¹¹⁷ Consequently, this decision gets the provisions criminalizing adultery out of Beninese positive law. Since the date of the decision, no one can be prosecuted and convicted on the basis of the provisions that have been declared unconstitutional.

However, what the Constitutional Court of Benin censures is not the repression of adultery, but simply the fact of repressing it in a discriminatory manner. The distinction is important because it helps put the scope of the decision into perspective. We can thus assume that it is still possible for the Beninese legislature to criminalise adultery and even impose imprisonment as the sentence. The only limitation arising out of that decision is that it must provide the same rule for all, without discrimination between men and women. Another evaluation is also possible. One can consider this decision to be a call for the legislature to pay more attention, regarding criminal law, to certain fundamental principles such as equality and non-discrimination.

POLYGAMY

Decision DCC 02-144 of December 23, 2002 Benin, Constitutional Court

COURT HOLDING

The Constitutional Court of Benin, reviewing Law N° 2002-07 relating to the Code of Persons and Family (*Loi n° 2002-07 portant Code des personnes et de la famille*), found section 74, which relates to polygamy, unconstitutional because it discriminates on the basis of sex.

Summary of Facts

In this case, there are two applicants: the President of the Republic of Benin and Ms. Rosine VIEYRA-SOGLO, a member of Parliament.

The adoption of the Law N° 2002-07 regarding the Code of Persons and Family, on June 7, 2002, leads the President of the Republic of Benin to submit a request for review of the entire Act's compliance with the Constitution, on June 20, 2002. In parallel, the same day, Ms Rosine VIEYRA-SOGLO submits a request for the constitutional review of certain provisions of the Act.

Noting the similarities between the two applications, the Court considers them jointly and rules with a single decision.

Applicant's argument

We will only present Rosine VIEYRA-SOGLO's argument, because it is the only one to appear in the text of the decision. Before the Constitutional Court, the applicant argues that sections 126, 143, 168, 185, and 335 of the Code of Persons and Family of Benin are not in accordance with section 26 of the Constitution and sections 2, 3, and 5 of the African Charter on Human and Peoples' Rights. We