

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

will pay special attention to the arguments made regarding section 143, with which the applicant contends that the provision is discriminatory and violates the principle of equality between men and women in that it allows a man to marry several women without permitting a woman to marry several men.

Issues

Whether the Code of Persons and Family, as a whole, is unconstitutional.

Whether sections 126, 143, 167, 185 and 334 of the Code of Persons and Family are unconstitutional.

Decision of the Court

The constitutional control by the Constitutional Court takes place in two stages, examining first the terms of Ms VIEYRA-SOGLLO's request, and analyzing secondly the compliance of the entire text with the Constitution, as requested by the President of the Republic.

As its holding shows, the Court finds certain provisions to be consistent with the Constitution, and others to be unconstitutional. For the second category – of more interest here – it finds two series of unconstitutional provisions. The first concerns section 12 paragraph 1 of the Code of Persons and Family, which is declared contrary to section 26 of the Constitution, as it does not allow the woman to retain her maiden name like her husband. For the Court, marriage should not cause the married woman to lose her identity; therefore, she ought to be able to keep her maiden name, to which she adds the name of her husband.

The second series is built around the Court's finding that there is unequal treatment between men and women arising from the option provided for in section 74-5 of the Code of Persons and Family, which allows a man to be polygamous whereas the woman can only be monogamous.

Because their content refers to polygamous marriage, numerous provisions, including sections 125, 127 (4), 137, 141, 143, 144, 149, 150, 154 (2), 128, and 155 of the Code of Persons and Family, are also declared unconstitutional.

Significance

The historically symbolic significance of this decision is undeniable. To our knowledge, this is the first time an African constitutional court declares the unconstitutionality of polygyny. In any case, this decision destroys any legal basis in Beninese law for polygamy.

More substantively, the decision is also important. The Court intends to mark its action of constitutional control of laws of a societal character with the seal of the protection of rights and freedoms.

Thus, for the Court, on the one hand, the identity of the woman should not be absorbed in the context of marriage, because persons under the same category should be subject to the same treatment without discrimination. A married woman may thus keep her maiden name, to which she adds her husband's name. On the other hand, the Court considers that section 74 of the Code of Persons and Family constitutes unequal and discriminatory treatment between men and women to the detriment of the latter, since polygamy is exclusively reserved to men.

A hasty reading might suggest that the Beninese judge wanted to encourage the legislature to allow polygyny and polyandry side by side, in order to ensure constitutional compliance. Such a view would be wrong because, through its laconic reasoning, the Court rather seems to want to proceed with realism. Without it being explicit, the decision rendered on December 23, 2002 led in fact to the abolition of polygamy, forcing the legislature to opt for monogamy.¹¹⁸

INFANTICIDE

Judgment N° 216 of December 13, 2005
Niger Republic, Court of Appeals of Niamey

COURT HOLDING

The Court finds that the accused H. A. did not obtain an abortion and is guilty of infanticide, and that there is insufficient proof to establish that her mother is guilty of complicity in infanticide.

Summary of Facts

The allegations against Ms. H. A. date back to December 23, 2002, when a brigade of the police force was informed of an act of infanticide committed by Ms. H. A. The investigation formally established certain elements, notably the fact that Ms. H. A. had given birth. Her arrest led the defendant (Ms. H. A.) to admit a pregnancy of seven months. She nevertheless declared that one night, she felt discomfort followed by bleeding of the genitals, out of which came blood clots that she wrapped in plastic and buried in a hole that she had dug.

The investigations also led to the indictment of Ms. F. B., the mother of Ms. H. A., for complicity in infanticide, despite both women's denials. The mother had denied any knowledge of the crime, or even of her daughter's pregnancy, though the village head claimed to have told her about the pregnancy and testified that even though the mother was not there, she had participated in the commission of the crime (in some way not specified in the decision).

Issues

1. Whether the facts alleged against Ms. H. A. constitute abortion or infanticide; and
2. Whether Ms F. B. is guilty of complicity in infanticide

Decision of the Court

Being a criminal trial, the Court endeavoured to identify the three elements constituting the offence.

The legal element lay in the requirements of sections 186, 237, 240, and 243 paragraph 2 of the Penal Code of Niger, punishing acts of infanticide. Based on the investigation, the Court established the acts attributed to Ms. H. A. By analyzing together different elements of the investigation,