UNITED NATIONS HUMAN RIGHTS TREATY BODIES

ANGOLA

Dias v Angola

(2001) AHRLR 3 (HRC 2000)

Communication 711/96, *Carlos Dias v Angola*
Decided at the 68th session, 20 March 2000, CCPR/C/68/D/711/1996

Evidence (failure of state party to respond to allegations, 7)
Personal liberty and security (security of person — death threats, 8.2, 8.3)

1. The author of the communication is Mr Carlos Dias, a Portuguese national. He submits the communication on his own behalf and on that of Carolina de Fátima da Silva Francisco, an Angolan national, killed on 28 February 1991. He does not invoke any articles of the Covenant. The Covenant and the Optional Protocol thereto entered into force for Angola on 9 February 1992.

Facts as submitted by the author

2.1. The author has a business in Angola, with a head office in Luanda. In February 1991, he was away on business and his business partner and companion, Carolina da Silva, stayed at the premises in Luanda. She was killed in the night of 28 February 1991. The author arrived back from his trip the following morning. The guard on duty was found severely wounded and later died of his injuries. The safe was found open and a large sum of money had been removed.

2.2. The author states that the murder was never seriously investigated by the Angolan police, despite several urgent requests made by him. The author then decided to start his own investigations and, in the beginning of 1993, published a series of advertisements in newspapers in Angola and in other countries, despite the fact that the Angolan authorities refused to give permission for these publications and actually threatened him if he would proceed to publish these. Following the advertisements, the author came into contact with an eyewitness to the crime.

2.3. In a statement made on 23 November 1993 in Rio de Janeiro, this eyewitness, an Angolan national born on 16 June 1972, stated that at the time she was the girlfriend of one Victor Lima, adviser to the President of Angola in charge of international affairs. On the evening of 27 February 1991, Mr Lima came to pick her up to go for a drive in his car. Later that

night they picked up four of his friends. According to the witness the five men started to complain about Angolans who worked for white men, and said that they would eliminate 'this black girl who is working with the whites'. After a while they stopped at a house, and a black woman, whom the witness did not know, but who apparently knew Mr Lima and his friends, opened the door. They went inside, had drinks, and then the men said that they wanted to speak to the woman alone, upon which they retired to a side room. The witness remained behind. After a while she heard loud voices, and then the woman started to scream. The witness became afraid and wanted to flee, but was prevented from leaving by the security guard. She then took up a position in the room from where she could see what was happening, and saw the woman being raped by the men. Mr Lima, the last one to rape her, then took her neck and twisted it. Upon leaving the premises, the witness was threatened by the men and told never to reveal what she had seen. Soon thereafter the witness left Angola out of fear.

2.4. The witness's sister was married to an inspector for the Secret Service of the Angolan Ministry of the Interior. In a statement, made on 15 September 1993 in Rio de Janeiro, this inspector confirmed that Carolina da Silva was being kept under surveillance by the secret police, officially for being suspected of furnishing political-military information to the South African government, through her contacts with whites, but, according to the statement, in reality because she had rejected the amorous proposals of the Chief of the Security Services of the cabinet of the President and National Director of the Secret Service, Mr Jose Maria.

2.5. The author states that the eyewitness's brother-in-law, the inspector who gave the statement referred to above, disappeared on 21 February 1994, while in Rio de Janeiro.

2.6. The author informed the President of Angola about his discoveries in a letter sent by his lawyer, pointing out that the perpetrators of the crime belonged to the President's inner circle. On 8 March 1994, a meeting was held with the Angolan consul in Rio de Janeiro, who informed the author that the government might send a mission to Rio de Janeiro. However, nothing happened. On 19 April 1994, the judicial adviser of the President, in a letter to the author's lawyer, stated that he was aware of the urgency of solving the case, and on 26 June 1994, a meeting took place in Lisbon between the judicial adviser and the Secretary of the Council of Ministers on the one side, and the author and his lawyer on the other. However, no further progress seems to have been made, and on 8 September 1994, an official *communiqué* was issued by the Angolan Minister of the Interior, stating that the police contested the declarations regarding the death of Carolina da Silva and accusing the author of trying to bribe the government.

2.7. Since then, the author has continued to try in vain to have the perpetrators of the murder brought to justice. In March 1995, he began a civil

action against Angola in the Civil Court of Lisbon, to recover unsettled debts. In July 1995, he applied to the Criminal Court in Lisbon against the perpetrators of the murder, apparently under article 6 of the Convention against Torture.

2.8. According to the author, the murder of his companion was planned by the Head of the Military House of the President, the vice-Minister of the Interior, the Minister of State Security and the Minister of Foreign Affairs. In this connection, he states that Carolina da Silva had been arrested on 6 October 1990 and kept in detention for 36 hours, because she had refused to open the safe of the enterprise owned by him.

2.9. The author states that since the murder he has not been able to live and do his business in Angola, because of threats. He has left Angola, leaving his properties (real estate, furniture, vehicles) behind. He has not been able to bring a case in the Angolan courts, since no lawyer wants to take the case, as it involves government officials. In this context he states that the lawyer who was representing Carolina's mother withdrew from the case on 15 March 1994.

The complaint

3. The author claims that Angola has violated the Covenant, since it has failed to investigate the crimes committed, retains those responsible for the crimes in high positions, and harasses the author and the witnesses so that they cannot return to Angola, with the result that the author has lost his property. The author argues that, although the murder occurred before the entry into force for Angola of the Covenant and the Optional Protocol thereto, the above-mentioned violations continue to affect the author and the witnesses.

The Committee's admissibility decision

4. By decision of 6 August 1996, the Special Rapporteur on New Communications of the Human Rights Committee transmitted the communication to the state party, requesting it, under rule 91 of the Rules of Procedure, to submit information and observations in respect of the admissibility of the communication. The state party did not forward such information in spite of several reminders addressed to it, the latest on 17 September 1997.

5.1. At its 62nd session, the Committee considered the admissibility of the communication. It ascertained, as required under article 5(2)(a) of the Optional Protocol, that the same matter was not being examined under another procedure of international investigation or settlement.

5.2. The Committee noted that it was precluded from considering the claim submitted on behalf of Ms Carolina Da Silva, *ratione temporis*. In the absence of observations from the state party, the Committee was not aware of any other obstacles to the admissibility of the communication and considered that the communication submitted on behalf of Mr Dias

might raise issues under the Covenant which should be examined on their merits.

6. Accordingly, on 20 March 1998, the Human Rights Committee decided that the communication was admissible.

Issues and proceedings before the Committee

7. The Committee's decision declaring the communication admissible was transmitted to the state party on 1 May 1998, with the request that explanations or statements clarifying the matter under consideration should reach the Committee at the latest by 1 November 1998. No clarifications were received despite several reminders sent to the state party, the last one on 24 June 1999. The Committee recalls that it is implicit in the Optional Protocol that the state party make available to the Committee all information at its disposal and regrets the lack of cooperation of the state party. In the absence of any reply from the state party, due weight must be given to the author's allegations to the extent that they have been substantiated.

8.1. The Committee has considered the present communication in the light of all the written information before it, in accordance with article 5(1) of the Optional Protocol.

8.2. The author has provided information to the effect that he has been harassed and threatened by the state party's authorities, when, in the absence of a serious investigation by the police, he started investigating the murder of his companion and found evidence that high-ranking government officials had been involved in the murder. The author's allegations in this respect have never been contradicted by the state party. The Committee notes that it has also not been disputed that one of the witnesses, who gave a statement to the author about the murder of his companion, disappeared shortly afterwards.

8.3. The Committee recalls its jurisprudence that article 9(1) of the Covenant protects the right to security of person also outside the context of the formal deprivation of liberty. An interpretation of article 9 that would allow a state party to ignore threats to the personal security of non-detained persons subject to its jurisdiction would render totally ineffective the guarantees of the Covenant (see the Committee's views in case no 195/1985, *Delgado Paez v Colombia*, paragraph 5(5), adopted on 12 July 1990, document CCPR/C/39/D/195/1985). In the present case, the author has claimed that the authorities themselves have been the source of the threats. As a consequence of the threats against him, the author has been unable to enter Angola, and he has therefore been prevented from exercising his rights. If the state party neither denies the threats nor cooperates with the Committee to explain the matter, the Committee must give due weight to the author's allegations in this respect. Accordingly, the Committee concludes that the facts before it disclose a violation of the author's right of security of person under article 9(1) of the Covenant.

9. 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 violations of article 9(1) of the Covenant.

10. Under article 2(3)(a) of the Covenant the state party is under the obligation to provide Mr Dias with an effective remedy and to take adequate measures to protect his personal security from threats of any kind. The state party is under an obligation to take measures to prevent similar violations in the future.

11. Bearing in mind that, by becoming a state party to the Optional Protocol, the state party has recognised the competence of the Committee to determine whether there has been a violation of the Covenant or not 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 provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the state party, within 90 days, information about the measures taken to give effect to the Committee's views. The state party is also requested to publish the Committee's views.

CAMEROON

Mazou v Cameroon

(2001) AHRLR 8 (HRC 2001)

Communication 650/1995, *Abdoulaye Mazou v Cameroon*
Decided at the 72nd session, 26 July 2001, CCPR/C/72/D/650/1995
(See also *Pagnoulle (on behalf of Mazou) v Cameroon* (2000) AHRLR 57 (ACHPR 1997))

Equal protection of the law (reinstatement in career, 8.2, 8.4, 9)
Admissibility (failure to exhaust local remedies, 8.3)
Fair trial (trial within reasonable time, 8.4)

1. The author of the communication, dated 31 October 1994, is Abdoulaye Mazou, a Cameroonian citizen and professional magistrate, currently living in Yaoundé, Cameroon. He claims to be the victim of a violation by Cameroon of article 2(3), article 14(1) and article 25(c) of the International Covenant on Civil and Political Rights. The Covenant and the Optional Protocol entered into force for Cameroon on 27 September 1984.

The facts as submitted by the author

2.1. Following an attempted *coup d'état* in Cameroon in April 1984, the author, who at that time was a second-class magistrate, was arrested on 16 April 1984. He was suspected of having sheltered his brother, who was wanted by the police for having taken part in the *coup d'état*. The author was found guilty and sentenced by the military court in Yaoundé to five years' imprisonment. According to the author, the charges against him were false, and no evidence was submitted and no witnesses were heard during the court proceedings. The trial was held *in camera*.[1]

2.2. While the author was detained, the President of Cameroon signed a decree on 2 June 1987 (no 87/747) removing the author from his post as Secretary-General in the Ministry of Education and Chairman of the Governing Council of the National Sports Office. The decree gave no reasons for the action and, according to the author, was issued in violation of article 133 of the Civil Service Statute.

[1] Note by the Secretariat [of the Human Rights Commitee]: The author has not attached any documentation relating to the criminal trial. The communication focuses primarily on the fact that he was not reinstated in his post.

2.3. On 23 April 1990 the author was released from prison but placed under house arrest in Yagoua, his birthplace, in the far north of the country. Not until the end of April 1991, following the adoption of the Amnesty Act of 23 April 1991 (no 91/002), were the restrictions lifted. On the date of transmission of the communication, however, the presidential decree of 2 June 1987 remained in force and the author had not been allowed to resume his duties.

2.4. On 12 June 1991 the author requested the President to reinstate him in the civil service. On 18 July 1991 he filed an appeal with the Ministry of Justice requesting the annulment of the presidential decree of 2 June 1987. Receiving no response, on 9 September 1991 he applied for a judicial remedy to the administrative division of the Supreme Court, asking it to find that the decree was illegal and ought therefore to be annulled. The author points out that although the Supreme Court has regularly ruled that such decrees should be annulled, as of 31 October 1994 the case had still not been settled.

2.5. On 4 May 1992, Decrees no 92/091 and no 92/092, setting out the terms of reinstatement and compensation of those covered by the Amnesty Act, were issued.

2.6. On 13 May 1992 the author applied to the Ministry of Justice for reinstatement to his post. Pursuant to Decree no 92/091, his application was transmitted to the committee responsible for monitoring reinstatement in the civil service. On 12 May 1993 that committee issued an opinion in support of the author's reinstatement in the civil service. According to the author, however, the Ministry did not take action on this opinion.

2.7. On 22 September 1992 the author initiated proceedings before the administrative division of the Supreme Court to attack Decree no 92/091 and Decree no 92/092. In his view, the decrees sought to block the full implementation of the Amnesty Act of 23 April 1991 which, he claims, provided for automatic reinstatement. This application was also pending at the time of submission of his communication.

2.8. In his initial communication the author stated that he had been out of work since being released from prison. He claimed that he was being persecuted for his opinions and on account of his ethnic origin. He added that other persons who had benefited from the Amnesty Act had been reinstated in their former posts.

2.9. At that time, the author stated that, in view of the silence of the judicial and political authorities, there were no further domestic remedies available to him.

2.10. Since the submission of his communication, however, the situation has improved significantly for the author; he was reinstated in his post on 16

April 1998 in accordance with a Supreme Court order of 30 January 1997 annulling Decree no 87/747, the decree removing him from his post.

The complaint

3. According to the author, the facts set out above constitute a violation of article 2(3), article 14(1) and article 25(c) of the Covenant. The author is asking the Committee to urge the state party to reinstate him in the civil service with retroactive effect and to award him damages in compensation for the injury done to him.

The state party's observations

4. In a note dated 13 May 1997 the state party informed the Committee that the administrative division of the Supreme Court, by an order dated 30 January 1997, had annulled Decree no 87/747 (removing the author from his post).

The Committee's decision regarding admissibility

5.1. At its 63rd session the Committee considered the admissibility of the communication.

5.2. At that time the Committee noted that the state party was not contesting the admissibility of the communication but had informed the Committee that the Supreme Court had annulled the decree dismissing the author from his post. At the same time, the state party had not indicated whether the author had been reinstated in his post and if so, under what conditions, or if not, on what grounds. The Committee therefore decided that the communication should be considered on the merits.

5.3. Accordingly, on 6 July 1998 the Committee decided that the communication was admissible.

The state party's observations on the merits of the communication

6.1. By a letter dated 10 August 2000 the state party transmitted its observations regarding the merits of the communication.

6.2. The state party reports that pursuant to the Supreme Court decision of 30 January 1997 the author of the communication was reinstated as a second-class magistrate in the Ministry of Justice as of 16 October 1998 and that his salary was calculated retroactive to 1 April 1987, the date on which he had been wrongfully suspended and subsequently dismissed.

The author's observations on the merits of the communication

7.1. In a letter dated 8 November 2000 the author transmitted his comments on the state party's observations.

7.2. The author first confirms that he was in fact reinstated in the Ministry

of Justice and that the administration had indeed paid him his salary dating back to 1 April 1987.

7.3. However, the author considers that the administration did not fully grasp the significance of the Supreme Court decision of 30 January 1997. Given that the effects of that decision were retroactive, the author believes that he is entitled to have his career restored, ie to be reinstated at the grade he would have held had he not been dismissed. Despite his requests to the Ministry of Justice to that end, however, the author has yet to be informed of a decision.

7.4. The author is also requesting damages in compensation for the injury suffered by him following his dismissal.

The Committee's deliberations on the merits

8.1. The Human Rights Committee considered the communication in the light of the information provided by the parties, in accordance with article 5(1) of the Optional Protocol.

8.2. The Committee learned that, pursuant to the Supreme Court decision of 30 January 1997, the author had been reinstated in his post and that his salary had been paid retroactively from the date of his dismissal. However, there seems to be no question that the state party neither honoured the request for damages in compensation for the injury suffered nor sought to restore the author's career, which would have resulted in his being reinstated at the grade to which he would have been entitled had he not been dismissed.

8.3. The Committee notes, however, that the author chose to bring his complaint to the Ministry of Justice by means of a letter, and submitted no evidence showing that a judicial authority had effectively been asked to give a ruling on the question of damages. This part of the communication is inconsistent with the principle of exhaustion of domestic remedies as set out in article 5(2)(b) of the Optional Protocol and must therefore be deemed inadmissible.

8.4. With regard to the author's allegations that the state party violated both article 2 and article 25 of the Covenant, the Committee considers that the Supreme Court proceedings that gave rise to the decision of 30 January 1997 satisfying the request that the author had made in his communication were unduly delayed, taking place more than 10 years after the author's removal from his post, and were not followed by restoration of his career on reinstatement, to which he was legally entitled in view of the annulment decision of 30 January 1997. Such proceedings cannot, therefore, be considered to be a satisfactory remedy in the meaning of articles 2 and 25 of the Covenant.

9. Consequently, the state party has an obligation to reinstate the author of the communication in his career, with all the attendant consequences

under Cameroonian law, and must ensure that similar violations do not recur in the future.

10. Bearing in mind that, by becoming a state party to the Optional Protocol, the state party has recognised the competence of the Committee to determine whether there has been a violation of the Covenant or not 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 to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the state party, within 90 days, information about the measures taken to give effect to its views. The state party is also invited to publish the Committee's views.

CENTRAL AFRICAN REPUBLIC

M'Boissona (on behalf of Bozize) v Central African Republic

(2001) AHRLR 13 (HRC 1994)

Communication 428/1990, *Yvonne M'Boissona v Central African Republic* Decided at the 50th session, 7 April 1994, CCPR/C/50/D/428/1990

Cruel, inhuman and degrading treatment (5.2)
Fair trial (defence — access to legal counsel, 5.2; trial within a reasonable time, 5.3)
Personal liberty and security (no legal remedies to challenge detention, 5.2)

1. The author of the communication is Yvonne M'Boissona, a citizen of the Central African Republic residing at Stains, France. She submits the communication on behalf of her brother, François Bozize, currently detained at a penitentiary at Bangui, Central African Republic. She claims that her brother is a victim of violations of his human rights by the authorities of the Central African Republic, but does not invoke any provisions of the International Covenant on Civil and Political Rights.

The facts as submitted by the author

2.1. The author states that her brother was a high-level military officer of the armed forces of the Central African Republic. On 3 March 1982, he instigated a *coup d'état*; after its failure, he went into exile in Benin. On 24 July 1989, the author's brother was arrested at a hotel in Cotonou, Benin, together with 11 other citizens of the Central African Republic; all were presumed members of the political opposition, the Central African Movement of National Liberation (*Mouvement centrafricain de libération nationale*). On 31 August 1989, Mr Bozize and the other opposition activists were repatriated by force, allegedly with the help of a Central African Republic military commando allowed to operate within Benin; this 'extradition' is said to have been negotiated between the governments of Benin and the Central African Republic. The forced repatriation occurred without a formal extradition request having been issued by the government of the Central African Republic.

2.2. Upon his return to Bangui, Mr Bozize was imprisoned at Camp Roux, where he allegedly suffered serious maltreatment and beatings. The

author claims that her brother was not allowed access to a lawyer of his own choosing, nor to members of his family. Allegedly, not even a doctor was allowed to see him to provide basic medical care. Furthermore, the sanitary conditions of the prison are said to be deplorable and the food allegedly consists of rotten meat mixed with sand; as a result, Mr Bozize's weight dropped to 40 kilograms by the summer of 1990.

2.3. During the night of 10 to 11 July 1990, the prison authorities of Camp Roux reportedly stage-managed a power failure in the sector of town where the prison is located, purportedly to incite Mr Bozize to attempt an escape. As this practice is said to be common and invariably results in the death of the would-be escapee, Mr Bozize did not leave his cell. The author contends that in the course of the night, her brother was brutally beaten for several hours and severely injured. This version of the events was confirmed by Mr Bozize's lawyer, Maître Thiangaye, who was able to visit his client on 26 October 1990 and who noticed numerous traces of beatings and ascertained that Mr Bozize had two broken ribs. The lawyer also reported that Mr Bozize was kept shackled, that his reading material had been confiscated and that the prison guards allowed him out of his cell only twice a week. Allegedly, this treatment is known to, and condoned by, President Kolingba and the Ministers of Defence and of the Interior.

2.4. The authorities of the Central African Republic consistently maintain that Mr Bozize indeed attempted to escape from the prison and that he sustained injuries in the process. This is denied by the author, who points to her brother's weak physical condition in the summer of 1990 and argues that he could not possibly have climbed over the three-metre-high prison wall.

2.5. Mr Bozize's wife, who currently resides in France, has requested the good offices of the French authorities. By a letter of 29 October 1990, the President of the National Assembly informed her that the French Foreign Service had ascertained that Mr Bozize was alive and that he had been transferred to the Kassai prison at Bangui.

2.6. As to the issue of exhaustion of domestic remedies, it is submitted that criminal proceedings against Mr Bozize were to have been opened on 28 February 1991, allegedly in order to profit from the momentary absence, owing to a trip abroad, of his lawyer. However, the trial was postponed for 'technical reasons'. Since then, the trial has apparently been postponed on other occasions. Mrs Bozize complains that in the months following his arrest, her husband was denied access to counsel; later, the family retained the services of a lawyer to defend him. The lawyer, however, was denied authorisation to visit his client; the lawyer allegedly also suffered restrictions of his freedom of movement on account of his client.

The complaint

3. It is submitted that the events described above constitute violations of Mr Bozize's rights under the Covenant. Although the author does not specifically invoke any provisions of the Covenant, it transpires from the context of her submissions that her claims relate primarily to articles 7, 9, 10, 14 and 19 of the Covenant.

The Committee's decision on admissibility

4.1. During its 45th session, in July 1992, the Committee considered the admissibility of the communication. It noted with concern that in spite of two reminders addressed to the state party, in July and September 1991, no information or observations on the admissibility of the communication had been received from the state party. In the circumstances, the Committee found that it was not precluded from considering the communication under article 5(2)(b) of the Optional Protocol.

4.2. On 8 July 1992, the Committee declared the communication admissible in so far as it appeared to raise issues under articles 7, 9, 10, 14(1) and (3), and 19 of the Covenant.

Examination of the merits

5.1. The state party did not provide any information in respect of the substance of the author's allegations, in spite of two reminders addressed to it in June 1993 and February 1994. The Committee notes with regret and great concern the absence of cooperation on the part of the state party in respect of both the admissibility and the substance of the author's allegations. It is implicit in article 4(2) of the Optional Protocol and in rule 91 of the Committee's Rules of Procedure that a state party to the Covenant must investigate in good faith all the allegations of violations of the Covenant made against it and its authorities and furnish the Committee with the information available to it. In the circumstances, due weight must be given to the author's allegations, to the extent that they have been substantiated.

5.2. The Committee decides to base its views on the following facts, which have not been contested by the state party. Mr François Bozize was arrested on 24 July 1989 and was taken to the military camp at Roux, Bangui, on 31 August 1989. There he was subjected to maltreatment and was held *incommunicado* until 26 October 1990, when his lawyer was able to visit him. During the night of 10 to 11 July 1990, he was beaten and sustained serious injuries, which was confirmed by his lawyer. Moreover, while detained in the camp at Roux, he was held under conditions which did not respect the inherent dignity of the human person. After his arrest, Mr Bozize was not brought promptly before a judge or other officer authorised by law to exercise judicial power, was denied access to counsel and was not, in due time, afforded the opportunity to obtain a decision by a court on the lawfulness of his arrest and detention.

The Committee finds that the above amount to violations by the state party of articles 7, 9, and 10 in the case.

5.3. The Committee notes that although Mr Bozize has not yet been tried, his right to a fair trial has been violated; in particular, his right to be tried within a 'reasonable time' under article 14(3)(c), has not been respected, as he does not appear to have been tried at first instance after over four years of detention.

5.4. In respect of a possible violation of article 19 of the Covenant, the Committee notes that this claim has remained unsubstantiated. The Committee therefore makes no finding of a violation in this respect.

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 disclose violations of articles 7, 9, 10 and 14(3)(c) of the Covenant.

7. The Committee is of the view that Mr François Bozize is entitled, under article 2(3)(a) of the Covenant, to an effective remedy, including his release and appropriate compensation for the treatment suffered. The state party should investigate the events complained of and bring to justice those held responsible for the author's treatment; it further is under an obligation to take effective measures to ensure that similar violations do not occur in the future.

8. The Committee would wish to receive prompt information on any relevant measures taken by the state party in respect of the Committee's views.

DEMOCRATIC REPUBLIC OF CONGO (FORMERLY ZAIRE)

Mpaka-Nsusu v Zaire

(2001) AHRLR 17 (HRC 1986)

Communication 157/1983, *André Alphonse Mpaka-Nsusu v Zaire*
Decided at the 27th session, 26 March 1986, CCPR/C/27/D/157/1983

Expression (persecution because of opinions expressed, 8.2, 10)
Movement (banishment, 8.2, 10)
Political participation (prohibition to stand for political office, 8.2, 10)

1.1. The author of the communication (initial letter dated 15 August 1983 and further letters dated 8 January and 8 May 1984) is André Alphonse Mpaka-Nsusu, a Zairian national at present living in exile. He claims to be a victim of breaches by Zaire of articles 1, 9, 14 and 26 of the International Covenant on Civil and Political Rights. He is represented by an attorney.

1.2. The facts as described by the author are as follows: on 21 November 1977 he presented his candidacy for the presidency of the *Mouvement populaire de la revolution* (MPR) and, at the same time, for the presidency of Zaire in conformity with existing Zairian law. After the rejection of his candidacy — which he alleges was in contravention of law no 77-029 (concerning the organisation of presidential elections) — Mr Mpaka-Nsusu, on 31 December 1977, submitted a proposal to the government requesting recognition of a second, constitutionally permissible, party in Zaire, the Federal Nationalist Party (PANAFE).

1.3. He claims that he acted in accordance with article 4 of the Constitution of 24 June 1967 which envisages a two-party system, but despite this he was arrested on 1 July 1979 and detained without trial until 31 January 1981 in the prison of the State Security Police (CNRI). He claims that his detention was based on unfounded charges of subverting state security. After being released from prison, he was banished to his village of origin for an indefinite period. This banishment ended *de facto* on 15 February 1983 when he fled the country.

1.4. The author states that although he filed a suit on 1 October 1981 before the Supreme Court of Justice of Zaire contesting the legality of the

institutionalisation of MPR as sole party as being counter to the dual-party structure set out in the Constitution therefore requesting that parts of laws no 74-020 of 15 August 1974 and no 80-012 of 15 November 1980 be declared unconstitutional (modifying by ordinary law constitutional provisions) and seeking reparation for damages suffered during detention), the Supreme Court of Justice refused to consider it. Furthermore, the author notes that individuals have no access to the Constitutional Court of Zaire. Accordingly, the author contends that he has exhausted all domestic remedies available to him.

2. By its decision of 9 November 1983, the Human Rights Committee transmitted the communication under rule 91 of the provisional Rules of Procedure to the state party concerned, requesting information and observations relevant to the question of admissibility of the communication in so far as it might raise issues under articles 9, 25 and 26 of the Covenant. The Committee also requested the state party to transmit to the Committee any copies of court orders or decisions relevant to the case. Furthermore, the Committee requested the author to provide more detailed information concerning the grounds for alleging violations of article 1 of the Covenant.

3. In response to the Committee's request, the author, by a letter dated 8 January 1984, explained that the people of Zaire, in a constitutional referendum held from 4 to 24 June 1967, had declared themselves in favour of a bipartisan constitutional system. He asserted that it was contrary to the Constitution of Zaire, in particular article 39, to prohibit the establishment of a second political party, and that he had been a victim of persecution because of his political activities as leader of PANAFE.

4. By a note dated 18 January 1984, the state party informed the Committee that an inquiry into the case of Mr Mpaka-Nsusu was in progress in Zaire and that a reply would be forwarded to the Committee by the end of February 1984. By a note dated 6 April 1984, the state party informed the Committee that the inquiry had not yet been completed and that a reply would be submitted by the end of April. No further submission from the state party has been received, despite repeated reminders.

5. Before considering a communication on the merits, the Committee must ascertain whether it fulfils all conditions relating to its admissibility under the Optional Protocol. With regard to article 5(2)(a) of the Optional Protocol, the Committee had not received any information that the subject matter had been submitted to another procedure of international investigation or settlement. Accordingly, the Committee found that the communication was not inadmissible under article 5(2)(a) of the Optional Protocol. The Committee was also unable to conclude that in the circumstances of the case there were effective remedies available to the alleged victim which he had failed to exhaust. Accordingly, the Committee found that the communication was not inadmissible under article 5(2)(b) of the Optional Protocol.

6. On 28 March 1985, the Human Rights Committee therefore decided that the communication was admissible, and in accordance with article 4(2) of the Optional Protocol, requested the state party to submit to the Committee, within six months of the date of the transmittal to it of the Committee's decision, written explanations or statements clarifying the matter and the remedy, if any, that might have been taken by it.

7.1. The time limit for the state party's submission under article 4(2) of the Optional Protocol expired on 2 November 1985. No submission has been received from the state party.

7.2. No further submission has been received from the author.

8.1. The Human Rights Committee, having considered the present communication in the light of all the information made available to it, as provided in article 5(1) of the Optional Protocol, hereby decides to base its views on the following facts, which have not been contested by the state party.

8.2. Mr André Alphonse Mpaka-Nsusu is a Zairian national at present living in exile. In 1977, he presented his candidacy for the presidency of Zaire in conformity with existing Zairian law. His candidacy, however, was rejected. On 1 July 1979, he was arrested and subsequently detained in the prison of the State Security Police without trial until 31 January 1981. After being released from prison he was banished to his village of origin for an indefinite period. He fled the country on 15 February 1983.

9.1. In formulating its views, the Human Rights Committee also takes into account the failure of the state party to furnish any information and clarifications necessary for the Committee to facilitate its tasks. In the circumstances, due weight must be given to the author's allegations. It is implicit in article 4(2) of the Optional Protocol that the state party has the duty to investigate in good faith all allegations of violation of the Covenant made against it and its authorities, and to furnish to the Committee the information available to it. The Committee notes with concern that, despite its repeated requests and reminders and despite the state party's obligation under article 4(2) of the Optional Protocol, no submission has been received from the state party in the present case, other than two notes of January and April 1984 informing the Committee that an inquiry into the case of Mr Mpaka-Nsusu was in progress.

9.2. The Committee observes that the information before it does not justify a finding as to the alleged violation of article 1 of the Covenant.

10. 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 these facts disclose violations of the Covenant, with respect to: article 9(1) because André Alphonse Mpaka-Nsusu was arbitrarily arrested on 1 July 1979, and detained without trial until 31 January 1981; article 12(1) because he was banished to his village of origin for an

indefinite period; article 19, because he suffered persecution for his political opinions; article 25, because, notwithstanding the entitlement to stand for the presidency under Zairian law, he was not so permitted.

11. The Committee, accordingly, is of the view that the state party is under an obligation, in accordance with the provisions of article 2 of the Covenant, to provide Mr Mpaka-Nsusu with effective remedies, including compensation, for the violations that he has suffered, and to take steps to ensure that similar violations do not occur in the future.

EQUATORIAL GUINEA

Oló Bahamonde v Equatorial Guinea

(2001) AHRLR 21 (HRC 1993)

Communication 468/1991, *Angel N Oló Bahamonde v Equatorial Guinea*
Decided at the 49th session, 20 Oct 1993, CCPR/C/49/D/468/1991

Evidence (failure of state party to respond to allegations, 6.1, 8.2, 9.1)
Admissibility (exhaustion of local remedies — onus on government to prove that remedies available, 6.1, 6.2)
Missions (mission by Committee not possible, 8.2)
Personal liberty and security (arbitrary arrest and detention, 9.1; harassment, intimidation and threats, 9.2)
Movement (right to leave home country, 9.3)
Fair trial (right to be heard, impartial court — court controlled by executive, 9.4)
Equality, non-discrimination (discrimination on the grounds of political opinion, 9.5)

The facts as submitted by the author

1. The author of the communication is Angel N Oló Bahamonde, a citizen of Equatorial Guinea born in 1944 and a landowner, mining engineer and former civil servant. Until the summer of 1991, he resided in Malabo, Equatorial Guinea. In September 1991, he fled the country for Spain. He currently resides in Luanco, Spain. The author claims to be a victim of violations by Equatorial Guinea of articles 6(1), 9, 12, 14, 16, 17, 19, 20(2), 25, 26 and 27, in conjunction with article 2 of the International Covenant on Civil and Political Rights.

2.1. On 4 March 1986, the author's passport was confiscated at the airport of Malabo. On 26 March 1986, the same thing occurred at the airport of Libreville, Gabon, allegedly upon orders of President Obiang of Equatorial Guinea. From 26 May to 17 June 1987, the author was detained by order of the Governor of Bioko. Some of his lands were confiscated in October 1987. The author complained to the authorities and directly to President Obiang, to no avail. A little later, some 22.2 tons of cacao from his plantations were confiscated by order of the Prime Minister, and his

objections and recourse of 28 February 1988 were simply ignored. Parts of his agricultural crops were allegedly destroyed by the military in 1990-1991. Once again, his requests for compensation were not acted upon.

2.2. On 16 January 1991, the author was granted a personal audience with President Obiang. In the course of this audience, the author outlined his grievances and handed to Mr Obiang a copy of the entire written record in the case, including copies of the complaints addressed to the President. The damage allegedly suffered included the expropriation of several of his farms by virtue of Decree no 125/1990 of 13 November 1990, the destruction of maize and soya crops worth more than 5 million CFA francs, and the exploitation of timberland in the order of approximately 5 million CFA francs. Finally, industrial development and oil exploration projects prepared by him for the government and valued at approximately 835 million CFA francs have been used by the authorities without any payment to the author.

2.3. According to the author, there are no effective domestic remedies to exhaust or even pursue, as President Obiang controls the state party's judiciary at all levels of the administration.

The complaint

3.1. The author complains that he and other individuals who do not share the views or adhere to the ruling party of President Obiang or who do not at least belong to his clan (the Mongomo clan) are subjected to varying degrees of discrimination, intimidation and persecution. More particularly, the author claims to have been a victim of systematic persecution by the Prime Minister, the Deputy Prime Minister, the Governor of Bioko (North) and the Minister of External Relations, all of whom, through their respective services, have pronounced threats against him, primarily on account of his outspoken views on the regime in place. He further contends that the ambassadors of Equatorial Guinea in Spain, France and Gabon have been instructed to 'make his life difficult' whenever he travels abroad.

3.2. The author asserts that his arrest in May-June 1987 was arbitrary, and that no indictment was served on him throughout the period of his detention. During this period, he was not brought before a judge or judicial officer.

3.3. It is further submitted that the author has been prevented from travelling freely within his own country and from leaving it at his own free will.

The state party's information and observations and the author's comments thereon

4.1. The state party notes that the author has failed to exhaust available domestic remedies, since he did not file any action before the local civil or administrative courts. It adds, in general terms, that there is no basis for

the author's assertion that the judicial organs in Equatorial Guinea are manipulated by the government and by President Obiang.

4.2. The state party submits that the author could invoke, before the domestic tribunals, the following laws and/or regulations, which the courts are bound to apply: (a) The Basic Law of Equatorial Guinea of 15 August 1982; (b) Law no 10/1984 on the organisation of the judiciary; (c) Decree no 28/1980 of 11 November 1980, governing the procedure before administrative judicial instances; (d) Decree no 4/1980 of 3 April 1980, which regulates the subsidiary application of old Spanish laws and regulations which were applicable in Equatorial Guinea until 12 October 1968. The state party does not relate this information to the specific circumstances of the author's case.

5.1. In his comments, the author challenges the state party's arguments and forwards copies of his numerous *démarches*, administrative, judicial or otherwise, to obtain judicial redress, adding that all the avenues of redress that in the state party's opinion are open to him have been systematically blocked by the authorities and President Obiang himself. In this context, it is submitted that the judiciary in Equatorial Guinea cannot act independently and impartially, since all judges and magistrates are directly nominated by the President, and that the President of the Court of Appeal himself is a member of the President's security forces.

5.2. The author contends that, since his departure from Equatorial Guinea in 1991, he has received death threats. He claims that the security services of Equatorial Guinea have received the order to eliminate him, if necessary in Spain. In this context, he argues that his departure from Malabo was possible only with the protection and the help offered by a German citizen. Moreover, since 29 September 1991, all his remaining properties in Equatorial Guinea are said to have been systematically dismantled or expropriated.

The Committee's decision on admissibility

6.1. During its 44th session, in March 1992, the Committee considered the admissibility of the communication. The Committee took note of the state party's contention that domestic remedies were available to the author and of the author's challenge to this affirmation. It recalled that it is implicit in rule 91 of its Rules of Procedure and article 4(2) of the Optional Protocol that a state party to the Covenant should make available to the Committee all the information at its disposal, including, at the stage of determination of the admissibility of the communication, detailed information about remedies available to the victims of the alleged violation in the circumstances of their cases. Taking into consideration the state party's failure to link its observations to the specific circumstances of the author's case, and bearing in mind that he had submitted very comprehensive information in support of his contention that he sought to avail himself of remedies under the laws of the state party, the Committee was

satisfied that he had met the requirements of article 5(2)(b) of the Optional Protocol.

6.2. As to the allegations under articles 16, 17, 19, 20(2), 25 and 27, the Committee considered that the author had failed to substantiate them for purposes of admissibility. Similarly, it noted that he had failed to adduce sufficient evidence in support of his claim under article 6(1) and concluded that in this respect, he had failed to advance a claim within the meaning of article 2 of the Optional Protocol.

6.3. On 25 March 1992, the Committee declared the communication admissible in so far as it appeared to raise issues under articles 9(1) and (3), 12(1) and (2), 14(1) and 26 of the Covenant.

The state party's further observations and comments

7.1. In a submission of 30 July 1992, the state party reaffirms that its earlier submission made in respect of the admissibility of the case was 'sufficiently detailed, honest and reflective of the truth on this matter'. It admits that its version cannot be reconciled with that of the author.

7.2. The state party notes that it will not add anything further in terms of clarifications or documentation and suggests that if the Committee intends to seek to obtain a clearer picture of the author's allegations, it should investigate *in situ* the 'well-founded submissions of the state party and the allegations of the author'. The state party indicates that it is willing to facilitate a fact-finding mission by the Committee and to provide all the necessary guarantees.

7.3. In a further submission dated 30 June 1993, the state party summarily dismisses all of the author's allegations as unfounded and alleges that Mr Bahamonde suffers from a 'persecution complex' ('*obsesionado por su manía persecutoria*'). It contends that far from being harassed and persecuted, the author owed both his high functions in the civil service of Equatorial Guinea and his promotions to President Obiang himself, and that he left his functions of his own free will. Accordingly, the state party contends that it does not owe the author anything in terms of compensation and submits that on the contrary, it could well prosecute the author for defamation, abuse of office and for treason.

7.4. The state party asserts that there is no basis for the author's contention of systematic political repression and an undemocratic system of government in Equatorial Guinea, nor for the assertion that the administration of justice is at the mercy of the executive and insensitive to considerations, for example, of due process. On the contrary, more than 13 political parties were legalised in March 1993, and they are said to be able to operate without restrictions. In the circumstances, the state party requests the Committee to reject the author's submissions as an abuse of the right of submission, under article 3 of the Optional Protocol.

Examination of the merits

8.1. The Committee has taken note of the state party's observations, which reject the author's allegations in summary terms and invite the Committee to ascertain *in situ* that there have been no violations of the Covenant.

8.2. As to the state party's suggestion that the Committee should investigate the author's allegations in Equatorial Guinea, the Committee recalls that pursuant to article 5(1) of the Optional Protocol, it considers communications 'on the basis of all written information made available to it by the individual and by the state party concerned'. The Committee has no choice but to confine itself to formulating its views in the present case on the basis of the written information received. Article 4(2) of the Optional Protocol enjoins a state party to investigate thoroughly, in good faith and within the imparted deadlines, all the allegations of violations of the Covenant made against it, and to make available to the Committee in written form all the information at its disposal. This the state party has failed to do; in particular, it has not addressed the substance of the author's claims under articles 9, 12, 14 or 26, the provisions in respect of which the communication had been declared admissible. Rather, it simply rejected them in general terms as unfounded. Accordingly, due weight must be given to the author's allegations, to the extent that they have been substantiated.

9.1. With respect to the author's allegation that he was arbitrarily arrested and detained between 26 May and 17 June 1986, the Committee notes that the state party has not contested this claim and merely indicated that the author could have availed himself of judicial remedies. In the circumstances, the Committee considers that the author has substantiated his claim and concludes that he was subjected to arbitrary arrest and detention, in violation of article 9(1). It further concludes that as the author was not brought promptly before a judge or other officer authorised by law to exercise judicial power, the state party has failed to comply with its obligations under article 9(3).

9.2. With regard to the author's claim that he was subjected to harassment, intimidation and threats by prominent politicians and their respective services on a number of occasions, the Committee observes that the state party has dismissed the claim in general terms, without addressing the author's well-substantiated allegations against several members of the government of President Obiang Nguema. The first sentence of article 9(1) guarantees to everyone the right to liberty and security of person. The Committee has already had the opportunity to explain that this right may be invoked not only in the context of arrest and detention, and that an interpretation of article 9 which would allow a state party to ignore threats to the personal security of non-detained persons within its

jurisdiction would render ineffective the guarantees of the Covenant.[1] In the circumstances of the case, the Committee concludes that the state party has failed to ensure Mr Oló Bahamonde's right to security of person, in violation of article 9(1).

9.3. The author has claimed, and the state party has not denied, that his passport was confiscated on two occasions in March 1986, and that he was denied the right to leave his country of his own free will. This, in the Committee's opinion, amounts to a violation of article 12(1) and (2), of the Covenant.

9.4. The author has contended that despite several attempts to obtain judicial redress before the courts of Equatorial Guinea, all of his *démarches* have been unsuccessful. This claim has been refuted summarily by the state party, which argued that the author could have invoked specific legislation before the courts, without however linking its argument to the circumstances of the case. The Committee observes that the notion of equality before the courts and tribunals encompasses the very access to the courts, and that a situation in which an individual's attempts to seize the competent jurisdictions of his or her grievances are systematically frustrated runs counter to the guarantees of article 14(1). In this context, the Committee has also noted the author's contention that the President of the state party controls the judiciary in Equatorial Guinea. The Committee considers that a situation where the functions and competences of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent and impartial tribunal within the meaning of article 14(1) of the Covenant.

9.5. Finally, on the basis of the information before it, the Committee concludes that Mr Oló Bahamonde has been discriminated against because of his political opinions and his open criticism of, and opposition to, the government and the ruling political party, in violation of article 26 of the Covenant.

10. 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 of articles 9(1) and (3), 12(1) and (2), 14(1) and 26 of the Covenant.

11. Pursuant to article 2 of the Covenant, the state party is under an obligation to provide Mr Oló Bahamonde with an appropriate remedy. The Committee urges the state party to guarantee the security of his

[1] Official Records of the General Assembly, 45th session, supplement no 40 (A/45/40), annex IXD, communication no 195/1985 (*Delgado Páez v Colombia*), views adopted on 12 July 1990, paras 5(5) and 5(6); and *ibid*, 48th session, supplement no 40 (A/48/40), annex XII.I, communication no 314/1988 (*Bwalya v Zambia*), views adopted on 14 July 1993, paragraph 6(4).

person, to return confiscated property to him or to grant him appropriate compensation, and that the discrimination to which he has been subjected be remedied without delay.

12. The Committee would wish to receive information, within 90 days, on any measures taken by the state party in respect of the Committee's views.

MAURITIUS

Gobin v Mauritius

(2001) AHRLR 28 (HRC 2001)

Communication 767/1997, *Mr Vishwadeo Gobin v Mauritius*
Decided at the 72nd session, 16 July 2001, CCPR/C/72/D/787/1997

Admissibility (exhaustion of local remedies — domestic courts no power to review constitution, 6.2; unreasonable lapse of time before submission of communication, 6.3, 8, 9)

[Views of the majority of the Human Rights Committee]

1. The author of the communication, dated 25 November 1996, is Mr Vishwadeo Gobin, a Mauritian citizen, born on 22 January 1945, who claims to be a victim of a violation by Mauritius of article 26 of the Covenant. He is represented by his son, Maneesh Gobin.

The facts as presented by the author

2.1. In September 1991, the author stood as a candidate in the general election for the legislature in Mauritius. He ranked fourth in his constituency in terms of number of votes received. According to Mauritian law, only the first three candidates from his constituency were directly elected but the author was, in principle, eligible for one of the eight additional seats that are not directly related to the constituency. However, he states that he was not given this seat because he did not belong to the 'appropriate community', and another candidate from the same constituency who had received fewer votes than he was allocated the seat.

2.2. The author explains that the electoral system for the legislature of Mauritius provides for 21 constituencies. In 20 of them, the three candidates with the highest number of votes are elected and in one constituency, the two candidates with the most votes are elected. Sixty-two members of the legislature are thus elected directly. The remaining eight seats are allocated to the 'best losers'. According to the First Schedule of the Constitution of Mauritius, all candidates have to indicate to which community (Hindu, Muslim, Sino-Mauritian or general) they belong. When appointing the eight additional members of the legislature, the Electoral Supervisory Commission applies article 5 of the First Schedule which provides that the candidates should belong to the 'appropriate community'. According to article 5(8) of the First Schedule, the 'appropriate community' means the community that has an unreturned candi-

date available and that would have the highest number of persons (as determined by the 1972 census) in relation to the number of seats in the Assembly held immediately before the allocation of the seat.

The complaint

3. The author claims that the constitutional provision of the state party according to which he had to be part of the 'appropriate community' in order to be granted a seat of 'best loser' is discriminatory because the criteria on which the decision is taken are based on race and religion. The said provision is thus contrary to article 26 of the International Covenant on Civil and Political Rights.

Observations by the state party

4.1. In a submission dated 25 May 1998, the state party made some observations on the admissibility of the communication.

4.2. The state party first argues that the author has not exhausted domestic remedies because he did not use his right under section 17 of the Constitution to apply to the Supreme Court in a discrimination matter protected by section 16 of the state party's Constitution. In this regard, the state party also contends, with regard to the author's argument that no court of law in Mauritius can rule against the Constitution, the supreme law of the land, that the author is surmising as to the outcome of such an application and points out that he would also have had the possibility to appeal to the Judicial Committee of the Privy Council since the matter is related to the interpretation of the Constitution.

4.3. It also considers that the communication is incompatible with the provisions of the International Covenant on Civil and Political Rights. The procedure of allocation of the eight additional seats is indeed organised so as to ensure that all minorities of the country are adequately represented in the legislature and has proved to be an effective barrier against racial discrimination in the sense of article 26 of the Covenant. The purpose of the communication is thus incompatible with the provisions of the Covenant because the absence of such a constitutional provision would entail discrimination on the grounds of race, religion, national, or social origin.

4.4. Finally, the state party argues that the communication constitutes an abuse of the right of submission of such communications, because the delay between the time when the alleged discrimination took place, in 1991, and the date of the communication, 25 November 1996, is excessive and without acceptable justification. Moreover, the state party considers that the important delay removes the possibilities of an effective remedy.

Additional comments by the author

5.1. In a submission dated 13 November 1998, the author comments on the observations by the state party.

5.2. With regard to the question of exhaustion of domestic remedies, the author first alleges that an application to the Supreme Court under section 17 of the Constitution, such as it is supported by the state party, would be aimed at challenging an action that is contrary to section 16 of the Constitution. However, in the present case, section 16 has undoubtedly not been violated; it was correctly applied. The question here is rather whether section 16 itself constitutes a violation of article 26 of the Covenant, and this is not what is provided for under section 17 of the Constitution. Secondly, the author notes that section 16 of the Constitution refers to a violation of the principle of non-discrimination by a 'law', that is an Act of Parliament, and not by the Constitution itself, which means that section 16 cannot be invoked in the Supreme Court with any reasonable prospect of success. Thirdly, it is undisputable that the Supreme Court cannot take a decision that goes against the Constitution because the latter is the supreme law of the land. Moreover, because the Covenant is not incorporated in Mauritian law, the Supreme Court could only draw some guidance from the Covenant. The same is true for the Judicial Committee of the Privy Council that would apply Mauritian law and would therefore encounter the same obstacle as the Supreme Court.

5.3. It is therefore wrong to consider that the author had an available and effective domestic remedy in this particular case. The only authority entitled to change the Constitution under certain circumstances is the Mauritian Parliament and, up to now, it has not brought any change in this direction. The Committee should consequently waive in the present case the requirement of the exhaustion of domestic remedies.

5.4. In respect of the argument of the state party that the communication is incompatible with the provisions of the Covenant, the author considers that the question of election should be left to the electors and that the state should not be overprotective. Most of all, since the Mauritian population is for purpose of elections divided in four 'communities' according to religion and race, the author is of the view that allocating seats on the basis of race and religion is unacceptable and fundamentally in contradiction with article 26 of the Covenant.

5.5. Finally, concerning the delay after which the communication was submitted, the author notes that a delay of five years is in many other cases a delay that is not considered to be excessive by the state party and therefore claims the same for his communication, especially where the interest of justice in international law is of such importance that it should take precedence.

Issues and proceedings before the Committee

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. The author claims that his rights under article 26 were violated by application of an arrangement enshrined in the Constitution relating to the division of parliamentary seats according to ethnic affiliation. The state party has not contested that the said arrangement is enshrined in the Constitution nor that the domestic courts do not have the power to review the Constitution in order to ensure its compatibility with the Covenant. In these circumstances it is abundantly clear that legal action would have been futile and that the author had no available domestic remedy for the alleged violation of his Covenant rights. The Committee therefore dismisses the state party's claim that the communication be declared inadmissible for failure to exhaust domestic remedies.

6.3. The state party claims that because of the delay in submission of the communication the Committee should consider it as inadmissible as an abuse of the right of submission under article 3 of the Optional Protocol. The Committee notes that there are no fixed time limits for submission of communications under the Optional Protocol and that mere delay in submission does not of itself involve abuse of the rights of communication. However, in certain circumstances, the Committee expects a reasonable explanation justifying a delay. In the present case, the alleged violation took place at periodic elections held five years before the communication was submitted on behalf of the alleged victim to the Committee with no convincing explanation in justification of this delay. In the absence of such explanation the Committee is of the opinion that submitting the communication after such a time lapse should be regarded as an abuse of the right of submission, which renders the communication inadmissible under article 3 of the Optional Protocol.

The Committee therefore decides:

7. (a) that the communication is inadmissible under article 3 of the Optional Protocol;

(b) that this decision shall be communicated to the author and to the state party.

Individual opinion by Committee members Christine Chanet, Louis Henkin, Martin Scheinin, Ivan Shearer and Max Yalden (dissenting)

[**8.**] The signers of the present opinion cannot agree that the five-year period between the alleged violation and the submission of the communication is, in the absence of any convincing justification by the author, a key element in declaring the communication inadmissible under article 3 of the Optional Protocol.

[**9.**] The Protocol does not set any time limit for the submission of a communication.

[**10.**] The Committee cannot, in this way, introduce a preclusive time limit in the Optional Protocol.

[**11.**] No particular harm was done to the state party as a result of the delay.

Individual opinion by Committee member Eckart Klein (dissenting)

[**12.**] To my regret I am not in a position to follow the majority on the issue of the abuse of the author's right to submit a communication (see paragraph 6.3. of the views). I agree that the mere fact that the Optional Protocol does not fix a time limit for submission of communications does not principally exclude the application of the general rule of abuse of rights. However, in order to conclude that a right has been abused (despite the lack of any time limit) a considerable period of time must have elapsed, and the adequate length of time for submitting a communication should be assessed against the background of each individual case. In addition, it would generally be for the state party to show that the requirements for the application of the abuse of rights rule are fulfilled. In the case at hand, the state party merely argued in a very unspecific way characterising the submission of the communication as excessive and without acceptable justification (see paragraph 4(4) of the views). Likewise, the Committee is putting the burden of argument upon the author. This shift of the burden of argument would only be acceptable if the submission of the communication would be so much delayed that this delay could not be understood at all without further explanation. Taking into account that here the relevant length of time is five years only, a shift of burden of argument cannot be assumed, leaving the burden on the state party, which in this case did not argue accordingly. The mere fact that the alleged violation took place at periodic elections is not sufficient in itself. I therefore do not think that the delay in the submission of this communication can be regarded as constituting an abuse of the right of submission within the meaning of article 3 of the Optional Protocol.

SIERRA LEONE

Mansaraj and Others v Sierra Leone

(2001) AHRLR 33 (HRC 2001)

Communications 839/1998, 840/1998, 841/1998, *Mr Anthony B Mansaraj et al; Mr Gborie Tamba et al; Mr Abdul Karim Sesay et al v Sierra Leone*
Decided at the 72nd session, 16 July 2001, CCPR/C/72/D/839/1998, CCPR/C/72/D/840/1998, CCPR/C/72/D/841/1998

Interim measures (stay of execution, 2.3, 2.4, 6.2)
Life (death penalty, 5.6, 6.1, 6.2)
Fair trial (appeal, 5.2, 5.6, 6.1)
Evidence (failure of state party to respond to allegations, 5.4)

1.1. The authors of the communications are Messrs Anthony Mansaraj, Gilbert Samuth Kandu-Bo and Khemalai Idrissa Keita (communication no 839/1998), Tamba Gborie, Alfred Abu Sankoh (alias Zagalo), Hassan Karim Conteh, Daniel Kobina Anderson, Alpha Saba Kamara, John Amadu Sonica Conteh, Abu Bakarr Kamara (communication no 840/ 1998), Abdul Karim Sesay, Kula Samba, Nelson Williams, Beresford R. Harleston, Bashiru Conteh, Victor L King, Jim Kelly Jalloh and Arnold H. Bangura (communication no 841/1998). The authors are represented by counsel.

1.2. On 16 July 2001, the Committee decided to join the consideration of these communications.

The facts as submitted by the authors

2.1. The authors of the communications (submitted 12 and 13 October 1998), at the time of submission, were awaiting execution at one of the prisons in Freetown. The following 12 of the 18 authors were executed by firing squad on 19 October 1998: Gilbert Samuth Kandu-Bo, Khemalai Idrissa Keita, Tamba Gborie, Alfred Abu Sankoh (alias Zagalo), Hassan Karim Conteh, Daniel Kobina Anderson, John Amadu Sonica Conteh, Abu Bakarr Kamara, Abdul Karim Sesay, Kula Samba, Victor L King and Jim Kelly Jalloh.

2.2. The authors are all members or former members of the armed forces of the Republic of Sierra Leone. The authors were charged with, *inter alia*, treason and failure to suppress a mutiny, were convicted before a court

martial in Freetown, and were sentenced to death on 12 October 1998.[1] There was no right of appeal.

2.3. On 13 and 14 October 1998, the Committee's Special Rapporteur for New Communications requested the government of Sierra Leone, under rule 86 of the Rules of Procedure, to stay the execution of all the authors while the communications were under consideration by the Committee.

2.4. On 4 November 1998, the Committee examined the state party's refusal to respect the rule 86 request by executing 12 of the authors. The Committee deplored the state party's failure to comply with the Committee's request and decided to continue the consideration of the communications in question under the Optional Protocol.[2]

The complaint

3.1. Counsel submits that as there is no right of appeal from a conviction by a court martial the state party has violated article 14(5) of the Covenant.

3.2. Counsel states that a right of appeal did originally exist under Part IV of the Royal Sierra Leone Military Forces Ordinance 1961, but was revoked in 1971.

The state party's submission

4. The state party has not provided any information in relation to these communications notwithstanding the Committee's repeated invitation to do so.

Issues and proceedings before the Committee

5.1. By adhering to the Optional Protocol, a state party to the Covenant recognises the competence of the Human Rights Committee to receive and consider communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant (preamble and article 1). Implicit in a state's adherence to the Protocol is an undertaking to cooperate with the Committee in good faith so as to permit and enable it to consider such communications, and after examination to forward its views to the state party and to the individual (article 5 (1) and (4)). It is incompatible with these obligations for a state party to take any action that would prevent or frustrate the Committee in its consideration and examination of the communication, and in the expression of its views.

5.2. Quite apart from any violation of the rights under the Covenant charged against a state party in a communication, the state party would be committing a serious breach of its obligations under the Optional Protocol if it engaged in any acts which have the effect of preventing or

[1] This is the only information provided by counsel on the convictions.
[2] Vol 1, A/54/40, chap 6, paragraph 420, annex X.

frustrating consideration by the Committee of a communication alleging any violation of the Covenant, or to render examination by the Committee moot and the expression of its views nugatory and futile. In respect of the present communication, counsel submits that the authors were denied their right under article 14(5) of the Covenant. Having been notified of the communication, the state party breached its obligations under the Protocol by proceeding to execute the following alleged victims, Gilbert Samuth Kandu-Bo, Khemalai Idrissa Keita, Tamba Gborie, Alfred Abu Sankoh (alias Zagalo), Hassan Karim Conteh, Daniel Kobina Anderson, John Amadu Sonica Conteh, Abu Bakarr Kamara, Abdul Karim Sesay, Kula Samba, Victor L King, and Jim Kelly Jalloh, before the Committee could conclude its examination of the communication, and the formulation of its views. It was particularly inexcusable for the state to do so after the Committee had acted under its rule 86 requesting the state party to refrain from doing so.

5.3. Interim measures pursuant to rule 86 of the Committee's Rules adopted in conformity with article 39 of the Covenant are essential to the Committee's role under the Optional Protocol. Flouting of the rule, especially by irreversible measures such as the execution of the alleged victim or his or her deportation from the country, undermines the protection of Covenant rights through the Optional Protocol.

5.4. The Human Rights Committee has considered the present communications in the light of all the information made available to it by the parties, as provided in article 5(1) of the Optional Protocol. The Committee notes with concern that the state party has not provided any information clarifying the matters raised by these communications. The Committee recalls that it is implicit in article 4(2) of the Optional Protocol that a state party examine in good faith all the allegations brought against it, and that it provide the Committee with all the information at its disposal. In the light of the failure of the state party to cooperate with the Committee on the matter before it, due weight must be given to the authors' allegations, to the extent that they have been substantiated.

5.5. The Committee has ascertained, as required under article 5(2)(a) of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement. The Committee notes that the state party has not claimed that there are any domestic remedies yet to be exhausted by the authors and has not raised any other objection to the admissibility of the claim. On the information before it, the Committee is of the view that the communication is admissible and proceeds immediately to a consideration of the merits.

5.6. The Committee notes the authors' contention that the state party has breached article 14(5) of the Covenant in not providing for a right of appeal from a conviction by a court martial *a fortiori* in a capital case. The Committee notes that the state party has neither refuted nor confirmed the authors' allegation but observes that 12 of the authors were

executed only several days after their conviction. The Committee considers, therefore, that the state party has violated article 14(5) of the Covenant, and consequently also article 6, which protects the right to life, with respect to all 18 authors of the communication. The Committee's prior jurisprudence is clear that under article 6(2) of the Covenant the death penalty can be imposed *inter alia* only when all guarantees of a fair trial including the right to appeal have been observed.

6.1. 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 as found by the Committee reveal a violation by Sierra Leone of articles 6 and 14(5) of the Covenant.

6.2. The Committee reiterates its conclusion that the state committed a grave breach of its obligations under the Optional Protocol by putting 12 of the authors to death before the Committee had concluded its consideration of the communication.[3]

6.3. In accordance with article 2(3)(a) of the Covenant, the state party is under an obligation to provide Anthony Mansaraj, Alpha Saba Kamara, Nelson Williams, Beresford R Harleston, Bashiru Conteh and Arnold H Bangura with an effective remedy. These authors were sentenced on the basis of a trial that failed to provide the basic guarantees of a fair trial. The Committee considers, therefore, that they should be released unless Sierra Leonian law provides for the possibility of fresh trials that do offer all the guarantees required by article 14 of the Covenant. The Committee also considers that the next of kin of Gilbert Samuth Kandu-Bo, Khemalai Idrissa Keita, Tamba Gborie, Alfred Abu Sankoh (alias Zagalo), Hassan Karim Conteh, Daniel Kobina Anderson, John Amadu Sonica Conteh, Abu Bakarr Kamara, Abdul Karim Sesay, Kula Samba, Victor L King, and Jim Kelly Jalloh should be afforded an appropriate remedy which should entail compensation.

6.4. Bearing in mind that, by becoming a party to the Optional Protocol, the state party has recognised the competence of the Committee to determine whether there has been a violation of the Covenant or not 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 provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the state party, within 90 days, information about the measures taken to give effect to the Committee's views.

[3] *Piandiong, Morallos and Bulan v The Philippines* (869/1999).

ZAMBIA

Lubuto v Zambia

(2001) AHRLR 37 (HRC 1995)

Communication 390/1990, *Bernard Lubuto v Zambia*
Decided at the 55th session, 31 Oct 1995, CCPR/C/55/D/390/1990

Evidence (evaluation of facts and evidence, 4.2, 7.4)
Interim measures (stay of execution, 4.4, 5.8)
Life (death penalty, 7.2)
Fair trial (trial within reasonable time, 5.2, 5.3, 7.3)

1. The author of the communication is Bernard Lubuto, a Zambian citizen, currently awaiting execution at the Maximum Security Prison in Kabwe, Zambia.

The facts as presented by the author

2.1. The author was sentenced to death on 4 August 1983 for aggravated robbery, committed on 5 February 1980. On 10 February 1988, the Supreme Court of Zambia dismissed his appeal.

2.2. The evidence led by the prosecution during the trial was that, on 5 February 1980, the author and two co-accused robbed a certain Marcel Joseph Mortier of a motor vehicle (a Datsun vanette). One of the co-accused held Mr Mortier at gun-point while he was getting into his car. The author and the other co-accused were standing nearby in the bushes. The man with the gun fired shots at one of Mr Mortier's labourers, who had been in the car and had tried to run away from the spot. This man then drove off in the car, with Mr Mortier still in it. Mr Mortier then threw himself out of the vehicle and fell on the ground. Gunshots were fired at him, but did not hit him. The author was later identified at an identification parade and the prosecution produced a statement signed by the author, in which he admitted his involvement in the robbery.

2.3. The author testified during the trial that he had been arrested by the police on the evening of 4 February 1980, after a fight in a tavern. He was kept in the police station overnight; on the morning of 5 February, when he was about to be released, he was told that a robbery had taken place. He was taken to an office, where one of Mr Mortier's labourers said that he answered the description of the robber. The author was then returned to the cells, but kept denying any involvement in the robbery. On 7 February

1980, he participated in an identification parade and was identified as one of the robbers by the labourer whom he had met earlier at the police station.

2.4. The author's testimony was rejected by the Court on the basis of the entries in the police register, which showed *inter alia* that the author was arrested late in the evening of 5 February 1980.

The complaint

3.1. The author claims that the trial against him was unfair, since the judge accepted all evidence against him, although a careful examination would have shown discrepancies in the statements made by the witnesses. He further claims that his legal aid lawyer advised him to plead guilty and that, when he refused, the lawyer failed to cross-examine the witnesses. The author claims that the death sentence imposed on him is disproportionate, since no one was killed or wounded during the robbery.

3.2. The author claims that he was tortured by the police to force him to give a statement. He alleges that he was beaten with a hosepipe and cable wires, that sticks were put between his fingers and that his fingers were then hit on the table, and that a gun was tied with a string to his penis and that he was then forced to stand up and walk. The allegations were produced at the trial, but the judge considered, on the basis of the evidence, that the author's statement to the police was given freely and voluntarily.

3.3. Although the author does not invoke the provisions of the Covenant, it appears from the allegations and the facts which he submitted that he claims to be a victim of a violation by Zambia of articles 6, 7 and 14 of the Covenant.

The Committee's admissibility decision

4.1. During its 51st session, the Committee considered the admissibility of the communication. It noted with concern the lack of cooperation from the state party, which had not submitted any observations on admissibility.

4.2. The Committee considered inadmissible the author's claims concerning the conduct of the trial. It recalled that, in principle, it is not for the Committee to evaluate facts and evidence in a particular case and it found that the trial transcript did not support the author's claims. In particular, it appeared from the trial transcript that the author's counsel had in fact cross-examined the witnesses against the author.

4.3. The Committee considered that the length of the proceedings against the author might raise issues under article 14(3)(c), and, as regards the appeal, article 14(5) of the Covenant. The Committee further considered that the author's claim that the imposition of the death sentence was disproportionate, since no one was killed or wounded during the robbery,

might raise issues under article 6(2) of the Covenant, and that his claim that he was tortured by the police to force him to give a statement might raise issues under article 7 of the Covenant which should be examined on the merits.

4.4. Consequently, on 30 June 1994, the Human Rights Committee declared the communication admissible in so far as it appeared to raise issues under articles 6, 7 and 14(3)(c) and (5) of the Covenant. The state party was requested, under rule 86 of the Committee's Rules of Procedure, not to carry out the death sentence against the author while his communication was under consideration by the Committee.

The state party's submission on the merits and author's comments thereon

5.1. By submission of 29 December 1994, the state party acknowledged that the proceedings in Mr Lubuto's case took rather long. The state party requests the Committee to take into consideration its situation as a developing country and the problems it encounters in the administration of justice. It is explained that the instant case is not an isolated one and that appeals in both civil and criminal cases take considerable time before they are disposed of by the courts. According to the state party, this is due to the lack of administrative support available to the judiciary. Judges have to write out every word verbatim during the hearings, because of the absence of transcribers. These records are later typed out and have to be proofread by the judges, causing inordinate delays. The state party also refers to the costs involved in preparing the court documents.

5.2. The state party further points out that crime has increased and the number of cases to be decided by the courts have multiplied. Due to the bad economic situation in the country, it has not been possible to ensure equipment and services in order to expedite the disposal of cases. The state party submits that it is trying to improve the situation, and that it has recently acquired nine computers and that it expects to get 40 more.

5.3. The state party concludes that the delays suffered by the author in the determination of his case are inevitable due to the situation as explained above. The state party further submits that there has been no violation of article 14(5) in the instant case, since the author's appeal was heard by the Supreme Court, be it with delay.

5.4. As regards the author's claim that the imposition of the death sentence was disproportionate since no one was killed or wounded during the robbery, the state party submits that the author's conviction was in accordance with Zambian law. The state party explains that armed robberies are prevalent in Zambia and that victims go through a traumatic experience. For this reason, the state party sees aggravated robbery involving the use of a firearm as a serious offence, whether or not a person is injured

or killed. Finally, the state party submits that the author's sentence was pronounced by the competent courts.

5.5. Furthermore, the state party points out that under articles 59 and 60 of the Constitution, the President of the Republic of Zambia can exercise the prerogative of mercy. The author's case has been submitted and a decision is awaited. The state party further states that the delay in the hearing of the appeal and the fact that no one was injured in the attack are taken into account by the Advisory Committee on the exercise of the Prerogative of Mercy.

5.6. With regard to the author's claim that he was tortured by the police in order to force him to give a statement, the state party submits that torture is prohibited under Zambian law. Any victim of torture by the police can seek redress under both the criminal and civil legal systems. In this case, the author did not make use of any of these possibilities, and the state party suggests that, had the author's allegations been true, his counsel at the trial would have certainly advised him to do so.

5.7. The state party further explains that, if an accused raises during trial that he was tortured by the police in order to extract a confession, the Court is obliged to conduct a 'trial within a trial' to determine whether the confession was given voluntarily or not. In the author's case, such a trial within a trial was held, but it appeared from the testimonies given that the accused claimed that they were merely ordered to sign a statement without having made a confession. The Court then continued with the main trial, and the question of whether the author made a statement or not was decided upon the basis of all the evidence at the end of the trial. It appears from the trial transcript that the judge concluded that the author had not been assaulted. He based his conclusion on the fact that the investigating magistrate, before whom the author and his co-accused appeared on 8 February 1980, had not recorded any injuries or marks of beating nor had the author complained to him about maltreatment; he further took into account discrepancies in the author's testimony as well as evidence led by the police officers that the accused had been cooperative. There was no record of the author having been medically treated for injuries which might have been caused by maltreatment.

5.8. Finally, the state party confirms that, pursuant to the Committee's request, the appropriate authorities have been instructed not to carry out the death sentence against the author while his case is before the Committee.

6. In his comments on the state party's submission, the author explains that he first appeared before a judge on 4 July 1981, and that the trial was then adjourned several times because the prosecution was not ready. At the end of July 1981, the case was transferred to another judge, who did not proceed with it, and then only on 22 September 1982, again before a different judge, the trial actually started.

Issues and proceedings before the Committee

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

7.2. The Committee notes that the author was convicted and sentenced to death under a law that provides for the imposition of the death penalty for aggravated robbery in which firearms are used. The issue that must accordingly be decided is whether the sentence in the instant case is compatible with article 6(2) of the Covenant, which allows for the imposition of the death penalty only 'for the most serious crimes'. Considering that in this case use of firearms did not produce the death or wounding of any person and that the Court could not under the law take these elements into account in imposing sentence, the Committee is of the view that the mandatory imposition of the death sentence under these circumstances violates article 6(2) of the Covenant.

7.3. The Committee has noted the state party's explanations concerning the delay in the trial proceedings against the author. The Committee acknowledges the difficult economic situation of the state party, but wishes to emphasise that the rights set forth in the Covenant constitute minimum standards which all states parties have agreed to observe. Article 14(3)(c), states that all accused shall be entitled to be tried without delay, and this requirement applies equally to the right of review of conviction and sentence guaranteed by article 14(5). The Committee considers that the period of eight years between the author's arrest in February 1980 and the final decision of the Supreme Court, dismissing his appeal, in February 1988, is incompatible with the requirements of article 14(3)(c).

7.4. As regards the author's claim that he was heavily beaten and tortured upon arrest, the Committee notes that this allegation was before the judge who rejected it on the basis of the evidence. The Committee considers that the information before it is not sufficient to establish a violation of article 7 in the author's case.

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 articles 6(2) and 14(3)(c) of the International Covenant on Civil and Political Rights.

9. The Committee is of the view that Mr Lubuto is entitled, under article 2(3)(a) of the Covenant, to an appropriate and effective remedy, entailing a commutation of sentence. The state party is under an obligation to take appropriate measures to ensure that similar violations do not occur in the future.

10. Bearing in mind that, by becoming a state party to the Optional Protocol, the state party has recognised the competence of the Committee to determine whether there has been a violation of the Covenant or not 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 provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the state party, within 90 days, information about the measures taken to give effect to the Committee's views.

Appendix

Individual opinion by Mr Nisuke Ando . . .

[**11.**] I do not oppose the Committee's views in the present case. However, with respect to the statement in the views that 'use of firearms did not produce the death or wounding of any person', I would like to add the following: Certain categories of acts are classified as 'crimes' because they create a grave danger which may result in death or irreparable harm to many and unspecified persons. Such crimes include bombing of busy quarters, destruction of reservoirs, poisoning of drinking water, gassing in subway stations and probably espionage in wartime. In my view, the imposition of the severest punishment, including the death penalty where applicable, could be justified against these crimes, even if they do not result for one reason or another in the death of or injury to any person.

* * *

Chongwe v Zambia

(2001) AHRLR 42 (HRC 2000)

Communication 821/1998, *Mr Rodger Chongwe v Zambia*
Decided at the 70th session, 25 Oct 2000, CCPR/C/70/D/821/1998

Evidence (failure of state party to respond to allegations, 4.1, 5.2)
Locus standi (4.4)
Life (use of force, 5.2, 5.3)
Personal liberty and security (security of person, 5.3)
State responsibility (insufficient investigation into alleged violations, 5.3, 7)

1. The author of the communication is Rodger Chongwe, born on 2 October 1938, a citizen of Zambia. He claims to be victim of the violation of his rights under articles 6 and 14 of the International Covenant on Civil and Political Rights by Zambia, and raises the issue of security of person, which may be considered in relation to article 9.

Facts as submitted by the author

2.1. The author, a Zambian advocate and chairman of a 13-party opposition alliance, states that in the afternoon of 23 August 1997, he and Dr Kenneth Kaunda, for 27 years the President of Zambia, were shot and wounded by the police. The author states that the incident occurred in Kabwe, a town some 170 kilometres north of Lusaka, while the author and Dr Kaunda were to attend a major political rally to launch a civil disobedience campaign. He annexes reports by Human Rights Watch and Inter-African Network for Human Rights and Development as part of his communication.

2.2. The author states that the police fired on the vehicle in which he was travelling, slightly wounding former president Kaunda and inflicting a life-threatening wound on the author. The police force subsequently promised to undertake its own investigation. The Zambian Human Rights Commission was also said to be investigating the incident, but no results of any investigations have been produced.

2.3. He further refers to the Human Rights Watch report for May 1998, Volume 10, no 2(A), titled 'Zambia, no model for democracy' which includes 10 pages on the so-called 'Kabwe shooting', confirming the shooting incident that took place by quoting witness statements and medical reports.

2.4. The report refers to the incident as follows:

> When Kaunda and Alliance leader Rodger Chongwe decided to leave by car, police attacked the car with tear gas and later live ammunition, possibly to try to stop their exit. According to eyewitnesses no warning was given before shots were heard. A small number of police that day were carrying AK-47s, and senior officers had revolvers and a few G-3s were held by mobile unit members. Most of the police were issued only batons or carried tear gas.

2.5. In a referred interview with Human Rights Watch, Kaunda's driver, Nelson Chimanga stated:

> They [the police] fired tear gas at the car, one came into the car because I had opened a window to let out the smoke. When we got out of the smoke, I had to swerve past a police vehicle that tried to block our escape; just before the roundabout, I had to swerve to avoid a second vehicle blocking the road and then a third that was across the road. It was after this vehicle that we heard the bullet. Suddenly Rodger Chongwe was bleeding next to me. We gave him first aid in the vehicle, but because he was bleeding so much, did a U-turn and returned to Kabwe General Hospital. Because of heavy paramilitary police presence I moved the vehicle around the back and we left for Lusaka at around 0300 hrs.

2.6. Former president Kenneth Kaunda described the incident as follows:

> A bullet fired by the Zambian police grazed the top of my head. The same bullet much more seriously injured Dr Chongwe . . . It was then the police opened up with live ammunition. A bullet grazed my head and struck Dr Chongwe, who was sitting in the front seat, below the right ear. My aide Anthony Mumbi was

also slightly injured by shrapnel. I probably would have died except my bodyguard Duncan Mtonga, pushed me to the side when he heard the gun shots. I did not hear them.

2.7. One of the passengers in the vehicle was the United Independence Party (UNIP)'s legal officer, Mwangala Zaloumis, who provided Human Rights Watch with a written statement dated 4 September 1997:

> The vehicle was blocked three times in three different places by police vehicles. At about 200 metres from the party offices the [former president's] vehicle was fired at and at the same time tear gas was fired into the vehicle because the windows were open due to earlier firing of tear gas around at the bottom of the vehicle. There was a lot of confusion in the vehicle as a result of tear gas smoke. The next thing we saw was blood all over. Dr Chongwe had been hit on the cheek and was bleeding profusely. One of the security personnel who sat next to me in the back was also bleeding. He had been hit by shrapnel in three different places . . .

2.8. According to the Human Rights Watch report, on 26 August 1997, President Chiluba denied that the Kabwe shooting was a state-sponsored assassination plot. He said that the Zambian police had instigated an investigation and that Nungu Sassasali, the commanding officer at Kabwe, was suspended. However, he rejected calls for an independent inquiry into the incident. The report refers to the ZNBC radio, stating that on 28 August, President Chiluba said the government would not apologise over the Kabwe shooting as it could not be held responsible for it.

2.9. According to the said report quoting the *Zambia Daily Mail*, Home Affairs Minister Chitalu Sampa on 31 August stated: ' We have been told that the bullet hit Dr Kaunda on the head, the same bullet went through Dr Chongwe's cheek, the same bullet again hit the other person in the neck. Honestly, how can that be possible, so we cannot conclusively say they were shot by the police.' Further, President Chiluba on 13 November stated that: 'These two people were not shot. An AK 47 cannot leave a simple wound. Let them prove that they were (shot).' The President then admitted that police fired in the air as they tried to break up the opposition rally.

2.10. The author states that he was admitted to the Kabwe hospital immediately after the shooting incident. The Human Rights Watch report cites a medical report by the Kabwe Hospital to the Permanent Secretary, Ministry of Health, Lusaka, stating: 'Local examination revealed puncture wound on the right cheek communicating with a bleeding, open wound on the upper aspect of the neck.' Furthermore, a medical report from St John of God Hospital in Australia, where the author took refuge, dated 3 October 1997, states that:

> A small metallic foreign body can be seen in the soft tissues beneath the skull base close to the skin surface consistent with the history of a gunshot wound . . . A small metallic fragment is noted in the soft tissues in the posterior aspect of the upper cervical region close to the skin surface.

2.11. Human Rights Watch reported that it showed the medical reports, photographs, and the Human Rights Commission video to Dr Richard Shepherd of the Forensic Medicine Unit, St George's Hospital Medical School, London, for an expert assessment. Dr Shepherd concluded as follows:

> From the evidence that I've seen one can say for sure that a bullet hit the vehicle and then as it entered it sprayed fragments throughout the vehicle, a bit like an angry swarm of bees. The injuries sustained by Kaunda, Chongwe and Kaunda's aide all are consistent with this. Rodger Chongwe is lucky to be alive. If the shrapnel had hit him a couple of inches to the left he would have been dead. The trajectory of the bullet hole is slightly downwards suggesting that whoever fired the shot was slightly elevated, from the back of a lorry, that sort of height. The angle does not suggest a shot from a tree or roof top.

2.12. Human Rights Watch also sought the expert opinion of a firearms and ballistics specialist, Dr Graham Renshew, who examined the photographs of the bullet hole in Kaunda's car, the photographs of a bullet cartridge found near the scene of the incident the day after the rally, and a photograph of a bullet that UNIP claimed was extracted from the vehicle after the incident. He explained the following, according to the Human Rights Watch report:

> One bullet clearly penetrated the vehicle through the back ... The bullet is consistent with the cartridge ... The bullet, with its folds bent backwards, suggests it had pierced three layers of metal, consistent with penetrating the vehicle ... It could be a non-Russian AK 47 but is more likely to be a G-3 or Belgian FAR. The bullet hole in Kaunda's vehicle is consistent with the bullet and cartridge. With this information it might be possible to match the bullet with the firearm that fired it. While one cannot say this was an assassination attempt, one can say for sure that all the passengers in the car are lucky to be alive. If the bullet had hit a window it would have been able to kill somebody straight. It was slowed down and displaced by going through metal.

2.13. Secondly, in its report, submitted by the author, on the investigation of the Kabwe shooting, the Inter-African Network for Human Rights and Development concluded that the shooting incident took place, and that an international tribunal should investigate the assassination attempt on the former president Kenneth Kaunda. This report, which is based on evidence taken from persons directly concerned in the incident, shows that the car in which the author was travelling, had left the centre of Kabwe. Before it did so, there is evidence that the local police commander had given orders to his men to fire on the car without giving any details as to the objective of such shooting; this information was relayed on the police radio network. At a roundabout at the outskirts of Kabwe, a police vehicle, whose registration number and driver have been identified, attempted to block the path of the car. The car's driver evaded this attempt, and there is evidence that two policemen standing on the back of the police vehicle opened fire on the car.

2.14. The author claims that on 28 November 1997, while on board a

British Airways plane in Harare, he was told by airport and airline personnel that there was a VIP plane on the runway sent by the Zambian government to collect him. He decided not to go back to Zambia, and has since this incident been residing in Australia. He will not return to Zambia, as he fears for his life.

2.15. From the information supplied by the author, he does not appear to have taken steps to exhaust domestic remedies, except for filing a claim for compensation to the Attorney-General of the Republic of Zambia, Ministry of Legal Affairs. The claim was filed approximately one and a half months after the Kabwe shooting, that is on 15 October 1997. The author states that he had no access to effective domestic remedies.

The complaint

3. The author alleges that the incident on 23 August 1997 was an assassination attempt by the Zambian government, and that it constitutes a violation of article 6 of the Covenant. The author further claims that the Zambian judges are not free from pressure in the performance of their duties, and that this implies a violation of article 14. He also raises the issue of security of person. He submits that an amount of US$2.5 million in damages would be reasonable compensation.

The Committee's admissibility consideration

4.1. The communication with its accompanying documents was transmitted to the state party on 3 July 1998. The state party has not responded to the Committee's request, under rule 91 of the Rules of Procedure, to submit information and observations in respect of the admissibility and the merits of the communication, despite several reminders addressed to it, the latest on 5 August 1999. The Committee recalls that it is implicit in the Optional Protocol that the state party makes available to the Committee all information at its disposal and regrets the lack of cooperation by the state party in the present case. In the absence of any reply from the state party, due weight must be given to the author's allegations to the extent that they have been substantiated.

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

4.3. With respect to exhaustion of domestic remedies, the Committee notes that the author has argued that he has no access to domestic tribunals and that no effective domestic remedies are available to him. The state party has failed to contest before the Committee these allegations and thus due weight must be given to the author's claim. The Committee considers therefore that it is not precluded by article 5(2)(b) of the Optional Protocol from examining the communication.

4.4. With respect to the author's claim of a violation of article 14 of the Covenant, the Committee notes that the information provided by the author does not substantiate for purposes of admissibility the author's claim that he is a victim of a violation of article 14 of the Covenant. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

4.5. The Committee considers that the author's remaining claims should be examined on the merits. Accordingly, the Committee finds the communication admissible and proceeds without delay to consider the merits of the author's claims under articles 6(1) and 9(1).

The Committee's consideration of the merits

5.1. The Human Rights Committee has examined the present case on the basis of the material placed before it by the parties, as required under article 5(1) of the Optional Protocol.

5.2. The Committee observes that article 6(1) entails an obligation of a state party to protect the right to life of all persons within its territory and subject to its jurisdiction. In the present case, the author has claimed, and the state party has failed to contest before the Committee that the state party authorised the use of lethal force without lawful reasons, which could have led to the killing of the author. In the circumstances, the Committee finds that the state party has not acted in accordance with its obligation to protect the author's right to life under article 6(1) of the Covenant.

5.3. The Committee recalls its jurisprudence that article 9(1) of the Covenant protects the right to security of person also outside the context of formal deprivation of liberty (see the Committee's views in case no 195/1985, *Delgado Paez*, paragraph 5(5), adopted on 12 July 1990, document CCPR/C/39/D/195/1985, and in case no 711/1996 *Carlos Dias*, paragraph 8(3), adopted on 20 March 2000, document CCPR/C/68/D/711/1996). The interpretation of article 9 does not allow a state party to ignore threats to the personal security of non-detained persons subject to its jurisdiction. In the present case, it appears that persons acting in an official capacity within the Zambian police forces shot at the author, wounded him, and barely missed killing him. The state party has refused to carry out independent investigations, and the investigations initiated by the Zambian police have still not been concluded and made public, more than three years after the incident. No criminal proceedings have been initiated and the author's claim for compensation appears to have been rejected. In the circumstances, the Committee concludes that the author's right to security of person, under article 9(1) of the Covenant, has been violated.

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 disclose a violation of articles 6(1) and 9(1) of the Covenant.

7. Under article 2(3)(a) of the Covenant, the state party is under the obligation to provide Mr Chongwe with an effective remedy and to take adequate measures to protect his personal security and life from threats of any kind. The Committee urges the state party to carry out independent investigations of the shooting incident, and to expedite criminal proceedings against the persons responsible for the shooting. If the outcome of the criminal proceedings reveals that persons acting in an official capacity were responsible for the shooting and hurting of the author, the remedy should include damages to Mr Chongwe. The state party is under an obligation to ensure that similar violations do not occur in the future.

8. Bearing in mind that, by becoming a state party to the Optional Protocol, the state party has recognised the competence of the Committee to determine whether there has been a violation of the Covenant or not 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 provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the state party, within 90 days, information about the measures taken to give effect to the Committee's views. The state party is also requested to publish the Committee's views.

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

BURKINA FASO

Mouvement Burkinabé des Droits de l'Homme et des Peuples v Burkina Faso

(2001) AHRLR 51 (ACHPR 2001)

Communication 204/97, *Mouvement Burkinabé des Droits de l'Homme et des Peuples v Burkina Faso*
Decided at the 29th ordinary session, May 2001, 14th Annual Activity Report
Rapporteur: Ben Salem

Fair trial (independence of courts — dismissal of judges, 38; trial within reasonable time, 40)
Life (arbitrary deprivation, 42)
State responsibility (duty to give effect to rights in the Charter in national law; responsibility for actions of non-state actors, 42)
Personal liberty and security (disappearances, 44)
Evidence (burden on complainant to furnish evidence, 45)
Movement (right to leave home country, 47)

Summary of facts

1. The complainant is the Chairman of the *Mouvement Burkinabé des Droits de l'Homme et des Peuples* (MBDHP), an NGO that enjoys observer status with the Commission. He cites a series of human rights violations reported to have been committed in Burkina Faso from the days of the revolutionary government to date. He therefore requests the Commission to strive to reveal the truth with regard to each of the cases reported not to have been reacted to by the competent bodies in his country.

2. According to the complainant, Burkina Faso, on 11 December 1991, re-established the rule of law by adopting a new constitution. This rekindled the hope that all human rights violations committed between 1983 and 1991 would be treated for the common good of the citizens of that country. Unfortunately, this was not the case. Furthermore, acts prejudicial to civil and political liberties have been recorded.

3. The complainant alleges that since the creation of the *Mouvement Burkinabé des Droits de l'Homme et des Peuples* in 1991, the latter has recorded several cases of human rights violations in the country after having been informed on several occasions by the victims and has unsuccessfully requested the judiciary to investigate the said cases. The most important

case to be brought to the notice of this NGO was that of the suspension, discharge and removal of magistrates which took place on 10 June 1987. It is reported that the state afterwards granted amnesty as part of the reinstatement of workers wrongly laid off under the regime called the National Revolutionary Council that ruled Burkina Faso from 1983 to 1987. Many workers are reported to have been reinstated, while many others were not.

4. The Chairman of MBDHP, Mr Halidou Ouédraogo, a magistrate by profession, belongs to this second category as does another magistrate, Mr Compaoré Christophe. Both of them are claiming damages in kind. Their claim has been in vain to date. The Supreme Court, which is reported to have been informed about the case 15 years ago, has never taken a decision on the case.

5. According to the complainant, although the situation has improved slightly, the magistrates concerned continue to suffer from harassment ranging from arbitrary postings to manipulations by the Supreme Council of Judges and Magistrates and irregularities in the promotion of some magistrates. The two unions of judges and magistrates are reported therefore to have, in a joint *communiqué*, denounced the subordination of their profession, corruption of judges and irregularities observed in the deliberations of the Supreme Council of Judges and Magistrates.

6. The complainant alleges that many cases brought by him before criminal courts in 1990, 1991, 1994 and 1996 have not been examined.

7. In October 1991, the *Organisation Pour la Democratie, Mouvement du Travail* (ODP/MT), the ruling party, is reported to have set alight, through its militants, a Peugeot 505 vehicle of the Chairman of MBDHP. This incident is reported to have taken place in front of the headquarters of another political party now dissolved. *La Convention pour le Peuple* (CNPP/PS) whose militants, fearing that their headquarters would be burned down, are reported to have called on Mr Halidou Ouédraogo to prevent the crime. The complainant maintains that the perpetrators of this act of hooliganism are known and that some of them are reported to have been active again in the task of intimidating any person, especially workers and students, suspected of being against the powers that be.

8. Following the above-mentioned destruction of his vehicle, the complaint filed at the Ouagadougou Criminal Court by Mr Ouédraogo in October 1991 is said to have had no effect.

9. In June 1994, after leaving work, Mr Ouédraogo is reported to have been a victim of an assassination attempt. When he switched on his car, it is reported to have exploded and he survived only by a miracle. A complaint filed against X at the Ouagadougou Criminal Court for an assassination attempt and destruction of personal property is reported to have had no effect.

10. The complainant claims that in May 1995 a student demonstration took a dramatic turn for the worse in a locality called Garango, 200 kilometres from Ouagadougou. A gendarme identified by MBDHP is reported to have shot two students dead at close range. The enquiry that was speedily launched by the said Movement, which led to the submission of the case to the Criminal Court of the said locality, is reported not to have been examined. On the other hand, a certain Ouya Bertin, a Member of Parliament representing his state, is reported to have accused the chairman of MBDHP of manipulating the pupils and students. The former is reported to have declared at a gathering that Mr Halidou Ouédraogo should be got rid of and that in any case 'measures have been taken to liquidate him'. MBDHP filed a complaint of libel and death threats against its chairman. This complaint is also reported to have remained without effect to date.

11. The complainant also alleges several human rights violations as well as threats reported to have been made against his movement and person during successive Burkina students' strikes in February, March and April 1997.

12. Referring to the turbulent political situation that prevailed in Burkina Faso between 1989 and 1990, the claimant alleges that there were many kidnapping cases followed by executions. He cited the disappearance of persons suspected or accused of plotting against the state, among them Mr Guillaume Sessouma who, at the time he was kidnapped/arrested, was a lecturer at the University of Ouagadougou and who has not been seen since 1989. Similarly, Dabo Boukary, a medical student arrested in May 1990 by the Presidential Guard, has not reappeared to this day. According to the claimant, the authorities are reported to have said that the latter might have fled.

13. As for assassinations, he cited those of Mr Clément Oumarou Ouédraogo, a university professor and erstwhile representative of Burkina Faso at UNESCO, gunned down in the middle of a street in Ouagadougou on 9 December 1991, two farmers killed in 1996 120 kilometres from Ouagadougou during a so-called police routine check, as well as the 1994/95 assassinations of people in the locality of Kaya (Nahouri). He claims that commandos of the Po military garrison are reported to have had a hand in the latter assassinations.

14. The complainant alleges that his organisation has submitted all these cases of human rights violations, but without response to this day, to the following Burkinabe institutions: competent jurisdictions; the ministries concerned (justice, interior and defence); the Prime Minister; and the President of the Republic of Burkina Faso.

The complaint

15. The complainant claims that Burkina Faso has violated articles 3, 4, 5,

6, 7, 8, 9(2), 10, 11, 12 and 13(2) of the African Charter on Human and Peoples' Rights. He requests the Commission to investigate the said violations and get the respondent state to explain the fate of the student Dabo Boukary; disclose the conclusions of the inquiry on the assassination of Mr Clément Oumarou Ouédraogo; take measures that can help find a legal solution to all these human rights violation cases; and compensate the victims of such violations.

16. In support of his petition, the complainant provided abundant documentation on most of the alleged human rights violation cases.

Procedure

17. The communication is dated 25 April 1997. It was received by the Secretariat of the Commission by fax on 25 May 1997. However, the complainant observed that there were annexes to the communication and the Secretariat had to wait to receive them.

18. On 20 August 1997, the Secretariat acknowledged receipt of the communication and asked the complainant to indicate precisely the points contained in the communication which he wanted the Commission to look into, and to attach the documents mentioned.

19. On the same day, a *note verbale* was faxed to the Burkinabe Ministry of External Relations and Co-operation forwarding a copy of the communication and requesting the Ministry's reaction within three months in accordance with the relevant provisions of the Rules of Procedure. There was no reaction to this *note verbale*.

20. On 5 December 1997, the Secretariat received correspondence from the complainant reiterating the grievances in his earlier complaint instead of providing the clarifications requested.

21. At its 23rd session, the Commission decided to be seized of the communication and deferred examination of the issue of admissibility to the 24th session.

22. On 1 June 1998, a *note verbale* was sent to the Burkinabe government informing it of this decision and calling for its reaction as to the admissibility of the communication. A similar letter was also addressed to the complainant.

23. On 13 July the Secretariat received a fax from the Burkinabe Minister of Justice and Guardian of the Seals stating that the Ministry of Foreign Affairs had informed him of a complaint submitted against Burkina Faso by *Mouvement Burkinabé des Droits de l'Homme*. He stated that the complaint was written in English and requested that the Secretariat provide him with the French version of the complaint since the working language of the country is French.

24. On the same day, the Secretariat reacted to the above-mentioned fax.

The Minister was informed that the Commission had been seized of the communication and that the respondent state was required to forward its submissions on the issue of admissibility for examination at the 24th session scheduled to be held in October 1998.

25. At its 24th ordinary session, the Commission heard the parties. Both parties expressed the desire to settle the dispute amicably and requested the Commission's assistance to that effect.

26. The Commission declared the communication admissible. However, in view of the desire of the parties to settle the dispute amicably, it offered its good services for that purpose.

27. On 10 November 1998, the parties were informed by the Secretariat of the Commission's decision.

28. At its 25th session, the Commission requested information on the progress of the settlement between the parties.

29. During the 26th session, the Commission learned that there had been no reaction from the parties with regard to the progress of the settlement. The Commission therefore decided to defer examination on the merits of the communication to the [next] session.

30. On 10 December 1999, the Secretariat informed the parties of the Commission's decision.

31. At the 27th ordinary session held in Algiers, Algeria, the Commission heard parties to the complaint and decided that the respondent state should take the initiative by inviting the complainant to an amicable settlement of the case, failing which, the Commission would proceed to consider the case on its merits.

32. On 20 July 2000, the Secretariat of the Commission conveyed the above decision to the parties.

33. On 17 August 2000, the Secretariat of the Commission received a *note verbale* from the respondent state informing the Commission that it had complied with its decision and invited the complainant to a meeting on 14 August 2000.

34. At the 28th ordinary session, the Commission heard both parties. The respondent state informed the Commission that the case of the victims of massacres committed by police officers had been settled but that the other cases were pending. The complainant confirmed that a meeting had been held, but stated that there had been no progress in so far as settling the matter was concerned.

Law

Admissibility

35. Article 56(5) of the African Charter on Human and Peoples' Rights

requires, prior to any recourse being addressed to the Commission, that communications received in accordance with article 55 should be . . . sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged'.

36. In this particular case, the complainant had approached the competent national authorities with a view to obtaining redress for the alleged violations and to clarifying the cases of disappearances and assassinations that had remained unpunished. At its 24th ordinary session, the Commission heard both parties. They expressed their desire to reach an amicable solution and requested its assistance to this end. The Commission informed the parties that it was at their disposal for purposes of reaching an amicable settlement, but the parties did not utilise this avenue. The communication was declared admissible.

Merits

37. Article 3 of the Charter, stipulates that: '(1) Every individual shall be equal before the law. (2) Every individual shall be entitled to equal protection of the law.'

38. In order to redress the effects of the suspensions, dismissals and retirements of magistrates which took place on 10 June 1987, the Burkinabe state introduced an amnesty, aimed at rehabilitating workers abusively removed under the so-called *Conseil National de la Révolution* regime, which ruled over Burkina Faso from 1983 to 1987. As part of the said measure, many workers were restored to their posts, while many others, according to information available to the Commission, remained unaffected by the measure. The complainants, Mr Halidou Ouédraogo and Mr Compaoré Christophe, both magistrates, fall in the latter category. They both demanded to be compensated in kind. The request made by Mr Compaoré has not been met to date. The Supreme Court, before which the case was filed over 15 years ago, has passed no verdict on it. The Commission further notes that no reason with a basis in law was given to justify this delay in considering the case. Nor does the respondent state give any legal reasons to justify the retention of the punishment meted out to these two magistrates. The Commission considers therefore that this is a violation of articles 18 and 19 of the Fundamental Principles on the Independence of the Judiciary, adopted by the 7th United Nations Congress on Crime Prevention and the Treatment of Offenders, held from 26 August to 6 September 1985, and confirmed by the General Assembly in its Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

39. In communication 39/90 [*Pagnoulle v Cameroon* (2000) AHRLR 57 (ACHPR 1997), paragraph 19], the Commission stated: 'Given that this case concerns Mr Mazou's ability to work in his profession, two years without any hearing or projected trial date . . . constitutes a violation . . . of the Charter.'

40. It is abundantly clear, as the Commission has already noted, that the respondent state has shown [no] reasons as to why the rehabilitation measure was applied in a selective manner. The Commission also wonders at the reasons behind the Supreme Court's failure to proceed with the case. Fifteen years without any action being taken on the case, or any decision being made either on the fate of the concerned persons or on the relief sought, constitutes a denial of justice and a violation of the equality of all citizens before the law. It is also a violation of article 7(1)(d) of the African Charter, which proclaims the right to be tried within a reasonable time by an impartial court or tribunal.

41. Article 4 of the Charter states that:

> Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.

42. The communication contains the names of various people who were victims of assassinations, forced disappearances, attacks or attempted attacks against their physical integrity, and acts of intimidation. The respondent state did not deny these facts. Also, the state has never published the results of the commission of enquiry set up following the assassination of Mr Clément Oumarou Ouédraogo, nor did it identify the perpetrators of the offences or take any measures against them. In conformity with its own jurisprudence which states that '. . .where allegations of human rights abuse go uncontested by the government concerned, . . . the Commission must decide on the facts provided by the complainant and treat those facts as given' (See communications 25/89, 47/90, 56/91 and 100/93 [*Free Legal Assistance Group and Others v Zaire* (2000) AHRLR 74 (ACHPR 1995) paragraph 40]). The Commission therefore applies the same reasoning to the facts related in the present communication. The Commission would also like to reiterate a fundamental principle proclaimed in article 1 of the Charter that not only do the states parties recognise the rights, duties and freedoms enshrined in the Charter, they also commit themselves to respect them and to take measures to give effect to them. In other words, if a state party fails to ensure respect of the rights contained in the African Charter, this constitutes a violation of the Charter, even if the state or its agents were not the perpetrators of the violation. (See communication 74/92 [*Commission Nationale des Droits de l'Homme et des Libertés v Chad* (2000) AHRLR 66 (ACHPR 1995)].)

43. The communication points to a series of human rights violations linked to certain events that occurred in Burkina Faso in 1995 and additional elements attached to the dossier describe the human rights violations perpetrated at Garango, Kaya Navio, as well as the murder of a young peasant at Réo. The communication also mentions the deaths of citizens who were shot or tortured to death, as well as the deaths of two young students who had gone onto the streets with their colleagues to express certain demands and to support those of the secondary school and higher

institution teachers. The Commission deplores the abusive use of means of state violence against demonstrators even when the demonstrations are not authorised by the competent administrative authorities. It believes that the public authorities possess adequate means to disperse crowds, and that those responsible for public order must make an effort in these types of operations to cause only the barest minimum of damage and violation of physical integrity, to respect and preserve human life.

44. Article 5 of the Charter guarantees respect for the dignity inherent in the human person and the recognition of his legal status. This text further prohibits all forms of exploitation and degradation of man, particularly slavery, slave trade, torture cruel, inhuman or degrading punishment and treatment. The guarantee of the physical integrity and security of the person is also enshrined in article 6 of the African Charter, as well as in the Declaration on the Protection of all Persons against Forced Disappearances, adopted by the General Assembly of the United Nations in Resolution 47/133 of 18 December 1992, which stipulates in article 1(2) that:

> Any act of enforced disappearance places the persons subjected thereto outside the protection of the law and inflicts severe suffering on them and their families. It constitutes a violation of the rules of international law quaranteeing, *inter alia*, the right to recognition as a person before the law, the right to liberty and security of ther person and the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment. It also violates or constitutes a grave threat to the right of life.

The disappearances of persons suspected or accused of plotting against the instituted authorities, including Mr Guillaume Sessouma and a medical student, Dabo Boukary, arrested in May 1990 by the Presidential Guard and who have not been seen since, then constitute a violation of the above-cited texts and principles. In this last case, the Commission notes the submission of a complaint on 16 October 2000.

45. Article 8 of the Charter provides for the guarantee of the freedom of conscience, the profession and the free practice of religion. While the complainant claims violation of these treaty provisions, the communication does not contain any elements that could reasonably lead to such a conclusion. Information before the Commission provides no indication that the complainant or that any other person cited in the communication had tried to express or exercise his freedom of conscience or to profess his faith. The Commission is of the view, therefore, that violation article 8 has not been established. It adopts the same position as regards the allegations of violations of articles 9(2), 10 and 11 of the Charter.

46. Article 12(2) stipulates that:

> Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions, provided

for by law for the protection of national security, law and order, public health or morality.

47. The communication alleges that on 6 August 1995, Mr Nongma Ernest Ouédraogo, Secretary General of the political party known as *Bloc Socialiste Burkinabé* was prevented from leaving the national territory, following the publication by the said party of a statement on the situation in the country. Information available to the Commission does not point to any threat to public security or morality that either the journey or even the person of the said Mr Ouédraogo could have represented. Therefore, it agrees that there was violation of article 12(2).

48. The complainant claims that there was dismissal of many workers at Poura on account of a strike. Unfortunately, the information provided to the Commission does not allow it to establish in any certain manner that there was violation of article 13(2).

For these reasons, the Commission:

[**49.**] Finds the Republic of Burkina Faso in violation of articles 3, 4, 5, 6, 7(1)(d) and 12(2) of the African Charter.

[**50.**] Recommends that the Republic of Burkina Faso draws all the legal consequences of this decision, in particular by identifying and taking to court those responsible for the human rights violations cited above; accelerating the judicial process of the cases pending before the courts and compensating the victims of the human rights violations stated in the complaint.

NIGERIA

Social and Economic Rights Action Centre (SERAC) and Another v Nigeria

(2001) AHRLR 60 (ACHPR 2001)

Communication 155/96, *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria*
Decided at the 30th ordinary session, Oct 2001, 15th Annual Activity Report
Rapporteur: Dankwa

Admissibility (exhaustion of local remedies - remedies must be available, effective and sufficient, government sufficiently informed to redress situation, 37-40; jurisdiction of courts ousted, 41)
State responsibility (duty to respect, protect, promote and fulfil rights, 44-47; responsibility for actions of non-state actors, 57, 58)
Interpretation (international standards, 44-49; no right in the African Charter that cannot be made effective, 68)
Locus standi (*actio popularis*, 49)
Environment (reasonable measures to prevent ecological degradation, 52-54)
Health (state should not carry out, sponsor or tolerate measures violating the integrity of the individual, 52; right to be informed of hazardous activities, 53, 71)
Peoples' right to disposal of wealth and natural resources (45, 55-58)
Shelter (right in Charter, destruction of homes, evictions, 59-63)
Food (implicit right in Charter, 64-66)
Life (arbitrary deprivation, 67)
Mission (mission to state party, 67)

Summary of facts

1. The communication alleges that the military government of Nigeria has been directly involved in oil production through the state oil company, the Nigerian National Petroleum Company (NNPC), the majority shareholder in a consortium with Shell Petroleum Development Corporation (SPDC), and that these operations have caused environmental degradation and health problems resulting from the contamination of the environment among the Ogoni people.

2. The communication alleges that the oil consortium has exploited oil reserves in Ogoniland with no regard for the health or environment of the local communities, disposing toxic wastes into the environment and local waterways in violation of applicable international environmental standards. The consortium also neglected and/or failed to maintain its facilities causing numerous avoidable spills in the proximity of villages. The resulting contamination of water, soil and air has had serious short- and long-term health impacts, including skin infections, gastrointestinal and respiratory ailments, increased risk of cancers, and neurological and reproductive problems.

3. The communication alleges that the Nigerian government has condoned and facilitated these violations by placing the legal and military powers of the state at the disposal of the oil companies. The communication contains a memo from the Rivers State Internal Security Task Force, calling for 'ruthless military operations'.

4. The communication alleges that the government has neither monitored the operations of the oil companies nor required safety measures that are standard procedure within the industry. The government has withheld from the Ogoni communities information on the dangers created by oil activities. Ogoni communities have not been involved in the decisions affecting the development of Ogoniland.

5. The government has not required oil companies or its own agencies to produce basic health and environmental impact studies regarding hazardous operations and materials relating to oil production, despite the obvious health and environmental crisis in Ogoniland. The government has even refused to permit scientists and environmental organisations from entering Ogoniland to undertake such studies. The government has also ignored the concerns of Ogoni communities regarding oil development, and has responded to protests with massive violence and executions of Ogoni leaders.

6. The communication alleges that the Nigerian government does not require oil companies to consult communities before beginning operations, even if the operations pose direct threats to community or individual lands.

7. The communication alleges that in the course of the last three years, Nigerian security forces have attacked, burned and destroyed several Ogoni villages and homes under the pretext of dislodging officials and supporters of the Movement of the Survival of Ogoni People (MOSOP). These attacks have come in response to MOSOP's non-violent campaign in opposition to the destruction of their environment by oil companies. Some of the attacks have involved uniformed combined forces of the police, the army, the air force, and the navy, armed with armoured tanks and other sophisticated weapons. In other instances, the attacks have been conducted by unidentified gunmen, mostly at night. The military-

type methods and the calibre of weapons used in such attacks strongly suggest the involvement of the Nigerian security forces. The complete failure of the government of Nigeria to investigate these attacks, let alone punish the perpetrators, further implicates the Nigerian authorities.

8. The Nigerian army has admitted its role in the ruthless operations which have left thousands of villagers homeless. The admission is recorded in several memos exchanged between officials of the SPDC and the Rivers State Internal Security Task Force, which has devoted itself to the suppression of the Ogoni campaign. One such memo calls for 'ruthless military operations' and 'wasting operations coupled with psychological tactics of displacement'. At a public meeting recorded on video, Major Okuntimo, head of the Task Force, described the repeated invasion of Ogoni villages by his troops, how unarmed villagers running from the troops were shot from behind, and the homes of suspected MOSOP activists were ransacked and destroyed. He stated his commitment to rid the communities of members and supporters of MOSOP.

9. The communication alleges that the Nigerian government has destroyed and threatened Ogoni food sources through a variety of means. The government has participated in irresponsible oil development that has poisoned much of the soil and water upon which Ogoni farming and fishing depended. In their raids on villages, Nigerian security forces have destroyed crops and killed farm animals. The security forces have created a state of terror and insecurity that has made it impossible for many Ogoni villagers to return to their fields and animals. The destruction of farm lands, rivers, crops and animals has created malnutrition and starvation among certain Ogoni communities.

The complaint

10. The communication alleges violations of articles 2, 4, 14, 16, 18(1), 21 and 24 of the African Charter.

Procedure

11. The communication was received by the Commission on 14 March 1996. The documents were sent with a video.

12. On 13 August 1996 letters acknowledging receipt of the communication were sent to both complainants.

13. On 13 August 1996, a copy of the communication was sent to the government of Nigeria.

14. At the 20th ordinary session held in Grand Bay, Mauritius, in October 1996, the Commission declared the communication admissible, and decided that it would be taken up with the relevant authorities by the planned mission to Nigeria.

15. On 10 December 1996, the Secretariat sent a *note verbale* and letters to this effect to the government and the complainants respectively.

16. At its 21st ordinary session held in April 1997, the Commission postponed taking a decision on the merits to the next session, pending the receipt of written submissions from the complainants to assist it in its decision. The Commission also awaits further analysis of its report of the mission to Nigeria.

17. On 22 May 1997, the complainants were informed of the Commission's decision, while the state was informed on 28 May 1997.

18. At the 22nd ordinary session, the Commission postponed taking a decision on the case pending the discussion of the Nigerian mission report.

19. At the 23rd ordinary session held in Banjul, The Gambia, the Commission postponed consideration of the case to the next session owing to lack of time.

20. On 25 June 1998, the Secretariat of the Commission sent letters to all parties concerned informing them of the status of the communication.

21. At the 24th ordinary session, the Commission postponed consideration of the above communication to the next session.

22. On 26 November 1998, the parties were informed of the Commission's decision.

23. At the 25th ordinary session of the Commission held in Bujumbura, Burundi, the Commission further postponed consideration of this communication to the 26th ordinary session.

24. The above decision was conveyed through separate letters of 11 May 1999 to the parties.

25. At its 26th ordinary session held in Kigali, Rwanda, the Commission deferred taking a decision on the merits of the case to the next session.

26. This decision was communicated to the parties on 24 January 2000.

27. Following the request of the Nigerian authorities through a *note verbale* of 16 February 2000 on the status of pending communications, the Secretariat, among other things, informed the government that this communication was set down for a decision on the merits at the next session.

28. At the 27th ordinary session of the Commission, held in Algeria from 27 April to 11 May 2000, the Commission deferred further consideration of the case to the 28th ordinary session.

29. The above decision was communicated to the parties on 12 July 2000.

30. At the 28th ordinary session of the Commission held in Cotonou, Benin, from 26 October to 6 November 2000, the Commission deferred

further consideration of the case to the next session. During that session, the respondent state submitted a *note verbale* describing the actions taken by the government of the Federal Republic of Nigeria in respect of all the communications filed against it, including the present one. In respect of the instant communication, the *note verbale* admitted the gravamen of the complaints but went on to describe the remedial measures being taken by the new civilian administration. They included:

- Establishing, for the first time in the history of Nigeria, a Federal Ministry of Environment with adequate resources to address environment-related issues prevalent in Nigeria and as a matter of priority in the Niger delta area
- Enacting into law the establishment of the Niger Delta Development Commission (NDDC) with adequate funding to address the environmental and social problems of the Niger delta area and other oil producing areas of Nigeria
- Inaugurating the Judicial Commission of Inquiry to investigate the issues of human rights violations. In addition, the representatives of the Ogoni people have submitted petitions to the Commission of Inquiry on these issues and these are presently being reviewed in Nigeria as a top priority.

31. The above decision was communicated to the parties on 14 November 2000.

32. At the 29th ordinary session held in Tripoli, Libya, from 23 April to 7 May 2001, the Commission decided to defer the final consideration of the case to the next session to be held in Banjul, The Gambia, in October 2001.

33. The above decision was communicated to the parties on 6 June 2001.

34. At its 30th session held in Banjul, The Gambia, from 13 to 27 October 2001, the African Commission reached a decision on the merits of this communication.

Law

Admissibility

35. Article 56 of the African Charter governs admissibility. All of the conditions of this article are met by the present communication. Only the exhaustion of local remedies requires close scrutiny.

36. Article 56(5) requires that local remedies, if any, be exhausted, unless these are unduly prolonged.

37. One purpose of the exhaustion of local remedies requirement is to give the domestic courts an opportunity to decide upon cases before they are brought to an international forum, thus avoiding contradictory judgments of law at the national and international levels. Where a right is not covered

by domestic law, it is unlikely that the case will be heard. Thus the potential of conflict does not arise. Likewise, if the right is not acknowledged, there cannot be effective remedial action or any remedial action at all.

38. Another rationale for the exhaustion requirement is that a government should be notified of a human rights violation in order to have the opportunity to remedy such violation before being called to account by an international tribunal. (See the Commission's decision on communications 25/89, 47/90, 56/91 and 100/93 [*Free Legal Assitance Group and Others v Zaire* (2000) AHRLR 74 (ACHPR 1995)]). The exhaustion of domestic remedies requirement should be properly understood to ensure that the state concerned has ample opportunity to remedy the situation pertaining to the applicant's complaint. It is unnecessary here to recount the international attention that Ogoniland has received as proof that the Nigerian government has had ample notice and, over the past several decades, more than sufficient opportunity to rectify the situation.

39. Requiring the exhaustion of local remedies also ensures that the African Commission does not become a tribunal of first instance for cases for which an effective domestic remedy exists.

40. The present communication does not contain any information on domestic court actions brought by the complainants to halt the violations alleged. However, on numerous occasions the Commission brought the complaint to the attention of the government at the time, but no response was made to the Commission's requests. In such cases the Commission has held that in the absence of a substantive response from the respondent state it must decide on the facts provided by the complainants and treat them as given. (See communications 25/89, 47/90, 56/91, 100/93 [*Free Legal Assistance Group and Others v Zaire* (2000) AHRLR 74 (ACHPR 1995)], 60/91 *Constitutional Right Project* (in respect of Akamu) *v Nigeria* [(2000) AHRLR 180 (ACHPR 1995)] and communication 101/93 *Civil Liberties Organisation v Nigeria* [(2000) AHRLR 186 (ACHPR 1995)]).

41. The Commission takes cognisance of the fact that the Federal Republic of Nigeria has incorporated the African Charter on Human and Peoples' Rights into its domestic law with the result that all the rights contained therein can be invoked in Nigerian courts including those violations alleged by the complainants. However, the Commission is aware that at the time of submitting this communication, the then military government of Nigeria had enacted various decrees ousting the jurisdiction of the courts and thus depriving the people in Nigeria of the right to seek redress in the courts for acts of government that violate their fundamental human rights[1]. In such instances, and as in the instant communication, the Commission is of the view that no adequate domestic remedies are existent

[1] See The Constitution (Suspension and Modification) Decree 1993.

(see communication 129/94 *Civil Liberties Organisation v Nigeria* [(2000) AHRLR 188 (ACHPR 1995)]).

42. It should also be noted that the new government in their *note verbale* referenced 127/2000 submitted at the 28th session of the Commission held in Cotonou, Benin, admitted to the violations committed then by stating,

> there is no denying the fact that a lot of atrocities were and are still being committed by the oil companies in Ogoni Land and indeed in the Niger Delta area.

The Commission therefore declared the communication admissible.

Merits

43. The present communication alleges a concerted violation of a wide range of rights guaranteed under the African Charter for Human and Peoples' Rights. Before we venture into the inquiry whether the government of Nigeria has violated the said rights as alleged in the complaint, it would be proper to establish what is generally expected of governments under the Charter and more specifically vis-à-vis the rights themselves.

44. Internationally accepted ideas of the various obligations engendered by human rights indicate that all rights — both civil and political rights and social and economic — generate at least four levels of duties for a state that undertakes to adhere to a rights regime, namely the duty to respect, protect, promote and fulfill these rights. These obligations universally apply to all rights and entail a combination of negative and positive duties. As a human rights instrument, the African Charter is not alien to these concepts and the order in which they are dealt with here is chosen as a matter of convenience and should in no way imply the priority accorded to them. Each level of obligation is equally relevant to the rights in question.[2]

45. Firstly, the obligation to respect entails that the state should refrain from interfering in the enjoyment of all fundamental rights; it should respect right-holders, their freedoms, autonomy, resources, and liberty of their action.[3] With respect to socio-economic rights, this means that the state is obliged to respect the free use of resources owned or at the disposal of the individual alone or in any form of association with others, including the household or the family, for the purpose of rights-related needs. And with regard to a collective group, the resources belonging to it should be respected, as it has to use the same resources to satisfy its needs.

[2] See generally, Asbjørn Eide 'Economic, Social and Cultural Rights As Human Rights' in Asbjørn Eide, Catarina Krause and Allan Rosas (eds), *Economic, Social, and Cultural Rights: A Textbook* (1995) 21-40.

[3] Krysztof Drzewicki 'Internationalization of Human Rights and their Juridization' in Raija Hanski and Markku Suksi (eds), *An Introduction to the International Protection of Human Rights: A Textbook* (1999) 31.

46. Secondly, the state is obliged to protect right-holders against other subjects by legislation and provision of effective remedies.[4] This obligation requires the state to take measures to protect beneficiaries of the protected rights against political, economic and social interferences. Protection generally entails the creation and maintenance of an atmosphere or framework by an effective interplay of laws and regulations so that individuals will be able to freely realise their rights and freedoms. This corresponds to a large degree with the third obligation of the state to promote the enjoyment of all human rights. The state should make sure that individuals are able to exercise their rights and freedoms, for example, by promoting tolerance, raising awareness, and even building infrastructures.

47. The last obligation requires the state to fulfil the rights and freedoms it freely undertook under the various human rights regimes. It is more of a positive expectation on the part of the state to move its machinery towards the actual realisation of the rights. This also corresponds to a large degree with the duty to promote mentioned in the preceding paragraph. It could comprise the direct provision of basic needs such as food or resources that can be used for food (direct food aid or social security).[5]

48. Thus states are generally burdened with the above set of duties when they commit themselves under human rights instruments. Emphasising the all-embracing nature of the obligations, the International Covenant on Economic, Social and Cultural Rights, for instance, under article 2(1), stipulates explicitly that states 'undertake to take steps . . . by all appropriate means, including particularly the adoption of legislative measures'. Depending on the type of rights under consideration, the level of emphasis in the application of these duties varies. Sometimes the need meaningfully to enjoy some of the rights demands a concerted action from the state in terms of more than one of the said duties. Whether the government of Nigeria has, by its conduct, violated the provisions of the African Charter as claimed by the complainants is examined below.

49. In accordance with articles 60 and 61 of the African Charter, this communication is examined in the light of the provisions of the African Charter and the relevant international and regional human rights instruments and principles. The Commission thanks the two human rights NGOs which brought the matter under its purview: the Social and Economic Rights Action Centre (Nigeria) and the Centre for Economic and Social Rights (USA). This is a demonstration of the usefulness to the Commission and individuals of *actio popularis*, which is wisely allowed under the African Charter. It is a matter of regret that the only written response from the government of Nigeria is an admission of the gravity of the complaints which is contained in a *note verbale* and which we have reproduced above at paragraph 30. In the circumstances, the Commission is compelled to

[4] Drzewicki, *ibid*.
[5] See Eide, in Eide, Krause and Rosas, *op cit* 38.

proceed with the examination of the matter on the basis of the uncontested allegations of the complainants, which are consequently accepted by the Commission.

50. The complainants allege that the Nigerian government violated the right to health and the right to a clean environment as recognised under articles 16 and 24 of the African Charter by failing to fulfil the minimum duties required by these rights. This, the complainants allege, the government has done by:

- Directly participating in the contamination of air, water and soil and thereby harming the health of the Ogoni population
- Failing to protect the Ogoni population from the harm caused by the NNPC Shell Consortium but instead using its security forces to facilitate the damage
- Failing to provide or permit studies of potential or actual environmental and health risks caused by the oil operations, article 16 of the African Charter reads:

> (1) Every individual shall have the right to enjoy the best attainable state of physical and mental health. (2) States parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

Article 24 of the African Charter reads: 'All peoples shall have the right to a general satisfactory environment favourable to their development.'

51. These rights recognise the importance of a clean and safe environment that is closely linked to economic and social rights in so far as the environment affects the quality of life and safety of the individual.[6] As has been rightly observed by Alexander Kiss:

> An environment degraded by pollution and defaced by the destruction of all beauty and variety is as contrary to satisfactory living conditions and the development of personality as the breakdown of the fundamental ecologic equilibria is harmful to physical and moral health.[7]

52. The right to a general satisfactory environment, as guaranteed under article 24 of the African Charter or the right to a healthy environment, as it is widely known, therefore imposes clear obligations upon a government. It requires the state to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources. Article 12 of the International Covenant on Economic, Social

[6] See also General Comment no 14 (2000) of the Committee on Economic, Social and Cultural Rights.

[7] Alexander Kiss 'Concept and Possible Implications of the Right to Environment' in Kathleen E Mahoney and Paul Mahoney (eds), *Human Rights in the Twenty-first Century: A Global Challenge*, 553.

and Cultural Rights (ICESCR), to which Nigeria is a party, requires governments to take necessary steps for the improvement of all aspects of environmental and industrial hygiene. The right to enjoy the best attainable state of physical and mental health enunciated in article 16(1) of the African Charter and the right to a generally satisfactory environment favourable to development (article [24]) already noted, obligate governments to desist from directly threatening the health and environment of their citizens. The state is under an obligation to respect these rights and this largely entails non-interventionist conduct from the state; for example, to desist from carrying out, sponsoring or tolerating any practice, policy or legal measures violating the integrity of the individual.[8]

53. Government compliance with the spirit of articles 16 and 24 of the African Charter must also include ordering or at least permitting independent scientific monitoring of threatened environments, requiring and publicising environmental and social impact studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities exposed to hazardous materials and activities and providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities.

54. We now examine the conduct of the government of Nigeria in relation to articles 16 and 24 of the African Charter. Undoubtedly and admittedly, the government of Nigeria, through NNPC has the right to produce oil, the income from which will be used to fulfil the economic and social rights of Nigerians. However, the care that should have been taken as outlined in the preceding paragraph and which would have protected the rights of the victims of the violations complained of was not taken. To exacerbate the situation, the security forces of the government engaged in conduct in violation of the rights of the Ogonis by attacking, burning and destroying several Ogoni villages and homes.

55. The complainants also allege a violation of article 21 of the African Charter by the government of Nigeria. The complainants allege that the military government of Nigeria was involved in oil production and thus did not monitor or regulate the operations of the oil companies and in so doing paved the way for the oil consortiums to exploit oil reserves in Ogoniland. Furthermore, in all their dealings with the oil consortiums, the government did not involve the Ogoni communities in the decisions that affected the development of Ogoniland. The destructive and selfish role played by oil development in Ogoniland, along with repressive tactics of the Nigerian government, and the lack of material benefits accruing to

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[8] See Scott Leckie 'The Right to Housing' in *Economic, Social and Cultural Rights*, Eide, Krause and Rosas (eds), Martinus Nijhoff Publishers (1995).

the local population,[9] may well be said to constitute a violation of article 21. Article 21 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. 2. In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation. 3. The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic co-operation based on mutual respect, equitable exchange and the principles of international law. 4. States 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. 5. States parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practised by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources.

56. The origin of this provision may be traced to colonialism, during which the human and material resources of Africa were largely exploited for the benefit of outside powers, creating tragedy for Africans themselves, depriving them of their birthright and alienating them from the land. The aftermath of colonial exploitation has left Africa's precious resources and people still vulnerable to foreign misappropriation. The drafters of the Charter obviously wanted to remind African governments of the continent's painful legacy and restore cooperative economic development to its traditional place at the heart of African society.

57. Governments have a duty to protect their citizens, not only through appropriate legislation and effective enforcement, but also by protecting them from damaging acts that may be perpetrated by private parties (see [*Commission Nationale des Droits de l'Homme et des Libertés v Chad* (2000) AHRLR 66 (ACHPR 1995)][10]). This duty calls for positive action on the part of governments in fulfilling their obligation under human rights instruments. The practice before other tribunals also enhances this requirement as is evidenced in the case *Velàsquez Rodríguez v Honduras*[11]. In this landmark judgment, the Inter-American Court of Human Rights held that when a state allows private persons or groups to act freely and with impunity to the detriment of the rights recognised, it would be in clear violation of its obligations to protect the human rights of its citizens. Similarly, this obligation of the state is further emphasised in the practice of the European Court of Human Rights, in *X and Y v Netherlands*.[12] In that

[9] See a report by the Industry and Energy Operations Division West Central Africa Department Defining an Environmental Development Strategy for the Niger Delta Volume 1 — paragraph B (1.6 — 1.7) at page 2-3.

[10] Communication 74/92.

[11] See Inter-American Court of Human Rights, *Velàsquez Rodrígeuz* case, judgment of 19 July 1988, Series C, no 4.

[12] 91 ECHR (1985) (Ser A) at 32.

case, the Court pronounced that there was an obligation on authorities to take steps to make sure that the enjoyment of the rights is not interfered with by any other private person.

58. The Commission notes that in the present case, despite its obligation to protect persons against interferences in the enjoyment of their rights, the government of Nigeria facilitated the destruction of the Ogoniland. Contrary to its Charter obligations and despite such internationally established principles, the Nigerian government has given the green light to private actors, and the oil companies in particular, to devastatingly affect the well-being of the Ogonis. By any measure of standards, its practice falls short of the minimum conduct expected of governments, and therefore, is in violation of article 21 of the African Charter.

59. The complainants also assert that the military government of Nigeria massively and systematically violated the right to adequate housing of members of the Ogoni community under article 14 and implicitly recognised by articles 16 and 18(1) of the African Charter. Article 14 of the Charter reads:

> The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.

Article 18(1) provides: 'The family shall be the natural unit and basis of society. It shall be protected by the state . . .'.

60. Although the right to housing or shelter is not explicitly provided for under the African Charter, the corollary of the combination of the provisions protecting the right to enjoy the best attainable state of mental and physical health, cited under article 16 above, the right to property, and the protection accorded to the family forbids the wanton destruction of shelter because when housing is destroyed, property, health and family life are adversely affected. It is thus noted that the combined effect of articles 14, 16 and 18(1) reads into the Charter a right to shelter or housing which the Nigerian government has apparently violated.

61. At a very minimum, the right to shelter obliges the Nigerian government not to destroy the housing of its citizens and not to obstruct efforts by individuals or communities to rebuild lost homes. The state's obligation to respect housing rights requires it, and thereby all of its organs and agents, to abstain from carrying out, sponsoring or tolerating any practice, policy or legal measure violating the integrity of the individual or infringing upon his or her freedom to use those material or other resources available to him or her in a way he or she finds most appropriate to satisfy individual, family, household or community housing needs.[13] Its obligations to protect obliges it to prevent the violation of any individual's right

[13] Scott Leckie 'The Right to Housing' in Eide, Krause and Rosas, *op cit*, 107-123, at 113.

to housing by any other individual or non-state actors like landlords, property developers, and landowners, and where such infringements occur, it should act to preclude further deprivations as well as guaranteeing access to legal remedies.[14] The right to shelter even goes further than a roof over one's head. It extends to embody the individual's right to be left alone and to live in peace — whether under a roof or not.

62. The protection of the rights guaranteed in articles 14, 16 and 18(1) leads to the same conclusion. As regards the earlier right, and in the case of the Ogoni people, the government of Nigeria has failed to fulfil these two minimum obligations. The government has destroyed Ogoni houses and villages and then, through its security forces, obstructed, harassed, beaten and, in some cases, shot and killed innocent citizens who have attempted to return to rebuild their ruined homes. These actions constitute massive violations of the right to shelter, in violation of articles 14, 16, and 18(1) of the African Charter.

63. The particular violation by the Nigerian government of the right to adequate housing as implicitly protected in the Charter also encompasses the right to protection against forced evictions. The African Commission draws inspiration from the definition of the term 'forced evictions' by the Committee on Economic, Social and Cultural Rights which defines this term as 'the permanent removal against their will of individuals, families and/or communities from the homes and/or which they occupy, without the provision of, and access to, appropriate forms of legal or other protection'[15]. Wherever and whenever they occur, forced evictions are extremely traumatic. They cause physical, psychological and emotional distress; they entail losses of means of economic sustenance and increase impoverishment. They can also cause physical injury and in some cases sporadic deaths. Evictions break up families and increase existing levels of homelessness.[16] In this regard, General Comment no 4 (1991) of the Committee on Economic, Social and Cultural Rights on the right to adequate housing states that '. . . all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats.' (E/1992/23, annex III, paragraph 8(a)). The conduct of the Nigerian government clearly demonstrates a violation of this right enjoyed by the Ogonis as a collective right.

64. The communication argues that the right to food is implicit in the African Charter, in such provisions as the right to life (article 4), the right to health (article 16) and the right to economic, social and cultural development (article 22). By its violation of these rights, the Nigerian government disregarded not only the explicitly protected rights but also upon the right to food implicitly guaranteed.

[14] *Ibid* 113-114.
[15] See General Comment No 7 (1997) on the right to adequate housing (article 11(1)): Forced Evictions.
[16] *Ibid* p 113.

65. The right to food is inseparably linked to the dignity of human beings and is therefore essential for the enjoyment and fulfilment of such other rights as health, education, work and political participation. The African Charter and international law require and bind Nigeria to protect and improve existing food sources and to ensure access to adequate food for all citizens. Without touching on the duty to improve food production and to guarantee access, the minimum core of the right to food requires that the Nigerian government should not destroy or contaminate food sources. It should not allow private parties to destroy or contaminate food sources, and prevent peoples' efforts to feed themselves.

66. The government's treatment of the Ogonis has violated all three minimum duties of the right to food. The government has destroyed food sources through its security forces and state oil company; has allowed private oil companies to destroy food sources; and, through terror, has created significant obstacles to Ogoni communities trying to feed themselves. The Nigerian government has again fallen short of what is expected of it as under the provisions of the African Charter and international human rights standards, and hence, is in violation of the right to food of the Ogonis.

67. The complainants also allege that the Nigerian government has violated article 4 of the Charter which guarantees the inviolability of human beings and everyone's right to life and that the integrity of the person will be respected. Given the widespread violations perpetrated by the government of Nigeria and private actors (be it with its blessing or not), the most fundamental of all human rights, the right to life has been violated. The security forces were given the green light to deal decisively with the Ogonis, which was illustrated by the widespread terrorisations and killings. The pollution and environmental degradation to a level humanly unacceptable has made living in Ogoniland a nightmare. The survival of the Ogonis depended on their land and farms that were destroyed by the direct involvement of the government. These and similar atrocities not only persecuted individuals in Ogoniland but also the Ogoni community as a whole. They affected the life of the whole of the Ogoni society. The Commission conducted a mission to Nigeria from 7 — 14 March 1997 and witnessed firsthand the deplorable situation in Ogoniland including the environmental degradation.

68. The uniqueness of the African situation and the special qualities of the African Charter on Human and Peoples' Rights imposes upon the African Commission an important task. International law and human rights must be responsive to African circumstances. Clearly, collective rights, environmental rights, and economic and social rights are essential elements of human rights in Africa. The African Commission will apply any of the diverse rights contained in the African Charter. It welcomes this opportunity to make clear that there is no right in the African Charter that cannot be made effective. As indicated in the preceding paragraphs, however, the

Nigerian government did not live up to the minimum expectations of the African Charter.

69. The Commission does not wish to fault governments that are labouring under difficult circumstances to improve the lives of their people. The situation of the people of Ogoniland, however, requires, in the view of the Commission, a reconsideration of the government's attitude to the allegations contained in the instant communication. The intervention of multinational corporations may be a potentially positive force for development if the state and the people concerned are ever mindful of the common good and the sacred rights of individuals and communities. The Commission however takes note of the efforts of the present civilian administration to redress the atrocities that were committed by the previous military administration as illustrated in the *note verbale* referred to in paragraph 30 of this decision.

For the above reasons, the Commission:

[**70.**] Finds the Federal Republic of Nigeria in violation of articles 2, 4, 14, 16, 18(1), 21 and 24 of the African Charter on Human and Peoples' Rights;

[**71.**] Appeals to the government of the Federal Republic of Nigeria to ensure protection of the environment, health and livelihood of the people of Ogoniland by:

- Stopping all attacks on Ogoni communities and leaders by the Rivers State Internal Securities Task Force and permitting citizens and independent investigators free access to the territory;
- Conducting an investigation into the human rights violations described above and prosecuting officials of the security forces, NNPC and relevant agencies involved in human rights violations;
- Ensuring adequate compensation to victims of the human rights violations, including relief and resettlement assistance to victims of government-sponsored raids, and undertaking a comprehensive clean-up of lands and rivers damaged by oil operations;
- Ensuring that appropriate environmental and social impact assessments are prepared for any future oil development and that the safe operation of any further oil development is guaranteed through effective and independent oversight bodies for the petroleum industry; and
- Providing information on health and environmental risks and meaningful access to regulatory and decision-making bodies to communities likely to be affected by oil operations.

[**72.**] Urges the government of the Federal Republic of Nigeria to keep the African Commission informed of the outcome of the work of:

- The Federal Ministry of Environment which was established to address

environmental and environment-related issues prevalent in Nigeria, and as a matter of priority, in the Niger Delta area including the Ogoni land;

- The Niger Delta Development Commission (NDDC) enacted into law to address the environmental and other social related problems in the Niger Delta area and other oil producing areas of Nigeria; and
- The Judicial Commission of Inquiry inaugurated to investigate the issues of human rights violations.

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Civil Liberties Organisation and Others v Nigeria

(2001) AHRLR 75 (ACHPR 2001)

Communication 218/98, *Civil Liberties Organisation, Legal Defence Centre and Assistance Project v Nigeria*
Decided at the 29th ordinary session, April-May 2001, 14th Annual Activity Report
Rapporteur: Pityana

State responsibility (change of government does not extinguish claim, 21-22)
Admissibility (exhaustion of local remedies — jurisdiction of courts ousted, 23)
Interpretation (international standards, 24, 35)
Fair trial (defence — access to legal counsel of one's choice, 28-31; appeal, 32-34; public trial, 35-39; presumption of innocence 40-41; impartial court — military court, 25, 27, 42-44)
Life (death penalty, 31, 33, 34)
Evidence (burden on complainant to furnish evidence, 45)

Summary of facts

1. The authors of the communication are three NGOs based in Nigeria with observer status with the African Commission. Nigeria is a state party to the African Charter on Human and Peoples' Rights.

2. The communication was received on 3 August 1998.

3. The authors allege a violation of the African Charter regarding the following:

(i) An unfair trial in respect of the trial and conviction of Lt Gen Oladipo Diya and four other soldiers and a civilian;
(ii) The above-mentioned victims were convicted and sentenced to death by a special military tribunal for an alleged *coup* plot to overthrow the Nigerian military government under Gen Sani Abacha.

4. It is alleged that on 21 December 1997, the Nigerian military government announced that it had uncovered a *coup* plot. Following this, 26 persons were arrested including Lt Gen Oladipo Diya, Major General Abdukadir Adisa, Lt Gen Olarenwaju, Col Akintonde and Professor Odekunle.

5. It is also alleged that in January 1998, the Nigerian military government set up a military panel of inquiry to investigate the alleged *coup* plot. Before the trial, the government displayed to a selected audience videotapes of supposed confessions by the suspects.

6. On 14 February 1998, a special military tribunal was constituted. Members of the tribunal included serving judges, but the chairman was a member of the Provisional Ruling Council (PRC).

7. The decision of the tribunal is not subject to appeal, but requires confirmation by the PRC, the members of which are exclusively members of the armed forces.

8. The tribunal concluded its proceedings in early April 1998 and on 28 April 1998 announced the conviction and sentencing to death of six of the accused, including the five persons mentioned above.

9. The authors contend that the arrest, detention, arraignment and trial of the convicted and sentenced persons were unlawful, unfair and unjust and as such a violation of the provisions of the African Charter on Human and Peoples' Rights.

10. The communication alleges that the following articles of the African Charter on Human and Peoples' Rights have been violated: articles 4, 5, 6, 7, and 26.

Procedure

11. At the 24th ordinary session, the Commission considered the communication and decided to be seized of it.

12. On 26 November 1998, letters were sent to the parties involved informing them of the Commission's decision.

13. At its 25th ordinary session held in Bujumbura, Burundi, the Commission requested the Secretariat to give its opinion on the effect of article 56(7) of the Charter in view of the political developments in Nigeria, and postponed consideration on admissibility to the 26th ordinary session.

14. On 13 May 1999, the Secretariat of the Commission dispatched letters to all the parties notifying them of this decision.

15. At its 26th ordinary session held in Kigali, Rwanda, the Commission declared the communication admissible in line with the recommendation of the Secretariat and requested parties to submit arguments on the merits of the case.

16. By separate letters dated 17 January 2000, all the parties were informed of the decision.

17. On 17 February 2000, the Secretariat received a *note verbale* from the High Commission of the Federal Republic of Nigeria in Banjul requesting the Commission to forward the following documents to the country's competent authorities to enable them prepare appropriate responses to the alleged violations: (a) The draft agenda for the 27th ordinary session and the letter of invitation to the said session; (b) A copy of the complaint that was attached to the Secretariat's note; and (c) A copy of the report of the 26th ordinary session.

18. Further to the above request, the Secretariat of the Commission, on 8 March 2000, forwarded all the documents requested, except the report of the 26th ordinary session, together with a copy of the summary and status of all communications filed against Nigeria which were pending before the Commission during the 26th ordinary session, a copy each of the three communications (218/98, 224/98 [*Media Rights Agenda v Nigeri*a (2000) AHRLR 262 (ACHPR 2000)] and 225/98 [*Huri-Laws v Nigeria* (2000) AHRLR 273 (ACHPR 2000)]) as submitted by their authors, and a copy of the written response of Media Rights Agenda on the merits of communication 224/98.

19. At its 27th ordinary session held in Algiers, Algeria, the Commission found a violation of article 7 of the Charter and requested the government of Nigeria to compensate the victims accordingly.

20. At its 28th ordinary session held in Cotonou, Benin, the rapporteur noted that although a decision had been taken at the 27th ordinary session, some amendments were necessary in order to reflect the peculiar nature of trials of soldiers by military tribunals. He undertook to continue working on the case and the matter was deferred to the 29th ordinary session.

Admissibility

21. At its 25th ordinary session held in Bujumbura, Burundi, the Commission requested the Secretariat to give an opinion on the effect of article 56(7) of the Charter in view of the changing political and constitutional situation in Nigeria. Relying on the case law of the Commission, the Secretariat submitted that based on the well-established principle of international law, a new government inherits its predecessor's obligations, including responsibility for the previous government's misdeeds (see communications 64/92, 68/92 and 78/92 [*Achuthan and Another (on behalf of Banda and Others v Malaw*i (2000) AHRLR 144 (ACHPR 1995)]).

22. The Commission has always dealt with communications by deciding upon the facts alleged at the time of submission of the communication (see communications 27/89, 49/91 and 99/93 [*Organisation Mondiale Contre la Torture and Others v Rwanda* (2000) AHRLR 282 (ACHPR 1996)]). Therefore, even if the situation has improved, such as leading to the release of the detainees, repealing of the offensive laws and tackling of impunity, the position remains that the responsibility of the present government of Nigeria would still be engaged for acts of human rights violations which were perpetrated by its predecessors.

23. It was noted that although Nigeria was under a democratically elected government, section 6(6)(d) of the Constitution provides that no legal action can be brought to challenge 'any existing law made on or after 15 January 1966 for determining any issue or question as to the competence of any authority or person to make any such law'. This means that there is no recourse within the Nigerian legal system for challenging the legality of any unjust laws. For the above reasons, and also for the fact that, as alleged, there were no avenues for exhausting local remedies, the Commission declared the communication admissible.

Merits

24. In interpreting and applying the Charter, the Commission relies on the growing body of legal precedents established in its decisions over a period of nearly 15 years. The Commission is also enjoined by the Charter and international human rights standards which include decisions and general comments by the UN treaty bodies (article 60). It may also have regard to principles of law laid down by states parties to the Charter and African practices consistent with international human rights norms and standards (article 61). In this matter, the Charter is silent on its application to military courts or tribunals.

25. The issues brought before the Commission have to be judged in the environment of a military junta and serving military officers accused of offences punishable in terms of military discipline in any jurisdiction. This caution has to be applied especially as pertaining to serving military officers. The civilian accused is part of the common conspiracy and as such it is reasonable that he be charged with his military co-accused in the same judicial process.[1] The Commission is making this decision conscious of the fact that Africa continues to have military regimes which are inclined to suspend the constitution, govern by decree and seek to oust the application of international obligations. Such was the case in Nigeria under military strongman Sani Abacha.

[1] In General Comment no 13 (1984) paragraph 4 the UN Human Rights Committee argues that 'While the Covenant does not prohibit such categories of courts [military or special courts which try civilians], nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14.'

26. The Commission believes that this decision must indicate the durability of the norms prescribed by the Charter and the duties on whatever system of governance may be in place to abide by the international norms as well as duties established in international human rights law. It must be clearly understood that the military tribunal here is one under an undemocratic military regime. In other words, the authority of the executive and the legislature has been subsumed under the military rule. Far from suggesting that military rulers have *carte blanche* to govern [by the barrel of a gun], the Commission wishes to underscore the fact that the laws of human rights, justice and fairness must still prevail.[2]

27. It is the Commission's view that the provisions of article 7 should be considered non-derogable providing as they do the minimum protection to citizens and military officers alike especially under an unaccountable, undemocratic military regime. The Human Rights Committee in its General Comment no 13 states that article 14 of the ICCPR applies to all courts and tribunals whether specialised or ordinary. The Committee went on to note the existence of military or special courts in many jurisdictions which, nonetheless, try civilians. It is noted that this could present serious problems as far as equitable, impartial and independent administration of justice is concerned. Such courts are resorted to in order to justify recourse to exceptional measures which do not comply with normal procedures. The European Commission has ruled that the purpose of requiring that courts be 'established by law' is that the organisation of justice must not depend on the discretion of the executive, but must be regulated by laws emanating from Parliament. The military tribunals are not negated by the mere fact of being presided over by military officers. The critical factor is whether the process is fair, just and impartial.

28. It is alleged that in contravention of article 7(1)(c) of the Charter, the convicted persons were not given the opportunity to be represented and defended by counsel of their choice, but rather that junior military lawyers were assigned to them and their objections were overruled. The fairness of the trial is critical if justice is to be done. For that reason, especially in serious cases, which carry the death penalty, the accused should be represented by a lawyer of his choice. The purpose of this provision is to ensure that the accused has confidence in his legal counsel. Failure to provide for this may expose the accused to a situation where he will not be able to give full instructions to his counsel for lack of confidence.

[2] In communications nos 137/94, 139/94, 154/96 and 161/97 [*International Pen and Others (on behalf of Saro-Wiwa) v Nigeria* (2000) AHRLR 212 (ACHPR 1999)], the Commission found that trials held under the Civil Disturbances (Special Tribunals) Decree no 2 of 1987 were in violation of the Charter in that the judgments of the tribunals were not subject to appeal but had to be confirmed by the Provisional Ruling Council, the members of which were military officers. The decree effectively ousts the jurisdiction of the ordinary courts and as such the accused had no access to a competent, independent, fair and impartial court.

29. Besides, it is desirable that in cases where the accused are unable to afford legal counsel they be represented by counsel at state expense. Even in such cases, the accused should be able to choose from a list the preferred independent counsel 'not acting under the instructions of government but responsible only to the accused'. The Human Rights Committee also prescribes that the accused person must be able to consult with his lawyer in conditions which ensure confidentiality of their communications. Lawyers should be able to counsel and to represent their clients in accordance with established professional standards without any restrictions, influences, pressures or undue interference from any quarter (*Burgos v Uruguay* [communication R12/52] and *Estrella v Uruguay* [communication 74/1980]).

30. The right to fair trial is essential for the protection of all other fundamental rights and freedoms. In its Resolution on the Right to Recourse and Fair Trial (1992), the Commission has observed that the right to fair trial includes, among other things, that:

> (a) In the determination of charges against individuals, the individuals shall be entitled in particular to: (i) have adequate time and facilities for the preparation of their defence and to communicate in confidence with counsel of their choice.

31. The assignment of military lawyers to accused persons is capable of exposing the victims to a situation of not being able to communicate, in confidence, with counsel of their choice. The Commission therefore finds the assignment of military counsel to the accused persons, despite their objections, and especially in a criminal proceeding which carries the ultimate punishment, a breach of article 7(1)(c) of the Charter (see the *Ken Saro-Wiwa* decision cited above).

32. The communication alleges that under the military rule, the decision of the military tribunal is not subject to appeal, but may be confirmed by the Provisional Ruling Council. The PRC in this instance arrogates to itself the role of complainant, prosecutor and judge in its own cause. This, it alleged, is a violation of article 7(1)(a) of the Charter. Article 7(1)(a) of the Charter provides:

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

33. The foreclosure of any avenue of appeal to competent national organs in a criminal case attracting punishment as severe as the death penalty clearly violates the said article. It also falls short of the standard stipulated in paragraph 6 of the UN Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty (1984), to wit:

> Any one sentenced to death shall have the right to appeal to a court of higher jurisdiction, and steps should be taken to ensure that such appeals shall become mandatory.

34. Article 6(4) of the ICCPR also makes provision for this protection. In a [1981 report on the situation of human rights in Nicaragua (oea/serl/v/ii53 doc 25 (30 June 1981))], the Inter-American Commission of Human Rights (IACHR) stated that 'the existence of a higher tribunal necessarily implies a re-examination of the facts presented in the lower court' and that the omission of the opportunity for such an appeal deprives defendants of due process. In other words, a higher threshold of rights is intended for those who are charged with crimes the sentence of which might be the death penalty (see ACHPR communications 60/91 and 87/93 *Constitutional Rights Project v Nigeria* [(2000) AHRLR 180 (ACHPR 1995)]).

35. The communication further alleges that except for the opening and closing ceremonies, the trial was conducted *in camera* in contravention of article 7 of the Charter. The Charter does not specifically mention the right to public trials; neither does its Resolution on the Right to Recourse and Fair Trial. Mindful of developments in international human rights law and practice [guidance may be drawn] especially from General Comment [13] of the Human Rights Committee to the effect that

> The publicity of hearings is an important safeguard in the interest of the individual and of society at large . . . (1) apart from such exceptional circumstances, the Committee considers that a hearing must be open to the public in general, including members of the press, and must not, for instance, be limited only to a particular category of persons. . .[3]

36. The publicity of hearings is an important safeguard in the interest of the individual and the society at large. At the same time article 14(1) [of ICCPR] acknowledges that courts have the power to exclude all or parts of the public for reasons spelt out in that paragraph. It should be noted that, apart from such exceptional circumstances, the UN Human Rights Committee considers that a hearing must be open to the public in general, including members of the press, and must not, for instance, be limited only to a particular category of persons.

37. In *Le Compte, van Leuven & de Meyere v Belgium*, the European Commission held that there is no public hearing unless the court dealing with the matter holds its proceedings in public both when considering the facts and when deciding on the law [judgment by the European Court, (1982) EHRR 1]. While it may be acceptable in certain circumstances for the hearing to be held *in camera*, the proceedings should remain fair and in the interests of the parties. While there may be circumstances where a trial *in camera* may be held, for example, where the identity of the accused or the safety of witnesses needs to be protected, this does not prescribe a right but is subject to the discretion of the judicial officer.

38. Article 14 of ICCPR explains that the trial should also guarantee the right of the accused 'to examine or have examined the witnesses against him and to obtain the attendance and examination of witnesses on his

[3] UN Human Rights Committee General Comment no 13 (1984) paragraph 6.

behalf under the same conditions as witnesses against him'. Where the trial is held *in camera*, there can be no independent demonstration that these requirements have been met.

39. The state party has not shown that the holding of the proceedings in secret was within the parameters of the exceptional circumstances contemplated above. The Commission therefore finds this a violation of the victims' right to fair hearing guaranteed under article 7 of the Charter.

40. Article 7(1)(b) stipulates that every individual shall have the right to have his cause heard. This comprises: 'the right to be presumed innocent until proven guilty by a competent court or tribunal'. The presumption of innocence is universally recognised. With it is also the right to silence. This means that no accused should be required to testify against himself or to incriminate himself or be required to make a confession under duress (articles 6(2) and 14(3)(g) of ICCPR).

41. In *Krause v Switzerland* [application 7986/77] the European Commission noted that this principle constituted a fundamental principle, which protects everybody against being treated by public officials as if they were guilty of an offence even before such guilt is established by a competent court. It has been alleged that videotapes show the accused making confession before other military officials. It is suggested that the officials affirmed the guilt of the accused on the basis of the 'confessions'. No evidence was led showing that these were the same officials who presided or participated in the military tribunal that tried them. The alleged tapes were not presented to the Commission as evidence. In the circumstances, the Commission cannot make a finding on hearsay evidence. The Commission cannot therefore find that the right to presumption of innocence has been violated.

42. The communication alleges that the trial, conviction and sentence of civilians (as at the time of filing of the complaint, one civilian was convicted and sentenced to death) by the tribunal, composed of military personnel as judges, was a breach of article 7 of the Charter. The Commission is not convinced that in the circumstances of this case it was possible to have a separation of trials, nor has it been alleged that the civilian accused applied for such separation. It may well be that the cause of justice would not have been served by such a separation. In the circumstances and in this respect, we are not in a position to find a violation of article 7(1)(d) of the Charter.

43. The communication alleges that the composition of the tribunal which was presided over by a serving military officer did not meet the requirement of an independent and impartial judicial panel to try the accused, and therefore is a violation of article 7(1)(d) of the Charter. Article 7(1)(d) of the Charter provides: 'Every individual shall have the right to have his cause heard. This comprises: . . . (d) The right to be tried within a reasonable time by an impartial court or tribunal.'

44. It has been stated elsewhere in this decision, that a military tribunal *per se* is not offensive to the rights in the Charter, nor does it imply an unfair or unjust process. We make the point that military tribunals must be subject to the same requirements of fairness, openness, justice, independence and due process as any other process. What causes offence is failure to observe basic or fundamental standards that would ensure fairness. As that matter has been dealt with above, it is not necessary to find that a tribunal presided over by a military officer is a violation of the Charter. It has already been pointed out that the military tribunal fails the independence test.

45. The complainant alleges a violation of articles 5 and 6 of the Charter. No details of the specific elements which constitute such claims are made in the complaint. In the absence of such information, the Commission cannot find a violation as alleged.

For the above reasons, the Commission:

[**46.**] Finds violations of articles 7(1)(a) and (c) of the Charter.

[**47.**] Urges the government of the Federal Republic of Nigeria to bring its laws in conformity with the Charter by repealing the offending decree.

[**48.**] Requests the government of the Federal Republic of Nigeria to compensate the victims as appropriate.

ZAMBIA

Legal Resources Foundation v Zambia

(2001) AHRLR 84 (ACHPR 2001)

Communication 211/98, *Legal Resources Foundation v Zambia*
Decided at the 29th ordinary session, April-May 2001, 14th Annual Activity Report
Rapporteur: Pityana

Political participation (prohibition to stand for political office, 52, 64, 72)
Interpretation (international standards, 58, 59; holistic interpretation of Charter, 70)
State responsibility (duty to give effects to rights in the Charter in national law, 59, 60, 62)
Jurisdiction (compatibility of domestic constitution and practice with Charter, 61, 68)
Equality, non-discrimination (discrimination on the grounds of language, origin, 63, 64, 68)
Limitation of rights (not to be used to subvert rights already enjoyed, cannot be justified soley on basis of popular will, 65-70)
Peoples' right to self-determination (applies to identifiable groups, 73)

Summary of facts

1. The complainant, an NGO that has observer status with the African Commission and is based in Zambia, is bringing this complaint against a state party to the Charter, Zambia.

2. The complainant alleges that the Zambian government has enacted into law, a constitution which is discriminatory, divisive and violates the human rights of 35 per cent of the entire population. The Constitution (Amendment) Act of 1996, it is alleged, has not only violated the rights of its citizens, but has also taken away the accrued rights of other citizens, including the first president, Dr Kenneth Kaunda.

3. The complainant alleges that the said Constitution of Zambia Amendment Act of 1996 provides, *inter alia*, that anyone who wants to contest the Office of the President has to prove that both parents are/were Zambians by birth or descent.

4. Article 35 of the said Constitution Amendment Act further provides that

nobody who has served two five-year terms as President shall be eligible for re-election to that office.

5. The complainant alleges that the amended constitutional provisions are in contravention of international human rights instruments in general and the African Charter on Human and Peoples' Rights in particular.

6. The complainant has taken the case to the Supreme Court of Zambia between May and August 1996 seeking:

- A declaration that articles 34 and 35 of the amended Constitution are discriminatory;
- A declaration that Parliament lacks the power to adopt a new constitution; and
- An injunction restraining the President from assenting to the Constitution.

7. The complainant alleges that while the case was pending in court, the ruling party, which dominated Parliament, went ahead to adopt and enact the controversial Constitution which the President assented to one week later.

8. The complainant's case was therefore thrown out of court.

9. The Supreme Court of Zambia is the highest court of jurisdiction in the land, thus all local remedies have been exhausted.

The complaint

10. The complainant alleges that the following provisions of the African Charter have been violated: article 2, which prohibits discrimination of any kind including place of birth, social origin and other status; article 3, which provides for the equality of all individuals before the law; article 13, which guarantees every citizen the right to participate freely in the government of his or her country and article 19, which provides for the equality of all peoples, irrespective of their place of origin etc.

Procedure

11. The communication is dated 12 February 1998.

12. On the 10 March 1998, the Secretariat sent a letter acknowledging receipt of the complaint.

13. At its 23rd ordinary session held in Banjul, The Gambia, from 20 — 29 April 1998, the Commission decided to be seized of this case and requested further information in order to decide on admissibility at the next session.

14. On 25 June 1998, the Secretariat sent letters to the parties notifying them of the Commission's decision.

15. At its 24th ordinary session held in Banjul, The Gambia, from 22 — 31 October 1998, the Commission postponed consideration of admissibility of the communication to the 25th ordinary session and instructed the Secretariat to request more information from the parties.

16. On 26 November 1998, the Secretariat informed the parties of the decision accordingly.

17. At its 25th ordinary session held in Bujumbura, Burundi, the Commission declared the communication admissible and postponed its consideration on the merits to the 26th ordinary session.

18. On 13 May 1999, the Secretariat of the Commission notified the parties of this decision.

19. At the 26th ordinary session of the Commission held in Kigali, Rwanda, the Commission considered the communication and invited parties to present oral arguments on the merits of the case.

20. Letters conveying this decision were dispatched to the parties by the Secretariat on 18 January 2000.

21. Reminders to this effect were sent on 14 March 2000, with a copy to the Embassy of the Republic of Zambia in Addis Ababa.

22. On 30 March 2000, the state party responded to the above request.

23. On 31 March 2000, the Secretariat of the Commission acknowledged receipt of the document, but reminded the state party of the necessity of sending the relevant sections of the Constitution together with the Supreme Court's decision on the case as soon as possible. A copy of this note was forwarded to its embassy in Addis Ababa. A copy of the state party's submission was also forwarded to the complainant in Lusaka.

24. On 7 April 2000, the state party sent a fax to the Secretariat requesting a copy of the report of the 26th ordinary session.

25. In view of the requirements of article 59 of the Charter, the Secretariat instead sent to the state party a copy of the final *communiqué* of the said session. It also informed the state party of the decision of the Commission during that session.

26. On 30 April 2000, the respondent state submitted additional arguments to its initial response of 30 March 2000.

27. On 2 May 2000, while at the session, the Secretariat received a letter from the complainant expressing its desire to continue with the case.

28. At the 27th ordinary session held in Algeria, the Commission heard representatives of the respondent state. The Commission decided that parties should address it on specific issues, particularly on whether or not the provisions of the amended Constitution were in conformity with the Republic of Zambia's obligations under the Charter. In addition, the

Secretariat was requested to seek an independent legal expert opinion on the issues raised for determination.

29. Parties were informed of the above decision on 7 July 2000.

30. On 31 August 2000, the Secretariat of the Commission wrote reminders to the parties and emphasised the necessity for them to furnish it with their submissions as soon as possible for use in the preparation of the draft decision for the 28th session.

31. On 26 September 2000, the Secretariat received a response from the respondent state on the issues raised by the Commission during the 27th ordinary session.

32. On 2 October 2000, the Secretariat of the Commission acknowledged receipt of the submission and also forwarded a copy of it to the complainant for its comments.

33. At the 28th Ordinary session in Cotonou, Benin, the communication was considered and further consideration of the merits was deferred until the 29th ordinary session.

34. The parties were informed of this decision on the 14 November 2000.

35. A *note verbale* was sent to the government of Zambia requesting a copy of the Commission of Inquiry Report on 5 April 2001.

State party's response

36. The matter concerns the Republican Constitution of Zambia and is therefore an open matter for discussion. The background to the Constitution of Zambia (Amendment) Act of 1996 is attributable to the desire of the Zambian people to save and preserve the Office of the President for Zambians with traceable descent.

37. The position was arrived at in the Mwanakatwe Commission of Inquiry Report commissioned to gather views on the content of the Republican Constitution. The amendment to the Constitution was not targeted at any person in the country.

38. Zambia welcomes views expressed on its Republican Constitution as a way of building a strong democracy. It is open to expert opinions on the issue, and will continue to listen to views expressed on it.

39. Zambia views the complaint filed by the Legal Resources Foundation as an opinion on the Constitution. The variance of opinion of the complainant from that of the majority therefore is in accordance with the democratic principle of freedom of opinion. Despite this difference, democracy entails the rule of the majority. Hence the amendment to the Republican Constitution incorporating the views expressed in the Mwanakatwe Commission of Inquiry Report for an indigenous Zambian to hold the Office of President.

40. Zambia is prepared to cooperate with the Commission and to elaborate further on the issues, if necessary.

Additional arguments from the respondent state to its initial response

41. The government avers that although the communication is vague as to the details of the judicial process that was exhausted, Zambia would however assume that the issues raised by the complainant were finally settled by the Supreme Court in *Zambia Democratic Congress v the Attorney-General* SCZ Appeal no 135/96, SCZ judgment no 37/99.

42. The Zambian Parliament has the power to adopt an alteration to the Constitution and the President may assent to a constitution that has been altered. However, if Parliament had amended the entire Constitution, there would have been a mandatory need for a national referendum in respect of article 79 and part III of the Constitution, which contains the Bill of Rights.

43. The government contends that the powers, jurisdiction and competence of Parliament to alter the Constitution of Zambia are extensive provided that Parliament adheres to the provisions of article 79 of the Constitution. The constitutional history of Zambia has shown that the alteration of the Constitution has depended on who controls the majority in Parliament. The ruling party dominated Parliament could therefore adopt the altered Constitution.

44. All individuals in Zambia are equal before the law and everyone enjoys the protection of his or her human rights and fundamental freedoms as provided for by the law.

45. Zambia abhors any type of discrimination. Article 23(1) of the Republican Constitution provides that: 'Subject to clauses (4), (5) and (7) no law shall make any provision that is discriminatory either of itself or in its effect.'

This article, however, needs to be read and understood with the provision of article 23(5), which states that:

> Nothing contained in any law shall be held to be inconsistent with or in contravention of clause (1) to the extent that it is shown that it makes reasonable provision with respect to qualifications for service as a public officer.

46. The government points out that it is in this context that Zambian people were of the view that it was reasonable for the Office of the President to be subject to other qualifications ie an indigenous Zambian candidate of traceable descent. Therefore there was no contravention of article 2 of the Charter.

47. To ensure Zambia's policy of non-discrimination, article 11 of the Constitution provides that:

> It is recognised and declared that every person in Zambia has been and shall continue to be entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed, sex or marital status, but subject to limitations . . .

The limitations being reasonable within the law, the government avers further that there has therefore been no violation of article 2 of the Charter as the limitations provided for by article 34 of the Republican Constitution are within the law. Zambia also submits that there is no violation of article 13 of the Charter, which guarantees every citizen the right to participate in government. If anything, there is a proviso that such should be 'in accordance with the provisions of the law'.

48. It underscores the fact that articles 34 and 35 of the Constitution are within Zambia's laws and therefore there is no violation of article 13 of the Charter.

49. It stated that Zambia considers the inclusion of a violation of article 19 of the Charter by the complainant as not being within the purview of the present communication. It is of the opinion that article 19 of the Charter relates to the principle of 'self-determination' by the mere mention of the term 'peoples'. This position notwithstanding, the peoples of Zambia are equal. It urges the Commission not to entertain this ground, as it is inappropriate to the issues raised in the communication.

50. It argues that the discrimination alleged in articles 34 and 35 of the Constitution is not unlawful and it reflects the popular desire of the majority of the Zambian people to save and preserve the Office of the President for Zambians. The Constitution of Zambia (Amendment) Act, 1996, therefore, seeks to give effect to the will of the people.

Law

Admissibility

51. Having considered that the communication satisfied the provisions of article 56 of the Charter, the communication was declared admissible.

Merits

52. The allegation before the Commission is that the respondent state has violated articles 2, 3 and 19 of the Charter in that the Constitution of Zambia Amendment Act of 1996 is discriminatory. Article 34 provides that anyone who wishes to contest the Office of President of Zambia had to prove that both parents were Zambian citizens by birth or descent. The effect of this amendment was to prohibit a Zambian citizen, former president Dr Kenneth David Kaunda from contesting the elections having been duly nominated by a legitimate political party. It is alleged that the effect of the amendment was to disenfranchise some 35 per cent of the electorate of Zambia from standing as candidate presidents in any future elections for the highest office in the land.

53. The enactment of the amendment to the Constitution is not in dispute. Neither is it denied that Dr Kenneth Kaunda was thus denied the right to contest the elections for the office of President. The respondent state, however, denies that some 35 per cent of Zambian citizens would be constitutionally denied the right to stand as President and alleges that in any event such facts have no relevance to the matter at hand. It nevertheless argues that the said amendment was constitutional, justifiable and not in violation of the Charter.

54. In the matter of *Zambia Democratic Congress v The Attorney-General* (SCZ Appeal no 135/1996), the Zambia Supreme Court was petitioned to declare the then proposed amendments to the Constitution unconstitutional in that the amendments contained in articles 34(3)(b) and 35(2) of the Constitution (Amendment) Act bar persons qualified to stand for election as President of the Republic under the 1991 Constitution and deny them the right to participate fully without hindrance in the affairs of government and shaping the destiny of the country and undermine democracy and free and fair elections which are the basic features of the Constitution of 1991.

55. It is alleged that the matter was rushed through Parliament by the ruling party and enacted into law while the legal and constitutional principles were before the courts for adjudication. In the event, the Court dismissed the appeal for the reason that the petition was

> attacking an Act of Parliament on the ground that it violated Part III of the Constitution relating to fundamental rights. We are satisfied that the application was commenced by a wrong procedure and that in our jurisdiction the application was untenable.

(*per* Sakala JS at 292).

56. The following provisions of the African Charter have relevance:

> Article 1: The Member States of the Organisation of African Unity parties to the present Charter shall recognise the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them;
> Article 2: Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national or social origin, fortune, birth or other status;
> Article 3: 1. Every individual shall be equal before the law. 2. Every individual shall be entitled to equal protection of the law;
> Article 13: 1. 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. 2. Every citizen shall have the right of equal access to the public service of his country. 3. Every individual shall have the right of access to public property and services in strict equality of all persons before the law.

57. The African Commission on Human and Peoples' Rights is a created by the Charter (article 30). It was established 'to promote human and

peoples' rights and ensure their protection in Africa'. The functions of the Charter are spelt out in article 45 of the Charter, *inter alia,* as follows:

> (1) (a) ... give its views or make recommendations to governments;
> (b) ... formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African governments may base their legislation;
> (2) Ensure the protection of human and peoples' rights under the conditions laid down by the present Charter; and
> (3) Interpret all the provisions of the present Charter at the request of a State Party.

58. In the task of interpretation and application of the Charter, the Commission is enjoined by articles 60 and 61 to 'draw inspiration from international law on human and peoples' rights' as reflected in the instruments of the OAU and the UN as well as other international standard setting principles (article 60). The Commission is also required to take into consideration other international conventions and African practices consistent with international norms etc.

59. Although international agreements are not self-executing in Zambia, the government of Zambia does not seek to avoid its international responsibilities in terms of the treaties it is party to (see communication 212/98 *Amnesty International v Zambia*). This is just as well because international treaty law prohibits states from relying on their national law as justification for their non-compliance with international obligations (article 27, Vienna Convention on the Law of Treaties).[1] Likewise an international treaty body like the Commission has no jurisdiction in interpreting and applying domestic law. Instead a body like the Commission may examine a state's compliance with the treaty, in this case the African Charter. In other words the point of the exercise is to interpret and apply the African Charter rather than to test the

[1] In General Comment no 9 (1998) on the domestic application of the Covenant, the UN Committee on Economic and Social Rights has established that legally binding international human rights standards should operate directly and immediately within the domestic legal system of each State Party, thereby enabling individuals to seek enforcement of their rights before national courts and tribunals. The Committee argues that states have an obligation to promote interpretations of domestic laws which give effect to their Covenant obligations. (*Compilation of general comments and general recommendations adopted by human rights treaty bodies;* HR1/GEN/Rev.4; February 2000; pp 48-52.) Although directed at the application of international law in domestic courts, Benedetto Confortus note of caution is appropriate:

> In our view, it is necessary to take a cautious approach in accepting the existence of an exceptional category of international norms that owe their non-executing nature to their substantive content. Such an exception must not lead to political manoeuvring in the form of non-implementation of rules found to be undesirable, either because they are considered contrary to national interest, or because they entrench progressive values, or finally, because they are viewed suspiciously by an internal judge purely by reason of their origins.

With F Francioni (eds) in *Enforcing international human rights in domestic courts*; 1997: The Hague; Martinus Nijhoff 7-8.

validity of domestic law for its own sake. (See the cases of the Inter-American Commission concerning Uruguay (petitions nos 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374, 10.375 in report 29/92).[2]

60. What this does mean, however, is that international treaties which are not part of domestic law and which may not be directly enforceable in the national courts nonetheless impose obligations on states parties. It is noticeable that the application of the Charter was not part of the argument before the national courts.

61. Conscious of the ramifications of any decision on this matter, the Commission had invited the parties to address the question of the extent of the jurisdiction of the Commission when it comes to domestic law including, as is the case in this instance, the Constitution. Counsel for the respondent state argued that the Commission had no *locus standi* to adjudicate on the validity of domestic law. That position is correct. What must be asserted, however, is that the Commission has the duty to:

> . . . give its views or make recommendations to governments . . . to formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African governments may base their legislations . . . Interpret all the provisions of the present Charter . . . (article 45).

62. In addition, the Commission is mindful of the positive obligations incumbent on states parties to the Charter in terms of article 1 not only to 'recognise' the rights under the Charter but to go on to 'undertake to adopt legislative or other measures to give effect to them'. The obligation is peremptory, states 'shall undertake'. Indeed, it is only if the states take their obligations seriously that the rights of citizens can be protected. In addition, it is only to the extent that the Commission is prepared to interpret and apply the Charter that governments would appreciate the extent of their obligations and citizens understand the scope of the rights they have under the Charter.

63. Article 2 of the Charter abjures discrimination on the basis of any of the grounds set out, among them 'language . . . national and social origin . . . birth or other status.' The right to equality is very important. It means that citizens should expect to be treated fairly and justly within the legal system and be assured of equal treatment before the law and equal enjoyment of the rights available to all other citizens. The right to equality is important for a second reason. Equality or lack of it affects the capacity of a person to

[2] The Commission held in respect to the amnesty laws promulgated by the government of Uruguay where it had been argued that these were valid and legitimate in terms of domestic law and the constitution and that they had approval by the democratic majority in a referendum:

> . . . it should be noted that it is not up to the Commission to rule on the domestic legality or the constitutionality of national laws. However, application of the Convention and the examination of the legal effects of a legislative measure, either judicial or of any nature, in so far as it has effects incompatible with the rights and guarantees embodied in the Convention or the American Declaration, are within the Commissions competence.

enjoy many other rights.[3] For example, [a person who is disadvantaged because] of his place of birth or social origin suffers indignity as a human being and an equal and proud citizen. He may vote for others but has limitations when it comes to standing for office. In other words, the country may be deprived of the leadership and resourcefulness such a person may bring to national life. Finally, the Commission should take note of the fact that in a growing number of African states, these forms of discrimination have caused violence and social and economic instability.

64. All parties are agreed that any measure which seeks to exclude a section of the citizenry from participating in the democratic processes, as the amendment in question has managed to do, is discriminatory and falls foul of the Charter. Article 11 of the Constitution of Zambia provides that there shall be no discrimination on the grounds of 'race, place of origin, political opinions, colour, creed, sex or marital status . . .'. The African Charter uses 'national and social origin . . .' which could be encompassed within the expression 'place of origin' in the Zambian Constitution. Article 23(1) of the Zambian Constitution says that Parliament shall not make any law that 'is discriminatory either of itself or in its effect . . .'

65. The respondent state, however, seeks to rely on some exceptions as justification for the exception in Zambian law. It is held that the right to equality has limitations which are justifiable and that the justifications are based on Zambian law and the Charter.

66. Article 11 of the Zambian Constitution states clearly that the right to non-discrimination is subject to limitations. Among the limitations reference is made to article 23(5) which provides that: 'Nothing contained in any law shall be held to be inconsistent with or in contravention of clause (1) to the extent that it is shown that it makes reasonable provision with respect to qualifications for service as a public officer . . .' It is argued that, following a consultative process, the Zambian people were of the view that the Office of President be subject to the additional qualification that the President be 'an indigenous Zambian candidate of traceable descent'.

67. There has been some persistent confusion in arguments before the Commission between 'limitations' and 'justification'. 'Limitations' refer to what may be referred to as the statute of limitations which gives a lower threshold of enjoyment of the right. Such limitations are allowed by law or provided for in the Constitution itself. In the African Charter these would typically be referred to as the 'claw-back' clauses. 'Justification' however applies in those cases where justification is sought to set perimeters on the enjoyment of a right. In other words, there has to be a two-stage process. First, the recognition of the right and the fact that such a right has been

[3] See UN Human Rights Committee General Comment no 18 (1989) for a fuller discussion on non-discrimination in the ICCPR.

violated, but that, secondly, such a violation is justifiable in law. The Vienna Declaration and Programme of Action (1993) has affirmed that 'all human rights are universal, interrelated, interdependent . . .' and as such they must be interpreted and applied as mutually reinforcing. It is interesting to note for example, that article 2 does not have a 'claw-back' clause while article 13 limits the right to 'every citizen' but goes on to state that 'in accordance with the law'.

68. In the matter before the Commission therefore the Government of Zambia concedes that the measures were discriminatory but then goes on to argue (1) a limitation of the right, and (2) justification of the violation. It is argued that the measure was within the law and Constitution of Zambia. It was stated before the Commission that Zambia has a constitutional system of parliamentary sovereignty, hence even the Supreme Court could not 'attack' an Act of Parliament (as Sakala JS put it). The task of the Commission, however, is not to seek to do that which even the Zambian courts could not do. The responsibility of the Commission is to examine the compatibility of domestic law and practice with the Charter. Consistent with decisions in the European and Inter-American jurisdictions, the Commission's jurisdiction does not extend to adjudicating on the legality or constitutionality or otherwise of national laws. Where the Commission finds a legislative measure to be incompatible with the Charter, this obliges the state to restore conformity in accordance with the provisions of article 1 (*cf Zanghi v Italy,* 194 Euro Ct HR (Ser A) 48 (1991)).

69. It is stated further that the limitation of the right is provided for in the Zambian Constitution and that it is justifiable by popular will in that, following the work of the Mwanakatwe Commission on the Constitution, it was recommended that the Zambian people desired 'to save and preserve the Office of the President for Zambians with traceable descent . . .'. Regarding the claim that the measure deprived some 35 per cent of Zambians of their rights under the previous Constitution, counsel for the respondent state dismisses this as mere speculation.

70. The Commission has argued forcefully that no state party to the Charter should avoid its responsibilities by recourse to the limitations and 'claw-back' clauses in the Charter. It was stated, following developments in other jurisdictions, that the Charter cannot be used to justify violations of sections thereof. The Charter must be interpreted holistically and all clauses must reinforce each other. The purpose or effect of any limitation must also be examined, as the limitation of the right cannot be used to subvert rights already enjoyed. Justification, therefore, cannot be derived solely from popular will, as this cannot be used to limit the responsibilities of states parties in terms of the Charter. Having arrived at this conclusion, it does not matter whether one or 35 per cent of Zambians are disenfranchised by the measure; that anyone is, is not disputed and it constitutes a violation of the right.

71. The Commission has arrived at a decision regarding allegations of

violation of article 13 by examining closely the nature and content of the right to equality (article 2). It cannot be denied that there are Zambian citizens born in Zambia but whose parents were not born in what has become known as the Republic of Zambia following independence in 1964. This is a particularly vexing matter as the movement of people in what had been the Central African Federation (now the states of Malawi, Zambia and Zimbabwe) was free and that by Zambia's own admission, all such residents were, upon application, granted the citizenship of Zambia at independence. Rights which have been enjoyed for over 30 years cannot be lightly taken away. To suggest that an indigenous Zambian is one who was born and whose parents were born in what came (later) to be known as the sovereign territory of the state of Zambia may be arbitrary and its application retrospectively cannot be justifiable according to the Charter.

72. The Charter makes it clear that citizens should have the right to participate in the government of their country 'directly or through freely chosen representatives . . .'. See UN Human Rights Committee General Comment no 25 (1996) where it says that '[p]ersons who are otherwise eligible to stand for election should not be excluded by unreasonable or discriminatory requirements such as education, residence, or descent, or by reason of political affiliation . . .'. The pain in such an instance is caused not just to the citizen who suffers discrimination by reason of place of origin, but [by the fact] that the rights of the citizens of Zambia to 'freely choose' political representatives of their choice is violated. The purpose of the expression 'in accordance with the provisions of the law' is surely intended to regulate how the right is to be exercised rather than that the law should be used to take away the right.

73. The Commission believes that recourse to article 19 of the Charter was mistaken. The section dealing with 'peoples' cannot apply in this instance. To do so would require evidence that the effect of the measure was to affect adversely an identifiable group of Zambian citizens by reason of their common ancestry, ethnic origin, language or cultural habits. The allegedly offensive provisions in the Zambia Constitution (Amendment) Act, 1996 do not seek to do that.

For the above reasons, the Commission:

[**74.**] Finds that the Republic of Zambia is in violation of articles 2, 3(1) and 13 of the African Charter;

[**75.**] Strongly urges the Republic of Zambia to take the necessary steps to bring its laws and Constitution into conformity with the African Charter; and

[**76.**] Requests the Republic of Zambia to report back to the Commission when it submits its next country report in terms of article 62 on measures taken to comply with this recommendation.

DOMESTIC DECISIONS

BOTSWANA

Attorney-General v Dow

(2001) AHRLR 99 (BwCA 1992)

The Attorney-General v Unity Dow
Court of Appeal, Lobatse, 3 July 1992 (no 4/91)
Judges: Amissah, Aguda, Bizos, Schreiner, Puckrin
Extract: Amissah JP delivering the leading judgment, full text on www.chr.up.ac.za
Previously reported: (1992) LRC (Const) 623; (1998) 1 HRLRA 1

Equality, non-discrimination (discrimination on the grounds of sex, 64, 65, 85)
Interpretation (broad and generous approach to constitutional interpretation; nature and status of preamble, 11, 13-30; international standards, 100-109)
Limitations of rights (strict interpretation of limitations, 66-73, 87)
Constitutional supremacy (48, 49)
Locus standi (110-131)

Amissah JP

[**1.**] This appeal is brought by the Attorney-General against the judgment given by Horwitz AJ in favour of Unity Dow in her claim that her constitutional rights had been infringed by certain specified provisions of the Citizenship Act 1984.

[**2.**] The facts of the case which gave cause for the respondent's complaint were well summarised by the learned judge *a quo*, and for convenience and with due apologies I will repeat that summary. As he said:

> The Applicant, Unity Dow is a citizen of Botswana having been born in Botswana of parents who are members of one of the indigenous tribes of Botswana. She is married to Peter Nathan Dow who, although he has been in residence in Botswana for nearly 14 years is not a citizen of Botswana, but a citizen of the United States of America. Prior to their marriage on 7 March 1984 a child was born to them on 29 October 1979 named Cheshe Maitumelo Dow and after the marriage two more children were born: Tumisang Tad Dow born on 26 March 1985 and Natasha Selemo Dow born on 26 November 1987. She states further in her founding affidavit that 'my family and I have established our home in Raserura Ward in Mochudi and all the children regard that place and no other as their home.' In terms of the laws in force prior to the Citizenship Act of 1984 the daughter born before the marriage is a Botswana citizen and therefore a Motswana, whereas in terms of the Citizenship Act of 1984 the children born during

> the marriage are not citizens of Botswana (although children of the same parents), and are therefore aliens in the land of their birth.

[**3.**] The respondent claimed that the provisions of the Citizenship Act of 1984 which denied citizenship to her two younger children were sections 4 and 5. Those sections read as follows:

> 4(1) A person born in Botswana shall be a citizen of Botswana by birth and descent if, at the time of his birth: (a) his father was a citizen of Botswana; or (b) in the case of a person born out of wedlock, his mother was a citizen of Botswana. (2) A person born before the commencement of this Act shall not be a citizen by virtue of this section unless he was a citizen at the time of such commencement.
>
> 5(1) A person born outside Botswana shall be a citizen of Botswana by descent if, at the time of his birth: (a) his father was a citizen of Botswana; (b) in the case of a person born out of wedlock, his mother was a citizen of Botswana. (2) A person born before the commencement of this Act shall not be a citizen by virtue of this section unless he was a citizen at the time of such commencement.

[**4.**] I should hereby add that the respondent's case before the Court *a quo* also embraced discriminatory treatment which she claimed the Act gave to alien men married to Botswana women on the one hand, and alien women married to Botswana men on the other. The section of the Citizenship Act of 1984 which, according to the respondent, perpetrated this distinction was section 15. But as the judgment of the Court *a quo* did not refer to that aspect of the case in its determination of the injustice suffered by the respondent from the Citizenship Act, I shall refrain from going further into that aspect of the case.

[**5.**] The case which the respondent sought to establish and which was accepted by the Court *a quo* was captured by paragraphs 13 to 15, and paragraphs 18, 19, 21 and 22 of her founding affidavit. They read as follows:

> 13. I am prejudiced by the section 4(1) of the Citizenship Act by reason of my being female from passing citizenship to my two children Tumisang and Natasha.
>
> 14. I am precluded by the discriminatory effect of the said law in that my said children are aliens in the land of mine and their birth and thus enjoy limited rights and legal protections.
>
> 15. I verily believe that the discriminatory effect of the said sections, (4 and 5 *supra*) offend against section 3(a) of the Constitution of the Republic of Botswana.
>
> 18. I am desirous of being afforded the same protection of the law as a male Botswana citizen and in this regard I am desirous that my children be accorded with Botswana citizenship. . .
>
> 19. As set out above, I verily believe and state that the provisions of section 3 of the Constitution have been contravened in relation to myself.
>
> 21. As a citizen of the Republic of Botswana, I am guaranteed under the Constitution, immunity from expulsion from Botswana and verily believe that such immunity is interfered with and limited by the practical implications of sections 4, 5, and 13 of the said Citizenship Act.

> 22. I verily believe that the provisions of the Constitution have been contravened in relation to myself.

[**6.**] The sections of the Constitution of the Republic which the respondent prayed in aid in this regard, therefore, are sections 3 and 14. Section 3 is the section which deals with the fundamental rights and freedoms of the individual. Section 14 deals with the protection of the freedom of movement. I shall have occasion to recite them and to refer to them in some detail in the course of this judgment.

[**7.**] After hearing the respondent, then the applicant in the case, and the Attorney-General in opposition, the learned judge *a quo* found in favour of the former. The relevant parts of his judgment are as follows:

> I therefore find that section 4 [of the Citizenship Act] is discriminatory in its effect on women in that, as a matter of policy:
> (i) It may compel them to live and bear children outside of wedlock.
> (ii) Since her children are only entitled to remain in Botswana if they are in possession of a residence permit and since they are not granted permits in their own right, their right to remain in Botswana is dependent upon their forming part of their father's residence permit.
> (iii) The residence permits are granted for no more than two years at a time, and if the applicant's husband's permit were not renewed both he and applicant's minor children would be obliged to leave Botswana.
> (iv) In addition applicant is jointly responsible with her husband for the education of their children. Citizens of Botswana qualify for financial assistance in the form of bursaries to meet the costs of University education. This is a benefit which is not available to a non-citizen. In the result the applicant is financially prejudiced by the fact that her children are not Botswana citizens.
> (v) Since the children would be obliged to travel on their father's passport the applicant will not be entitled to return to Botswana with her children in the absence of their father.

What I have set out at length may inhibit women in Botswana from marrying the man whom they love. It is no answer to say that there are laws against marrying close blood relatives — that is a reasonable exclusion. . . It seems to me that the effect of section 4 is to punish a female citizen for marrying a non-citizen male. For this she is put in the unfavourable position in which she finds herself vis-à-vis her children and her country. The fact that according to the Citizenship Act a child born to a marriage between a citizen female and a non-citizen male follows the citizenship of the father [may] not in fact have that result. It depends on the law of the foreign country. The result may be that the child may be rendered stateless unless its parents emigrate. If they are forced to emigrate then the unfortunate consequences which I have set out earlier in this judgment may ensue. I therefore come to the conclusion that the application succeeds. I have also come to the conclusion that section 5 of the Act must join the fate of section 4.

[**8.**] The appellant has appealed against this decision on several grounds. He complains that the Court *a quo* erred in holding that the applicant had

sufficiently shown that any of the provisions of sections 3-16 (inclusive) of the Constitution had been, was being, or was likely to be contravened in relation to her by reason of the provisions of section 4 or section 5 of the Citizenship Act so as to confer on her *locus standi* to apply to the High Court for redress pursuant to section 18 of the Constitution. After holding that the provisions of the Constitution should be given a 'generous interpretation', the Court *a quo* erred in failing to give any or any adequate effect to other principles of construction, in particular, the principle that an Act of the National Assembly must be presumed to be *infra vires* the Constitution: the principle that an Act or instrument, including the Constitution should be construed as a whole; and with regard to section 15(3) of the Constitution, the principle of '*inclusio unius exclusio alterius*', to which effect is given in section 33 of the Interpretation Act.

[**9.**] The Court *a quo* also erred, in that instead of holding that the word 'sex' had been intentionally omitted from section 15(3) of the Constitution so as to accommodate, subject to the fundamental rights protected by section 3 thereof, the matrilineal structure of Botswana society, in terms of the common law, the customary law, and statute law, it held that section 15(3) of the Constitution merely listed examples of different grounds of discrimination and was to be interpreted as including discrimination on the grounds of 'sex', and that section 4 and/or section 5 of the Citizenship Act denied to the respondent by reason of sex her rights under the Constitution. The rights mentioned in the appellant's grounds of his appeal being the respondent's: her right to liberty and/or her right to the protection of the law under section 3 of the Constitution, her right to freedom of movement and immunity from expulsion from Botswana under section 14 of the Constitution, and her protection from subjection to degrading punishment or treatment under section 7 of the Constitution.

[**10.**] According to the complaint neither section 4 nor section 5 in fact denied the respondent any of the rights and protections mentioned. Further, the complaint went on, the Court *a quo,* having extended the definition of discrimination in section 15(3) of the Constitution, also erred in failing to consider and apply the limitations to the rights and freedoms protected by section 15 of the Constitution which are contained in subsection 4(c) (the law of citizenship being a branch of personal law), subsection (4)(e) and subsection (9) (to the extent that the Citizenship Act re-enacts prior laws), or to avert its mind to the special nature of citizenship legislation, and the fact that citizenship was not a right protected under Chapter II of the Constitution, nor was any right 'to pass on citizenship' there created or protected. Finally, the complaint stated, the Court *a quo* erred in holding that section 4 and section 5 of the Citizenship Act were discriminatory in their effect or contravened section 15 of the Constitution.

[**11.**] Argument was offered before us on most of the grounds stated above, but rearranged to follow a somewhat different format. Apart

from the *locus standi* point, the basic question was whether upon a proper interpretation of Chapter II of the Constitution, the chapter on fundamental rights and freedoms of the individual, especially sections 3, 14, 15 and 18, the constitutional right which the respondent claimed to have been infringed had actually not been infringed with respect to her by sections 4 or 5 of the Citizenship Act of 1984. The other submissions were formulated as argument around that central theme.

[**12.**] It will be recalled from her founding affidavit which has been recited above that the respondent complained in the Court below that she was prejudiced by section 4(1) of the Citizenship Act by reason of her being female from passing citizenship to her two children Tumisang and Natasha; that the law in question had discriminatory effect in that her children named were aliens in her own land and the land of their birth, and they thus enjoyed limited rights and legal protections therein; that she believed that the discriminatory effect of specified sections of the Citizenship Act offended against section 3 (a) of the Constitution; and that she believed that the provisions of section 3 of the Constitution had been contravened in relation to herself.

[**13.**] We are here faced with some difficult questions of constitutional interpretation. But our problems are to some extent eased by the fact that not all matters for our consideration were in dispute between the parties: neither party maintained that the Constitution had to be construed narrowly or restrictively. Both parties agreed that a generous approach had to be taken in constitutional interpretation. Both sides also agreed that section 3 of the Constitution was a substantive section conferring rights on the individual. This, in my view, put an end to any argument about whether the section was a preamble or not. It also, in my view, totally undermines any judgment based on the premise that section 3 is only a preamble. The sections of the Constitution which arose for construction were also, more or less, agreed.

[**14.**] With regard to the approach to the interpretation of the Constitution, learned counsel for the appellant further drew our attention to the Interpretation Act of 1984 (cap 01:01) which in section 26 provides that:

> Every enactment shall be deemed remedial and for the public good and shall receive such fair and liberal construction as will best attain its object according to its true intent and spirit.

[**15.**] He then submitted that by section 2 of the Act, each provision of the Act applied to every enactment, whether made before, on or after the commencement of the Act, including the Constitution. This section, he submitted, therefore, must be the section which has to be applied to the present case. I agree that the provisions of the Interpretation Act apply to the interpretation of the Constitution. The section cited, however, is not inconsistent with viewing the Constitution as a special enactment which in many ways differs from the ordinary legislation designed, for example, to

establish some public utility or to remedy some identified defect in the body politic.

[**16.**] A written constitution is the legislation or compact which establishes the state itself. It paints in broad strokes on a large canvas the institutions of that state, allocating powers, defining relationships between such institutions and between the institutions and the people within the jurisdiction of the state, and between the people themselves. A constitution often provides for the protection of the rights and freedoms of the people, which rights and freedoms have thus to be respected in all further state action. The existence and powers of the institutions of state, therefore, depend on its terms. The rights and freedoms, where given by it, also depend on it. No institution can claim to be above the constitution; no person can make any such claim. The constitution contains not only the design and disposition of the powers of the state which is being established, but embodies the hopes and aspirations of the people. It is a document of immense dimensions, portraying, as it does, the vision of the peoples' future. The makers of a constitution do not intend that it be amended as often as other legislation; indeed, it is not unusual for provisions of the constitution to be made amendable only by special procedures imposing more difficult forms and heavier majorities of the members of the legislature.

[**17.**] By nature and definition, even when using ordinary prescriptions of statutory construction, it is impossible to consider a constitution of this nature on the same footing as any other legislation passed by a legislature which is itself established, with powers circumscribed, by the constitution. The object it is designed to achieve evolves with the evolving development and aspirations of its people. In terms of the Interpretation Act, the remedial objective is to chart a future for the people, a liberal interpretation of that objective brings into focus considerations which cannot apply to ordinary legislation designed to fit a specific situation. As Lord Wright put it when dealing with the Australian case of *James v Commonwealth of Australia* (1936) AC 578 at page 614:

> It is true that a Constitution must not be construed in any narrow and pedantic sense. The words used are necessarily general, and their full import and true meaning can often only be appreciated when considered, as the years go on, in relation to the vicissitudes of fact which from time to time emerge. It is not that the meaning of the words changes, but the changing circumstances illustrate and illuminate the full import of that meaning.

[**18.**] We in this Court, however, are not bereft of previous authority of our own to guide us in our deliberations on the meaning of the Botswana Constitution. The present case does not present us with a first opportunity to explore unsheltered waters and to interpret the Constitution free from all judicial authority. We do have some guidance from previous pronouncements of this Court as to the approach which we should follow

in this matter. In *Attorney-General v Magi* (1981) BLR 1 at page 32, Kentridge JA said:

> A constitution such as the Constitution of Botswana, embodying fundamental rights, should as far as its language permits be given a broad construction. Constitutional rights conferred without express limitation should not be cut down by reading implicit restrictions into them, so as to bring them into line with the common law.

[**19.**] In *Petrus and Another v The State* (1984) BLR 14, my brother, Aguda JA had occasion to review the Courts' approach to constitutional construction. In that review, he said at page 34:

> It was once thought that there should he no difference in approach to constitutional construction from other statutory interpretation. Given the British system of government and the British judicial set-up, that was understandable, it being remembered that whatever statutes that might have the look of constitutional enactment in Britain, such statutes are nevertheless mere statutes like any others and can be amended or repealed at the will of Parliament. But the position where there is a written Constitution is different.

[**20.**] Aguda JA then cited in support the view of Higgins J in the Australian High Court in *Attorney-General for New South Wales v Brewery Employees Union of New South Wales* (1908) 6 CLR 469 at pp 611-612, that:

> Although we are to interpret the words of the Constitution on the same principles of interpretation as we apply to any ordinary law, these very principles of interpretation compel us to take into account the nature and scope of the Act that we are interpreting — to remember that it is a Constitution, a mechanism under which laws are to be made, and not a mere Act which declares what the law is to be.

[**21.**] He also cited Sir Udo Udoma of the Supreme Court of Nigeria in *Rain Rabin v The State* (1981) 2 NCLR 293 at p 326 where that learned judge said:

> The Supreme Law of the Land; that it is a written, organic instrument meant to serve not only the present generation, but also several generations yet unborn . . . that the function of the Constitution is to establish a framework and principles of government, broad and general in terms, intended to apply to the varying conditions which the development of our several communities, must involve, ours being a plural, dynamic society, and therefore, more technical rules of interpretation of statues are to some extent inadmissible in a way as to defeat the principles of government enshrined in the Constitution.

[**22.**] Finally, he cited Justice White of the Supreme Court of the United States in *South Dakota v North Carolina* (1904) 192 US 286 [at 341], where the learned judge said:

> I take it to be an elementary rule of constitutional construction that no one provision of the Constitution is to be segregated from all the others, and to be considered alone but that all the provisions bearing upon a particular subject are to be brought into view and to be so interpreted as to effectuate the great purpose of the instrument.

[**23.**] Aguda JA concludes his review in the *Petrus* case by saying:

> It is another well-known principle of construction that exceptions contained in constitutions are ordinarily to be given strict and narrow, rather than broad constructions. See *Corey v Knight* (1957) Cal App 2d 671; 310 p 2d 673 at p 679.

[**24.**] With such pronouncements from our own Court as guide, we do not really need to seek outside support for the views we express. But just to show that we are not alone in the approach we have adopted in this country towards constitutional interpretation, I refer to similar dicta of judges from various jurisdictions such as Wilberforce in *Minister of Home Affairs (Bermuda) and Another v Fisher and Another (1980)* AC 319 at pages 328 to 329; Dicksen CJ in the Canadian case of *R v Big M Drug Mart Ltd* (1985) 1 SCR 295 at page 344; the Namibian case of *Mwondingi v Minister of Defence, Namibia* 1991 (1) SA 851 (run) at 857-858; and the Zimbabwe cases of *Hewlett v Minister of Finance and Another* 1982 (1) SA 490(C) at 495D-496E and *Ministry of Home Affairs v Bickle and Others* 1984 (2) SA 439 per Georges CJ at page 447; United States cases such as *Boyd v United States* I 16 US 616 at 635 and *Trop v Dunes* 356 US 86.

[**25.**] In my view, these statements of learned judges who have had occasion to grapple with the problem of constitutional interpretation capture the spirit of the document they had to interpret, and I find them apposite in considering the provisions of the Botswana Constitution which we are now asked to construe. The lessons they teach are that the very nature of a constitution requires that a broad and generous approach be adopted in the interpretation of its provisions; that all the relevant provisions bearing on the subject for interpretation be considered together as a whole in order to effect the objective of the constitution; and that where rights and freedoms are conferred on persons by the constitution, derogations from such rights and freedoms should be narrowly or strictly construed.

[**26.**] It is now necessary to examine the constitutional provisions giving rise to the dispute in this case. Section 3 states that:

> 3. Whereas every person in Botswana is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and the public interest to each and all the following freedoms, namely:
>
> (a) life, liberty, security of the person and the protection of the law;
>
> (b) freedom of conscience, of expression and of assembly and association; and
>
> (c) protection for the privacy of his home and other property and from deprivation of property without compensation, the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, as being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.

[**27.**] The first impression gained from the opening 'whereas' is that section 3 is a preamble. If it were so, different consequences might arise from it compared with the consequences arising from it being a substantive provision conferring rights on the individual. In section 272 of Bennion on *Statutory Interpretation* the effect of a preamble is given as follows:

> The preamble is an optional feature in public general Acts, though compulsory in private Acts. It appears immediately after the long title, and states the reason for passing the Act. It may include a recital of the mischief towards which the Act is directed. When present, it is thus a useful guide to the legislative intention.

[**28.**] Obviously section 3 is not a preamble to the whole of the Constitution. An argument made that it is a preamble therefore would have to limit its operative effect as such, if any, to Chapter II on the Protection of Fundamental Rights and Freedoms of the Individual. Were it a preamble, it would have to be taken as a guide to the intention of the framers of the Constitution in enacting the provisions of that chapter.

[**29.**] A careful look at the section, however, shows that it was not intended merely as a preamble indicating the legislative intent for the provisions of Chapter II at all. The internal evidence from the structure of the section is against such an interpretation. Although the section begins with 'whereas', it accepts that 'every person in Botswana is entitled to the fundamental rights and freedoms of the individual, ... whatever his race, place of origin, political opinions, colour, creed or sex' is, and continues to enact positively that 'the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms (that is, the rights and freedoms itemised in (a), (b) and (c) of section 3), subject to such limitations as are contained in those provisions (that is, the provisions in the whole of Chapter II) being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest'. That positively enacted part of section 3 alone should be sufficient to refute a suggestion that it is a mere preamble. But section 18(1) of the Constitution which finds itself in the same Chapter II put the matter beyond doubt. It provides that:

> Subject to the provisions of subsection (5) of this section, if any person alleges that any of the provisions of sections 3 to 16 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress.

[**30.**] If a preamble confers no right but merely provides an aid to the discovery of legislative intention, it is impossible to hold otherwise than that from section 18(1), it is clear that contravention of section 3 leads to enforcement by legal action.

[**31.**] From the wording of section 3, it seems to me that the section is not only a substantive provision, but that it is the key or umbrella provision in Chapter II under which all rights and freedoms protected under that

chapter must be subsumed. Under the section, every person is entitled to the stated fundamental rights and freedoms. Those rights and freedoms are subject to limitations only on two grounds, that is to say, in the first place, 'limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others', and secondly on the ground of 'public interest'. Those limitations are provided in the provisions of Chapter II itself, which is constituted by sections 3 (but effectively, section 4) to 19, of the Constitution.

[**32.**] The argument has been advanced that even if rights and freedoms are conferred by section 3, that section makes no mention of discrimination, and therefore, that section does not deal with the question of discrimination at all. Discrimination is mentioned only in section 15 of the Constitution; it is, therefore, that section only which we ought to look at in a case which basically alleges discrimination. But that argument assumes that section 15 is an independent section standing alone in Chapter II of the Constitution. It is only if section 15 is considered as standing on its own, separate and distinct, and conferring new rights unconnected with the rights and freedoms stated in section 3 that it can be said that section 15 has no connection with section 3. As I have tried to demonstrate by the examination of the wording used in section 3, that assumption cannot be right. The wording is such that the rest of the provisions of Chapter II, other than those dealing with derogations under the general powers exercisable in times of war and emergency in sections 17 and 18, and the interpretation of section 19 of the Constitution, have to be read in conjunction with section 3. They must be construed as expanding on or placing limitations on section 3, and be construed within the context of that section.

[**33.**] As pointed out before, the wording of section 3 itself shows clearly that whatever exposition, elaboration or limitation is found in sections 4 to 19 must be exposition, elaboration or limitation of the basic fundamental rights and freedoms conferred by section 3. Section 3 encapsulates the sum total of the individual's rights and freedoms under the Constitution in general terms, which may be expanded upon in the expository, elaborating and limiting sections ensuing in the chapter. We are reminded of the lesson that all the provisions of a constitution which have a bearing on a particular interpretation have to be read together. If that is the case then section 15 cannot be taken in isolation as requiring separate treatment from the other relevant provisions of Chapter II or indeed from those of the rest of the Constitution.

[**34.**] Support is given to this view by a look at other provisions of Chapter II. A number of rights and freedoms dealt with in section 3 are not specifically referred to in the express terms in which they are later dealt with in the succeeding sections of Chapter II.

[**35.**] Take, for example, section 6 of Chapter II which details the protec-

tion against slavery, servitude or forced labour. Section 3 does not specifically mention the words 'slavery', 'servitude' or 'forced labour'. But clearly these words can, and in the structure of the Constitution must, be subsumed under some general expression or term in section 3. That section confers the right and freedom to 'liberty' and 'security of the person'. A person who is put in slavery or servitude or made to do forced labour cannot be said to enjoy a right to liberty or security of his person. Infringing section 6 will automatically infringe section 3.

[**36.**] Take section 7 of the same Chapter II which gives protection against torture or inhuman or degrading treatment. Section 3 does not specifically mention 'torture', 'inhuman treatment' or 'degrading treatment'. But section 3(a) confers the right to 'life, liberty, security of the person and the protection of the law'. It would be strange to propound the argument that a person who has been subjected to torture, inhuman or degrading treatment has only his right under section 7 infringed, but that his right to life, liberty, security of the person and the protection of the law remains intact because torture, inhuman or degrading treatment are not specifically mentioned in section 3. The same applies to section 14 which deals with freedom of movement. Again freedom of movement is not mentioned in section 3 although the person deprived of such freedom cannot be said to be enjoying his 'liberty' or 'security of the person' which are mentioned in section 3.

[**37.**] The United States Constitution makes no specific reference to discrimination as such. Yet several statutes have been held to be in contravention of the Constitution on the ground of discrimination. These cases have been decided on the basis of the 14th Amendment of the Constitution passed in 1868 which forbids any state to 'deny to any person within its jurisdiction the equal protection of the laws' (see, for example, *Reed v Reed* 404 US 71; *Craig v Boren, Governor of Oklahoma, et al* 429 US 190; *Abdiel Caba v Kazim Mohammend and Maria Mohammend* 441 US 380) or on the equally wide due process clause in the 5th Amendment passed in 1791 (for example, *Frontiero v Richardson, Secretary of Defence* 411 US 677; *Weinberger, Secretary of Health, Education and Welfare v Wiesenfeld* 420 US 636), or sometimes on both Amendments.

[**38.**] In Botswana, when the Constitution, in section 3, provides that 'every person . . . is entitled to the fundamental rights and freedoms of the individual', and counts among these rights and freedoms 'the protection of the law', that fact must mean that, with all enjoying the rights and freedoms, the protection of the law given by the Constitution must be equal protection. Indeed, the appellant generously agreed that the provision in section 3 should be taken as conferring equal protection of the law on individuals. I see section 3 in that same light. That the word 'discrimination' is not mentioned in section 3 therefore does not mean that discrimination, in the sense of unequal treatment, is not proscribed under the section.

[**39.**] I also conclude from the foregoing that the fact that discrimination is not mentioned in section 3 does not detract from section 3 being the key or umbrella provision conferring rights and freedoms under the Constitution under and in relation to which the other sections in Chapter II merely expound further, elaborate or limit those rights and freedoms. Section 15, which specifically mentions and deals with discrimination, therefore does not, in my view, confer an independent right standing on its own.

[**40.**] One other possible argument may be advanced against section 3 as the section of the Constitution conferring rights and freedoms: it arises from the question whether the proposition can seriously be maintained that the section gives the same right to every person in Botswana. What, it may be asked in this connection, about children? Do they have the same rights and freedoms as adults? What about aliens? Can they claim the same rights and freedoms as citizens? The answer to both questions is, while under the jurisdiction of the State of Botswana, yes, but subject to whatever derogations or limitations may have been placed by specific provisions of the Constitution with respect to them. With regard to a child, section 5 which gives protection against deprivation of personal liberty, for example, makes in subsection 1(f) an exception by restrictions imposed on him 'with the consent of his parent or guardian, for his education or welfare during any period ending not later than the date when he attains the age of eighteen years'. Section 10(11)(b) places a limitation on the right of persons under the age of 18 to free access to proceedings in court. The qualifications for the Office of President (section 33) places a minimum age of 35 on the capacity to be elected President, and a minimum age limit of 21 years is placed on the capacity for election of a member of parliament. These are all limitations to his freedoms under the Constitution.

[**41.**] Aliens, on the other hand, have their rights and freedoms curtailed by, for example, section 14(3)(b) which permits the imposition of restrictions on the freedom of movement of any person who is not a citizen of Botswana; and by section 15(4)(b) which permits discrimination 'with respect to persons who are not citizens of Botswana'.

[**42.**] Where other derogations or limitations are made to the general rights and freedoms conferred by section 3 of the Constitution, they are made in sections 4 to 16 or through specific provisions of the Constitution which are inconsistent with the rights or freedoms conferred.

[**43.**] If my reading of sections 3 to 16 of the Constitution is correct, and if section 3 provides, as I think, equal treatment to all save in so far as derogated from or limited by other sections, the question in this particular case is whether and how section 15 derogates from the rights and freedoms conferred by section 3(a), which requires equal protection of the law to all persons irrespective of sex.

[**44.**] The case made for the appellant in this respect is, to put it succinctly,

that section 15 is the section of the Constitution which deals with discrimination; that, significantly, whereas section 3 confers rights and freedoms irrespective of sex, the word 'sex' is not mentioned among the identified categories in the definition of 'discriminatory' treatment in section 15(3); that the omission of sex is intentional and is made in order to permit legislation in Botswana which is discriminatory on grounds of sex; that discrimination on grounds of sex must be permitted in Botswana society as the society is patrilineal and, therefore, male oriented. The appellant accepts that the Citizenship Act 1984 is discriminatory, but this was intentionally made so in order to preserve the male orientation of the society; that Act, though discriminatory, was not actually intended to be so, its real objective being to promote the male orientation of society and to avoid dual citizenship, the medium for achieving these ends being to make citizenship follow the descent of the child; and that even if the Act were as a result discriminatory, it was not unconstitutional.

[**45.**] Before I attempt to answer the question whether any of the sections of the Citizenship Act infringes the rights and freedoms conferred by section 3(a), as the respondent has complained that they do, it is necessary that one or two incidental matters put forward in support of the central theme described be disposed of. It was submitted by the appellant that Parliament could enact any law for the peace, order and good government of Botswana, and that the Citizenship Act was a law based on descent which was required to ensure that the male orientation imperative of Botswana society and the need to avoid dual citizenship be advanced. There is no doubt that the Citizenship Act is an Act of Parliament. I also accept that an Act of Parliament is presumed to be *intra vires* the Constitution. But it must be added that that presumption is not irrebutable. The power of Parliament to legislate in the terms propounded is found in section 86 of the Constitution.

[**46.**] It is a provision which, I daresay, is found in the constitutions of all former colonies and protectorates of Britain, and which gives the legislature the amplitude of power to legislate on all matters necessary for the proper governance of a country. In Britain, the power of Parliament to legislate is uncircumscribed. The fact was what led Philip Herbert, fourth Earl of Pembroke and Montgomery, in a speech at Oxford on 11 April 1648 to say that, 'My father said, that a Parliament could do anything but make a man a woman, and a woman a man.' But as we know, when in the 19th century Kay LJ gave a property and mathematical rendition of the same sentiment by saying in *Metropolitan Railway Co v Fowler* (1892) 1 QB 165 at 183, that, 'Even an Act of Parliament cannot make a freehold estate in land an easement, any more than it could make two plus two equal five.' Scrutton LJ in *Taff Vale Railway Co v Cardiff Railway Co* (1917) 1 Ch 199 at 317 countered by saying, 'I respectfully disagree with him, and think that 'for the purposes of the Act' it can effect both statutory results.' (See Megarry *A Second Miscellany-at-Law*.)

[**47.**] Scrutton LJ's statement is correct because Britain does not live under a written constitution; no piece of legislation by Parliament has primacy over others and Parliament cannot legislate to bind future Parliaments. We, therefore, speak of the supremacy of Parliament in Britain. What the British Parliament has done or is capable of doing is no sure guide to us trying to understand a written constitution. The American Revolution which started off the era of written constitutions changed all that. With a written constitution, under which the existence and powers of the legislature are made dependent on the constitution, the power to legislate is circumscribed by the constitution. As section 86 of the Botswana Constitution put it, the power of Parliament 'to make laws for the peace, order and good government of Botswana', is 'subject to the provisions of the Constitution'. Parliament cannot, therefore, legislate to take away or restrict the fundamental rights and freedoms of the individual, unless it is on a subject on which the Constitution has made an exception by giving Parliament power to do so, or the Constitution itself is properly amended. Instead of the supremacy of Parliament, we have, if anything, the supremacy of the Constitution.

[**48.**] As the legislative powers of Parliament in Botswana are limited by the provisions of the Constitution, where the Constitution lays down matters on which Parliament cannot legislate in ordinary form, as it does in Chapter II, for example, or guarantees to the people certain rights and freedoms, Parliament has no power to legislate by its normal procedures in contravention or derogation of these prescriptions. This view of a constitution is, of course, contrary to the law and practice of the British Constitution under which the normal canons of construction of Acts of Parliament are formulated.

[**49.**] Our attention has been drawn to the patrilineal customs and traditions of the Botswana people to show, I believe, that it was proper for Parliament to legislate to preserve or advance such customs and traditions. Custom and tradition have never been static. Even then, they have always yielded to express legislation. Custom and tradition must *a fortiori*, and from what I have already said about the pre-eminence of the constitution, yield to the Constitution of Botswana. A constitutional guarantee cannot be overridden by custom. Of course, the custom will as far as possible be read so as to conform to the constitution. But where this is impossible, it is custom not the constitution which must go.

[**50.**] In this connection a document entitled *Report of the Law Reform Committee on: (i) Marriage Act (ii) Law of Inheritance (iii) Electoral Law and (iv) Citizenship Law* was put before us for our consideration. The report apparently covered the activities of the Committee from June to December 1986, and was laid before Parliament in March 1989. The Committee had, apparently, gone round the country finding out the reaction of the people to the laws named. The authority for placing the report before us was said to be section 24(1) of the Interpretation Act which provides that:

> 24 (1) For the purpose of ascertaining that which an enactment was made to correct and as an aid to the construction of the enactment a court may have regard to any textbook or other work of reference, to the report of any commission of enquiry into the state of the law, to any memorandum published by authority in reference to the enactment or to the Bill for the enactment, to any relevant international treaty, agreement or convention and to any papers laid before the National Assembly in reference to the enactment or to its subject matter, but not to the debates in the Assembly.

[**51.**] The object of putting the report before us was, presumably, to demonstrate that the majority of the people whose views were collected wanted or agreed to the differentiation or discrimination made between men and women under the Citizenship Act. It is noticed, however, from the report itself that the expression of the people was made in the form of answers to questions. The manner in which those questions were put does not appear in the report. Neither do we know the explanations made to the people before they came out with the recorded answers. Nowhere in the report is reference made to the fact that the provisions of the Citizenship Act, at least, may possibly be affected by the Constitution. For this reason, the report loses much of its value as an expression of the people after all relevant facts and considerations had been placed before them.

[**52.**] Besides, the report is a document prepared some years after both the Constitution and Citizenship Act were passed. The Constitution was promulgated in 1966. The Act was passed in 1984. The activities of the Committee resulting in the report were in 1986, and the document was laid before Parliament in 1989. I must say that with the interpretation of the provisions of the Citizenship Act I have no difficulty whatsoever. Its provisions are clear. What difficulty I have is in respect to the Constitution which we are trying to unravel in this case, not the Citizenship Act. I would have derived some value from the report if the activities of the Committee leading to it had been before, not after, the Constitution was promulgated. For then I would have got some indication of what the people of Botswana thought was the overriding characteristic of their society which should not be altered by any rights or freedoms to individuals conferred by the Constitution. That would have given me some assistance, other defects aside for the moment, in determining the intention of the framers of the Constitution in enacting the fundamental rights and freedoms chapter. But that is not the case here. Even if, therefore, the report qualifies under section 24(1) under 'any papers laid before the national assembly in reference to the enactment or to its subject matter', I do not think it in any way aids my efforts at interpreting the Constitution, which is the question at hand, or whether provisions of the Citizenship Act, which to me are quite clear, infringe the Constitution.

[**53.**] It seems to me that the argument of the appellant was to some extent influenced by a premise that citizenship must necessarily follow the customary or traditional systems of the people. I do not think that view is supported by the development of the law relating to citizenship.

Botswana as a sovereign republic dates from 30 September 1966. Before then persons who were within the territorial area which is now Botswana acquired their citizenship under British laws. The law of citizenship in Britain is now governed by legislation. But the development of the concept of citizenship, like most other political concepts, dates as far back as ancient Greece. Walker in *The Oxford Companion to Law* describes citizenship as:

> The legal link between an individual and a particular state or political community under which the individual receives certain rights, privileges, and protections in return for allegiance and duties. Whether an individual has citizenship of a particular state depends on its own legal system and by reason of differences between legal systems some individuals may be stateless and others have citizenship of more than one state. In ancient Athens only some of the population were citizens; resident aliens, women, and slaves were excluded. The Romans similarly initially had a restricted concept of citizenship, but gradually extended it until in AD 212 Caracalla's *Constitutio Antoniniana* gave citizenship to most of the freemen of the Empire. The concept was in abeyance in the middle ages until city dwellers became a third force in politics, with the nobles and clergy. Citizenship was the relationship to a city implying certain liberties. The American and French Revolutions gave a new meaning to citizenship, contrasting it with 'subject', while in the twentieth century the movement for women's rights has further extended the concept. In modern practice what rights and duties attach to citizenship depends on the municipal law of each state.

[**54.**] Mr Justice Gray of the American Supreme Court in *United States v Wong Kim Ark* 169 US, 649 at 655 (1898) saw the development of the law on citizenship in the following terms:

> II. The fundamental principle of the common law with regard to English nationality was birth within the allegiance, also called 'legality', 'obedience', 'faith', or 'power', of the King. The principle embraced all persons born within the king's allegiance and subject to his protection. . . . It thus clearly appears that by the law of England for the last three centuries, beginning before the settlement of this country, and continuing to the present day, aliens, while residing in the dominions possessed by the Crown of England, were within the allegiance, the obedience, the faith or loyalty, the protection, the power and the jurisdiction of the English sovereign; and therefore every child born in England of alien parents was a natural born subject, unless the child of an ambassador or other diplomatic agent of a foreign state, or of an alien enemy in hostile occupation of the place where the child was born.
> III. The same rule was in force in all the English colonies upon this continent down to the time of the Declaration of Independence, and in the United States afterwards, and continued to prevail under the Constitution as originally established.

[**55.**] That must also have been the position with Botswana until independence. All who were born within the protection or jurisdiction of the sovereign power became citizens by birth. That, however, is not claimed to have interfered with the male orientation of Botswana customary society.

[**56.**] The old classic, Oppenheim on *International Law* Volume 1 (Peace)

(8th ed 1955) gives the international law aspect of the matter. At 645, it makes the following distinction:

> 'Nationality' in the sense of citizenship of a certain state, must not be confused with 'nationality' as meaning membership of a certain nation in the sense of race. Thus, according to international law, Englishmen and Scotsmen are, despite their different nationality as regards race, all of British nationality as regards their citizenship. Thus further, although all Polish individuals are of Polish nationality *qua* race, for many generations there were no Poles *qua* citizenship.

[**57.**] By this, I understand that Botswana nationality in the sense of the identity of the Botswana people, which like the Poles would be a matter of descent, need not be the same as Botswana nationality in the sense of citizenship. Although it is possible that citizenship should by municipal law be based on descent or guardianship, there is no historical reason for compelling any state to so base its citizenship laws, especially where there is some serious obstacle like a constitutional guarantee in the way. Even in Britain, where until the Guardianship Act of 1973, all parental rights, including guardianship, were vested in the father, unless the child was born out of wedlock, nationality was not based on descent or guardianship. I find, therefore, no necessary *nexus* mandating that citizenship should be based on traditional or customary ideas of descent or guardianship.

[**58.**] The British concept of citizenship, which at one time must have governed the position in Botswana, had started with a question of allegiance, and been conferred on a basis of birth within the territorial jurisdiction. In Taswell-Langmead's *Constitutional History* (11th ed 1960) by TFT Plucknett, at 678, the position of the alien, the opposite of the citizen, was contrasted with that of the citizen in these words:

> By way of a conclusion we may consider the position of the alien who strictly had no civil liberties. There were many reasons for this. He was often a merchant intent on the dangerous operation of taking money out of the realm; he was sometimes a usurer; he might be a cleric with obnoxious bulls and provisions from Rome; he might be an enemy; after the Reformation his theology as well as his trading might arouse antipathy.

[**59.**] It is clear that what the State of Britain was trying to guard against was not purity in descent or guardianship, but a host of prejudicial activities which those not within the sovereigns allegiance threatened. Of course in modern states, it is the municipal law which determines the citizenship of the individual. The legislature may choose which prescription to follow. The basis may be birth to parents who are themselves citizens irrespective of where the child is born, or may be birth within the territorial jurisdiction, while yet a third course may have a mixture of both. There may be other prescriptions. It is all a matter for the state legislature. But whatever course municipal law adopts must comply with two prerequisites: it must, in the first place, conform to the constitution of the state in question, and secondly it must conform to international law. For as Oppenheim points out, at 643-4:

> while it is for each state to determine under its law who are its nationals, such law must be recognised by other states only 'in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality'.

[**60**.] As he points out by way of example, a state which imposes its nationality upon aliens residing for a brief period in its territory or upon persons resident abroad may not have the privilege so conferred accepted by other members of the international community.

[**61**.] I may mention also in passing that the fact that different states follow different criteria in conferring citizenship means that whatever Botswana provides in its citizenship laws may not achieve the objective of eliminating dual citizenship, if that indeed is what is desired, because where some states confer citizenship by birth to parents, whether through the male or the female line, and others confer citizenship by birth within a territorial area, cases will occur where a child born to citizens of state A, which follows the descent principle, within the territorial jurisdiction of state B, which follows the territorial area principle, will initially acquire the citizenship of both states A and B.

[**62**.] Other combinations between the parents may produce similar results. In this very case, the respondent's eldest child, Cheshe, who acquired Botswana citizenship at birth because her parents were not married at the time, also became, and presumably still is, an American citizen by descent. Such a child may continue with this dual citizenship for the rest of his or her life. But those states which want to avoid dual nationality would then require the child to opt for the citizenship which he or she wishes to continue with upon attaining majority. The device for eliminating dual citizenship does not, therefore, appear to me to lie in legislation which discriminates between the sexes of the parents.

[**63**.] As far as the present case is concerned, the more important prerequisite which each legislation must comply with is the requirement that the legislative formula chosen must not infringe the provisions of the Constitution. It cannot be correct that because the legislature is entitled to lay down the principles of citizenship, it should, in doing so, flout the provisions of the Constitution under which it operates. Where the legislature is confronted with passing a law on citizenship, its only course is to adopt a prescription which complies with the imperatives of the Constitution, especially those which confer fundamental rights to individuals in the state.

[**64**.] With those considerations in mind, I come now to deal with the central question, namely, whether section 15 of the Constitution allows discrimination on the ground of sex. The provisions of the section which are for the moment relevant to this issue are subsections (1), (2), (3) and (4). They state as follows:

> (1) Subject to the provisions of subsections (4), (5) and (7) of this section, no law shall make any provision that is discriminatory either of itself or in its effect.
> (2) Subject to the provisions of subsections (6), (7) and (8) of this section, no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.
> (3) In this section, the expression 'discriminatory' means affording different treatment to different persons, attributable wholly or mainly to their respective descriptions by race, tribe, place of origin, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or accorded privileges or advantages which are not accorded to persons of another such description.
> (4) section (1) of this section shall not apply to any law so far as that law makes provision
> (a) for the appropriation of public revenues or other public funds;
> (b) with respect to persons who are not citizens of Botswana;
> (c) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law
> (d) for the application in the case of members of a particular race, community or tribe of customary law with respect to any matter whether to the exclusion of any law in respect to that matter which is applicable in the case of other persons or not; or
> (e) whereby persons of any such description as is mentioned in subsection (3) of this section may be subjected to any disability or restriction or may be accorded any privilege or advantage which, having regard to its nature and to special circumstances pertaining to those persons or to persons of any other such description, is reasonably justifiable in a democratic society.

[**65.**] Subsection (1) mandates that 'no law shall make any provision that is discriminatory either of itself or in its effect'. Subsection (2) mandates that no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority'. Subsection (3) then defines what 'discriminatory' means in this section. It is 'affording different treatment to different persons, attributable wholly or mainly to their respective descriptions by race, tribe, place of origin, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or accorded privileges or advantages which are not accorded to persons of another such description'. The word 'sex' is not included in the categories mentioned. According to the appellant, therefore, 'sex' had been intentionally omitted from the definition in section 15(3) of the Constitution so as to accommodate, subject to the fundamental rights protected by section 3 thereof, the patrilineal structure of Botswana society, in terms of the common law, the customary law, and statute law.

[**66.**] If that is so, the next question is whether the definition in section 15(3) in any way affects anything stated in section 3 of the Constitution. We must always bear in mind that section 3 confers on the individual the

right to equal treatment of the law. That right is conferred irrespective of the person's sex. The definition in section 15(3) on the other hand is expressly stated to be valid 'in this section'. In that case, how can it be said that the right which is expressly conferred is abridged by a provision which in a definition for the purposes of another section of the Constitution merely omits to mention sex? I know of no principle of construction in law which says that a fundamental right conferred by the Constitution on an individual can be circumscribed by a definition in another section for the purposes of that other section. Giving the matter the most generous interpretation that I can muster, I find it surprising that such a limitation could be made, especially where the manner of limitation claimed is the omission of a word in a definition in that other section which is valid only for that section. What the legal position, however, is, is not that the courts should give the matter a generous interpretation but that they should regard limitations to fundamental rights and freedoms strictly.

[**67.**] If one comes imploring the Court for a declaration that his or her right under section 3 of the Constitution has been infringed on the ground that, as a male or female, unequal protection of the law has been accorded to him or her as compared to members of the other gender, the Court cannot drive that person away empty handed with the answer that a definition in section 15 of the Constitution does not mention sex so her right conferred under section 3 has not been infringed. How can the right to equal protection of the law under section 3 be amended or qualified by an omission in a definition for the purposes of section 15? We are told that the answer lies in an application of the rule of construction *expressio unius exclusio alterius*.

[**68.**] Before testing the validity of that maxim in this case, I think we should examine further the manner in which limitations on the fundamental rights and freedoms of Chapter II of the Constitution are set out in the Constitution itself. A number of sections in the chapter make exceptions or place limitations on the rights and freedoms conferred. A close reading of the provisions of the chapter discloses that whenever a provision wishes to state an exception or limitation to a described right or freedom, it does so expressly in a form which is bold and clear. In some cases the form of words used occurs so frequently that it can even be characterised as a formula. In section 4(2) the protection of the right to life is limited by:

> A person shall not be regarded as having been deprived of his life in contravention to subsection (1) of this section if he dies as the result of the use, to such extent and in such circumstances as are permitted by law, of such force as is reasonably justified — (a) for the defence of any person from violence or for the defence of property . . .

[**69.**] In section 6(2) the protection from slavery, servitude and forced labour is limited by: 'For the purposes of this section, the expression 'forced labour' does not include a) any labour required in consequence of the sentence or order of this court . . .'.

[**70.**] In section 7(2) the protection from inhuman treatment is limited by:

> Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorises the infliction of any description of punishment that was unlawful in the former Protectorate of Bechuanaland immediately before the coming into operation of this Constitution.

[**71.**] The expression 'nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention . . . of this section to the extent that the law 'authorises' or 'makes provision for'', in particular, is often used to create the required exceptions. It is again used in section 8(5) with respect to the protection from deprivation of property; in section 9(2), with respect to the limitations on the protection for privacy of home and other property; in section 10(12), with respect to limitations to the provisions to secure protection of law; in section 11(5) with respect to limitations on the protection of freedom of conscience; in section 12(2) with respect to limitations on the protection of freedom of expression; in section 13(2), with respect to the limitation to the protection of freedom of assembly and association; and in section 14(3) with respect to the limitation on the protection of freedom of movement. Section 16(1), which gives a general and comprehensive power to derogate from fundamental rights and freedoms in time of war or where a state of emergency has been declared under section 17, uses a variation of the formula.

[**72.**] Even section 15 follows that pattern. As we have seen, subsection (1) proscribes laws which make any provision which is discriminatory either of itself or in its effect, and subsection (2) proscribes discriminatory treatment in actions under any law or public office or authority. Then subsection (4) places the limitations on that proscription. It opens by saying, 'Subsection (1) of this section shall not apply to any law so far as that law makes provision — ' and proceeds to itemise the provisions which are exempted from the application of subsections 15(1) and (2). Then in subsection (5) a limitation is placed on the protection from discrimination with respect to qualifications for service as a public officer etcetera by the use of what has been described before as the formula: 'Nothing contained in any law shall be held to be inconsistent with or in contravention of subsection (1) of this section . . .'. And in subsection (9), where savings are made from the protection with respect to laws in force immediately before the coming into force of the Constitution or to written laws repealed and re-enacted, a variation of the same formula is used.

[**73.**] If the makers of the Constitution had intended that equal treatment of males and females be excepted from the application of subsections 15(1) or (2), I feel confident, after the examination of these provisions, that they would have adopted one of the express exclusion forms of words that they had used in this very same section and in the sister sections referred to. I would expect that, just as section 3 boldly states that every person is entitled to the protection of the law irrespective of sex, in other

words giving a guarantee of equal protection, section 15 in some part would also say, again equally expressly, that for the purposes of maintaining the patrilineal structure of the society, or for whatever reason the framers of the Constitution thought necessary, discriminatory laws or treatment may be passed for or meted to men and women. Nowhere in the Constitution is this done. Nowhere is it mentioned that its objective is the preservation of the patrilineal structure of the society.

[**74.**] But I am left to surmise that the Constitution intended sex-based legislation by the omission of the word 'sex' from section 15(3) and that the reason for the word's omission was to preserve the patrilineal structure of the society. I find it a startling proposition. If that were so, is it not extraordinary that equal protection is conferred irrespective of sex at all by section 3? What is even more serious is that section 15 would then, under subsection (1), permit not only the making of laws which are discriminatory on the basis of sex, but under subsection (2) it would permit the treatment of people in a discriminatory manner by 'any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority'. Does this mean that differential treatment is permissible under the Constitution by any person in the performance of any public office or any public authority depending on whether the person being dealt with is a man or a woman? That interpretation boggles the mind.

[**75.**] Faced with the remarkable consistency in the manner in which the Constitution makes exceptions to or places limitations on the protections that it grants, I have the greatest difficulty in accepting that the Constitution chose only the all important question of sex discrimination to make its desired exception by omission in a definition. Why did the framers of the Constitution choose, in this most crucial issue of sex-based discrimination, required to preserve the male orientation of traditional society, to leave the matter to this method? Why did they make the discovery of their intention on this vital question dependent on an aid to construction, an aid which is not conclusive in its application, when in other cases desired exclusions had been so boldly and expressly stated? I can find no satisfactory answers to these questions. My difficulty is further compounded when I consider that this omission in the definition is expected not only to exclude 'sex' from a protection conferred in section 15 but also to actually limit or qualify a right expressly conferred by section 3, the basic and umbrella provision for the protection of fundamental rights and freedoms under the Constitution.

[**76.**] The application of the *expressio unius* principle to statutory interpretation in Botswana, which has to compete for supremacy in this case with conclusions derived from the positive internal evidence of the Constitution itself as to how it makes exceptions when desired, is, according to the argument of the appellant, provided for by section 33 of the Interpretation Act (Cap 01:04) which states that:

> 33. Where an enactment qualifies a general expression by providing that it shall include a number of particular matters or things, any matter or thing which is not expressly included is by implication excluded from the meaning of the general expression.

[**77.**] It is true that 'sex' is omitted from the categories mentioned in the definition in section 15(3) of the Constitution. But even if that definition through the omission qualifies any general expression found in the subsection, it appears to me that it does not qualify any general expression in section 3, which is the section under which the respondent complained. Nevertheless, as the appellant submits that the respondent could challenge the provisions of the Citizenship Act, if at all, only on the ground that her rights under section 15 of the Constitution have been contravened, the *expressio unius* principle calls for examination. In any event, section 24(2) of the Interpretation Act admits all aids to the construction of an enactment in dispute when it provides that: '24 (2) The aids to construction referred to in this section (that is, those dealing with what material could be used by a Court as an aid to construction) are in addition to any other accepted aid.'

[**78.**] The occasions on which the *expressio unius* principle applies are summarised in Bennion on *Statutory Interpretation* at 844 as:

> it is applied where a statutory proposition might have covered a number of matters but in fact mentions only some of them. Unless these are mentioned merely as examples, or *ex abundanti cautela*, or for some other sufficient reason, the rest are taken to be excluded from the proposition . . . [it] is also applied where a formula which in itself may or may not include a certain class is accompanied by words of *extension* naming only some members of that class. The remaining members of the class are then taken to be excluded. Again the principle may apply where an item is mentioned in relation to one matter but not in relation to another equally eligible.

[**79.**] The competing claims in this case are that the omission was deliberate and intended to exclude sex-based discrimination, the alternative being that the omission was neither intentional nor made with the object of excluding sex-based discrimination. I have already shown how exclusions from the protections in the fundamental rights chapter of the Constitution have in other cases been made. The method is wholly against the argument based on the application of the *exclusio unius* principle. Further, when the categories mentioned in sections 3 and 15(3) of the Constitution are compared, it will be seen that they do not exactly match. Not only is 'sex' omitted from the definition in section 15(3) although it appears in section 3, but 'tribe' is added to the definition in section 15(3) so that it reads, 'race, tribe, place of origin, political opinions, colour or creed', although 'tribe' does not appear in section 3.

[**80.**] The appellant explained the addition of 'tribe' on the ground that it was specifically included because of the concern that the framers of the Constitution had for possible discrimination on that ground. That indicates that the classes were mentioned in order to highlight some vulner-

able groups or classes that might be affected by discriminatory treatment. I find this conforming more with the mention of the class or group being *ex abundanti cautela* rather than with the intention to exclude from cover under section 15 a class upon which rights had been conferred by section 3. Here, as Bennion points out at 850, the ruling maxim is *abundans cautela non nocet* (abundance of caution does not harm) (see the Canadian case of *Docksteader v Clark* (1903) 11 BCR 37, cited by EA Driedger in *The Construction of Statutes*).

[**81.**] I do not think that the framers of the Constitution intended to declare in 1966 that all potentially vulnerable groups or classes who would be affected for all time by discriminatory treatment have been identified and mentioned in the definition in section 15(3). I do not think that they intended to declare that the categories mentioned in that definition were forever closed. In the nature of things, as far-sighted people trying to look into the future, they would have contemplated that with the passage of time not only the groups or classes which had caused concern at the time of writing the Constitution, but other groups or classes needing protection would arise. The categories might grow or change. In that sense, the classes or groups itemised in the definition would be and, in my opinion, are, by way of example, what the framers of the Constitution thought worth mentioning as potentially some of the most likely areas of possible discrimination.

[**82.**] I am fortified in this view by the fact that other classes or groups with respect to which discrimination would be unjust and inhuman and which, therefore, should have been included in the definition were not. A typical example is the disabled. Discrimination wholly or mainly attributable to them as a group as such would, in my view, offend as much against section 15 as discrimination against any group or class. Discrimination based wholly or mainly on language or geographical divisions within Botswana would similarly be offensive, although not mentioned. Arguably religion is different from creed, but although creed is mentioned, religion is not. Incidentally, it should also be noticed, that although the definition mentions 'race' and 'tribe', it does not mention 'community', yet the limitation placed on subsection 15(1) by section 15(4) refers to 'a particular race, community or tribe'.

[**83.**] All these lead me to the conclusion that the words included in the definition are more by way of example than as an exclusive itemisation. The main thrust of that definition in section 15(3) is that discrimination means affording different treatment to different persons wholly or mainly attributable to their respective characteristic groups. Then, of course, section 15(4) comes in to state the exceptions when such differential treatment is acceptable under the Constitution. I am, therefore, in agreement with the learned judge *a quo* when he says that the classes or groups mentioned in section 15(3) are by way of example.

[**84.**] On the basis of the appellant's argument, the legislature relying on

the omission of 'sex' in section 15(3), could, for example legislate that the women of Botswana shall have no vote. Legislation in Botswana may also provide in that case that no woman shall be President or be a member of parliament. The appellant states that the legislature will not do that because there will be no rational basis for it, and in any case it will not, under subsection 15(4)(e), be reasonably justifiable in a democratic society. But is not the basis for such legislation the same as the preservation of the patrilineal structure of the society which, as has been urged, led to the deliberate omission of 'sex' in the definition of discrimination?

[**85.**] In any case, the appellant cannot, for this purpose, take advantage of the exception provided in section 15(4)(e) which permits discrimination which is reasonably justifiable in a democratic society to support his argument on the rationality of the basis of the legislation, because, in the first place, that would be using the exception for purposes directly opposite to what was intended, and secondly, on his own argument, if 'sex' is deliberately left out of the definition of discrimination in subsection (3) in order to perpetuate the patrilineal society, it is left out for all purposes of section 15, including the provisions of subsection (4)(e). That provision in subsection 15(4)(e) expressly refers to 'persons of any such description as is mentioned in subsection (3) of this section . . .'. That, by the argument of the appellant, cannot include anything done on the basis of the sex of the person.

[**86.**] Fundamental rights are conferred on individuals by constitutions, not on the basis of the track records of governments of a state. If that were the criterion, fundamental rights need not be put in the constitution of a state which is known for the benevolent actions of its government. In any event, if the constitution is the basic or founding document of the particular state, that state would have no track record for anyone to go by. In the best of all possible worlds, entrenchment of fundamental rights in a constitution should not be necessary. All that these rights require in such a state would be accorded as a matter of course by the government. Fundamental rights are conferred on the basis that, irrespective of the government's nature or predilections, the individual should be able to assert his rights and freedoms without reliance on its goodwill or courtesy. It is protection against possible tyranny, oppression or deprivations of those selfsame rights.

[**87.**] A fundamental right or freedom once conferred by the constitution can only be taken away or circumscribed by an express and unambiguous statement in that constitution or by a valid amendment of it. It cannot be taken away or circumscribed by inference. It is for these reasons that I find it difficult to accept the argument of the appellant which asks us to infer from the omission of the word 'sex' in the definition of discrimination in section 15(3) that the right to equal protection of the law given in section 3 of the Constitution to all persons has, in the case of sex-based differentiation in equality of treatment, been taken away.

[**88.**] Questions as to whether every act of differentiation between classes or groups amounts to discrimination and what categories of persons are protected under section 15 may arise. If the categories of groups or classes mentioned in section 15(3) are but examples, where does one draw the line as to the categories to be included? Of course, treatment to different sexes based on biological differences cannot be taken as discrimination in the sense that section 15(3) proscribes. With regard to the classes which are protected, it would be wrong to lay down any hard and fast rules. The vulnerable classes identified in sections 3 and 15 are well known. I would add that not only the classes mentioned in the definition in section 15(3), but, for example, the class also mentioned in subsection (4)(d), where it speaks of 'community' in addition to 'race' and 'tribe' have to be taken as vulnerable.

[**89.**] Civilised society requires that different treatment should not be given to people wholly or mainly on the ground of membership of the designated classes or groups. But as has been shown with respect to race and gender-based discrimination, the development of thought and conduct on these matters may take years. One feels a sense of outrage that there was a time when a Chief Justice of the United States would say, as did Taney CJ in *Dred Scott v Sanford* 60 US 393 at 406 (1857):

The question then arises, whether the provisions of the Constitution, in relation to the personal rights and privileges to which the citizen of a state should be entitled, embraced the negro African race, at that time in this country ... In the opinion of the court, the legislation and histories of the times, and the language used in the Declaration of Independence, show, that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as part of the people, nor intended to be included in the general words used in that memorable instrument ... They had for more than a century before been regarded as beings of an inferior order; and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit ... This opinion was at that time fixed and universal in the civilised portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion.

[**90.**] Today, it is universally accepted that discrimination on the ground of race is an evil. It is within the memory of men still living today in some countries that women were without a vote and could not acquire degrees from institutions of higher learning, and were otherwise discriminated against in a number of ways. Yet today the comity of nations speaks clearly

against discrimination against women. Changes occur. The only general criterion which could be put forward to identify the classes or groups is what to the right thinking man is outrageous treatment only or mainly because of membership of that class or group and what the comity of nations has come to adopt as unacceptable behaviour.

[**91.**] One point was taken by the appellant in his grounds of appeal but not developed further by him before us. That is the argument that in section 15(4)(c) of the Constitution there is an exclusion from the provisions of subsection (1) 'with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law', and that an exclusion with regard to the law of citizenship is an exclusion which qualifies under 'other matters of personal law'. I raise this point here only to show that it has not been overlooked, and that in my view it is not valid. In the first place, as stated in connection with the argument which prayed in aid the provisions of section 15(4)(3), the underlying argument that on the basis of the omnibus clause in section 15(4)(c) discriminatory laws on citizenship could be made on the basis of sex is defeated by the fact that section 15 as a whole does not deal with discrimination on the basis of sex at all. Proceeding from that general exclusion to exclude further from the section discrimination in citizenship cases on the ground of sex seems to me to be excluding sex-based discrimination from a provision which does not in any case apply. That cannot achieve the desired object.

[**92.**] On the other hand, there is a sense in which the expression 'personal law' may be used to describe the aggregate of elements affecting the legal status of a person. That would be the case, for example, when one is considering matters of personal law as opposed to the law of things. But it does not seem to me to be the use made of that expression here. The more common meaning of personal law is the system of law which applies to a person and his transactions determined by the law of his tribe, religious group, case, or other personal factor, as distinct from the territorial law of the country to which he belongs, in which he finds himself, or in which the transaction takes place. (See Walker in *The Oxford Companion to Law*.) That, I think, is the sense in which personal law is used here. Apart from the laws on 'adoption, marriage, divorce, burial, devolution of property on death' of the communities to which persons belong which are expressly mentioned in the provision, I would expect the omnibus clause, 'other matters of personal law', to cover related matters of family law on, for example, domicile, guardianship, legal capacity, and rights and duties in the community and such matters. Otherwise, if the wider meaning of all laws affecting personal legal status is taken as the correct meaning, the omnibus clause in the exception would serve to wipe out practically all protections given to individuals as persons. In the usual narrow sense, however, citizenship, which is conferred by statute on a state-wide basis is not a matter of personal law.

[**93.**] The point was also mentioned, though not developed, that the provisions of the Citizenship Act questioned were re-enactments of previously existing legislation, and, therefore, were saved from challenge by section 15(9)(b) which states that:

> (9) Nothing contained in or done under authority of any law shall be held to be inconsistent with the provisions of this section —
>
> (a) to be extent that the law repeals and re-enacts any provision which has been contained in any written law at all times since immediately before the coming into operation of this Constitution.

[**94.**] Serious examination of this provision shows that it clearly does not apply to the situation in this case. It would apply if sections 4 and 5 of the Citizenship Act had existed as laws before the Constitution came into effect. We know they did not. Even sections 21 and 22 of the Constitution which they were intended to replace were not in existence as laws prior to the coming into operation of the Constitution. But above all, I think that section 15(9)(b) applies only when a written law in existence before the Constitution, and therefore, one which is protected whatever its terms by section 15(9) if it continues after the Constitution is repealed and re-enacted exactly or at least substantially in the same form as before. By this test, the provisions of section 4 and 5 would not qualify, even if they had replaced some written law in existence before the Constitution. They were not exactly the same or even substantially the same as the provisions before.

[**95.**] The point was rightly taken that if discrimination on the basis of sex was disallowed by the Constitution, the Constitution itself proceeded to break its prescription by providing in the original form, after section 21 which dealt with births within Botswana in terms which were gender neutral, section 22 which provided that: 'A person born outside Botswana or after 30 September 1966 shall become a citizen of Botswana at the date of his birth if at that date his father is a citizen of Botswana.'

[**96.**] Obviously, the Constitution there treated children of Botswana men differently from children of Botswana women, in that the children of Botswana men acquired citizenship which children of Botswana women did not necessarily acquire. In their wisdom, the framers of the Constitution at the time thought that the prescriptions they provided for the acquisition of nationality for persons born outside its territory or jurisdiction should be limited to descent through the male line. It made no distinction between birth within wedlock or otherwise. It made no provision with respect to the mother of the child. That was how the Constitution framers thought Botswana citizens born outside Botswana should be traced. We cannot declare a provision in the Constitution unconstitutional. It would otherwise be a contradiction in terms. The Constitution had always had the power to place limitations on its own grants. If it did so, what it enacted was as valid as any other limitation which the Constitution placed on rights and freedoms granted.

[**97.**] What a constitutional provision can do, however, ordinary legislation cannot necessarily do. The same limiting provision which the Constitution places on a grant, if put into ordinary legislation may be open to review on the ground of *vires*, and if found to infringe any of the provisions of the Constitution will be declared invalid, unless it could otherwise be justified under the Constitution itself. The fact that the Constitution differentiated between men and women in its citizenship has to be accepted as a legitimate exception which the framers thought right. But that does not provide a general license for discrimination on the basis of sex. My view on the meaning of sections 3 and 15, therefore, is not altered by the original provision in section 22.

[**98.**] Incidentally, it would be noticed from the original constitutional provisions on citizenship that no distinction was drawn between descent through the male or female line in the case of persons born within the jurisdiction. If the framers had intended that a distinction in citizenship be made dependent on the nationality of the father in order to preserve the male orientation of Botswana society, this was where it would have been found. It was the most important provision on the acquisition of citizenship because it was the provision governing the acquisition of citizenship by the overwhelming number of Botswana. Yet the repealed section 21 of the Constitution simply stated that: 'Every person born in Botswana on or after 30 September 1966 shall become a citizen of Botswana.'

[**99.**] The learned judge *a quo* referred to the intentional obligations of Botswana in his judgment in support of his decision that sex-based discrimination was forbidden under the Constitution. That was objected to by the appellant. But by the law of Botswana, relevant international treaties and conventions may be referred to as an aid to interpretation. We noticed this in our earlier citation of section 24 of the Interpretation Act which stated that a's an aid to the construction of the enactment a court may have regard to . . . any relevant international treaty, agreement or convention . . .'.

[**100.**] The appellant conceded that international treaties and conventions may be used as an aid to interpretation. His objection to the use by the learned judge *a quo* of the African Charter on Human and Peoples' Rights, the Convention for the Protection of Human Rights and Freedoms, and the Declaration on the Elimination of Discrimination Against Women, was founded on two grounds. In the first place, he argued that none of them had been incorporated into the domestic law by legislation, although international treaties became part of the law only when so incorporated. According to this argument, of the treaties referred to by the learned judge *a quo*, Botswana had ratified only the African Charter on Human and Peoples' Rights, but had not incorporated it into domestic law. That, the appellant admitted, however, did not deny that particular Charter the status of an aid to interpretation. The appellant's second objection was that treaties were only of assistance in interpretation when the language of

the statute under consideration was unclear. But the meaning of both section 15(3) of the Constitution and sections 4 and 5 of the Citizenship Act was quite clear, and, therefore, no interpretative aids were required.

[**101.**] I agree that the meaning of the questioned provisions of the Citizenship Act is clear. But from the strenuous efforts that the appellant has made in justification of his interpretation of section 15(3) of the Constitution his claim that the meaning of that subsection is clear seems more doubtful. The problem before us is one of discrimination on the basis of sex under the Constitution. Why, one may ask, do sections 3 and 15 of the Constitution apparently say contradictory things? It is the provisions of the Constitution itself which give rise to the difficulty of interpretation, if any, not the Citizenship Act.

[**102.**] What we have to look at when trying to determine the intentions of the framers of the Constitution is the ethos, the environment, which the framers thought Botswana was entering into by its acquisition of statehood, and what, if anything, can be found likely to have contributed to the formulation of their intentions in the Constitution that they made. Botswana was, at the time the Constitution was promulgated, about to enter the comity of nations. What could have been the intentions and expectations of the framers of its Constitution? It is to be recalled that Maisels P in the *Petrus* case, referred to earlier, at 714 to 715 said in this connection that: '. . . Botswana is a member of a comity of civilised nations and the rights and freedoms of its citizens are entrenched in its Constitution which is binding on the legislature.'

[**103.**] The comity of civilised nations was the international society into which Botswana was about to enter at the time its Constitution was drawn up. Lord Wilberforce in the case of *Minister of Home Affairs (Bermuda) v Fisher* (1980) AC 319, at 329 to 329 spoke of this international environment acting as one of the contributory influences which fashioned and informed the approach of the framers of the Constitution of Bermuda in words which could, with slight modification, have been written equally for Botswana. He said:

> Here, however, we are concerned with a constitution, brought in force certainly by Act of Parliament, the Bermudian Constitution Act 1967 of the United Kingdom, but established by a self-contained document . . . It can be seen that this instrument has certain special characteristics.(1) It is, particularly in Chapter 1, drafted in a broad and ample style which lays down principles of width and generality. (2) Chapter 1 is headed protection of fundamental rights and freedoms of the individual.
>
> It is known that this chapter, as similar portions of other constitutions instruments drafted in the post-colonial period, starting from Nigeria, and including the constitutions of most Caribbean territories, was greatly influenced by the European Convention for the protection of human rights and fundamental freedoms (1953) . . . That convention was signed and ratified by the United Kingdom and applied to dependent territories including Bermuda. It was in turn influenced by the United Nations Universal Declaration of Human Rights of

> 1948. These antecedents, and the form of Chapter 1 itself, call for a generous interpretation, avoiding what has been called 'the austerity of tabulated legalism', suitable to give to individuals the full measure of the fundamental rights and freedoms referred to.

[**104.**] The antecedents of the Constitution of Botswana with regard to the imperatives of the international community could not have been any different from the antecedents found by Lord Wilberforce in the case of Bermuda. Article 2 the Universal Declaration of Human Rights of 1948 states that:

> Everyone is entitled to all the rights and freedoms set forth in this declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

[**105.**] The British Government must have subscribed to this declaration on behalf of itself and all dependent territories, including Bechuanaland, long before Botswana became a state. And it must have formed part of the backdrop of aspirations and desires against which the framers of the Constitution of Botswana formulated its provisions.

[**106.**] Article 2 of the African Charter on Human and Peoples' Rights provides that:

> Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

[**107.**] Then paragraphs 1 and 2 of article 12 state that:

> (1) Every individual shall have the right to freedom of movement and residence within the borders of a state provided he abides by the law.
> (2) Every individual shall have the right to leave any country including his own, and return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health and morality.

[**108.**] Botswana is a signatory to this Charter. Indeed it would appear that Botswana is one of the credible prime movers behind the promotion and supervision of the Charter. The learned judge *a quo* made reference to Botswana's obligations under such treaties and conventions. Even if it is accepted that those treaties and conventions do not confer enforceable rights on individuals within the state until Parliament has legislated its provisions into the law of the land, in so far as such relevant international treaties and conventions may be referred to as an aid to construction of enactments, including the Constitution, I find myself at a loss to understand the complaint made against their use in that manner in the interpretation of what no doubt are some difficult provisions of the Constitution. The reference made by the learned judge *a quo* to these materials amounted to nothing more than that. What he had said was:

> I am strengthened in my view by the fact that Botswana is a signatory to the

> OAU Convention on discrimination. I bear in mind that signing the convention does not give it power of law in Botswana but the effect of the adherence by Botswana to the convention must show that a construction of the section which does not do violence to the language but is consistent with and in harmony with the convention must be preferable to a 'narrow construction' which results in a finding that section 15 of the Constitution permits unrestricted discrimination on the basis of sex.

[**109.**] That does not seem to me to be saying that the OAU convention, or by its proper name the African Charter of Human and Peoples' Rights, is binding within Botswana as legislation passed by its Parliament. The learned judge said that we should so far as is possible so interpret domestic legislation as not to conflict with Botswana's obligations under the Charter or other international obligations. Indeed, my brother Aguda JA referred in his judgment at 37 to the Charter and other international conventions in a similar light in the *Petrus* case. I am in agreement that Botswana is a member of the community of civilised states which has undertaken to abide by certain standards of conduct, and, unless it is impossible to do otherwise, it would be wrong for its courts to interpret its legislation in a manner which conflicts with the international obligations Botswana has undertaken. This principle, used as an aid to construction as is quite permissible under section 24 of the Interpretation Act, adds reinforcement to the view that the intention of the framers of the Constitution could not have been to permit discrimination purely on the basis of sex.

[**110.**] I now come to the submission on *locus standi*. I have left this point until the end because I agree with the appellant who himself admitted in his submissions that: 'This is a case where in view of the 'circularity' of some of the arguments, it may be necessary for the Court to consider the merits before coming to a conclusion on the *locus standi*'. I feel that it could not have been determined without first going into the merits. With respect to the point, the appellant argued that the Court *a quo* erred in holding that the respondent had *locus standi* to ask to pass on either section 4 or 5 of the Citizenship Act. The appellant, it was submitted, is a practising lawyer, who on marrying on 7 March 1984, freely married into an existing citizenship regime carrying with it all the consequences referred to by the judge *a quo*, namely, that not only her husband but her children by the marriage were liable to be expelled from Botswana, and that if her husband were to decide to leave both Botswana and herself, the children, assuming that they were left behind, could only continue to live in Botswana if granted residence permits. She was, went on the argument, at the time of her marriage exercising her right to liberty, and could not now be heard to complain of a consequence which she had consciously invited. Nor could she rely on the choice she freely made as an infringement of her rights which should confer jurisdiction under section 18 of the Constitution.

[**111.**] In any event, the appellant argued, there was no threat or likelihood, as alleged by the respondent, of expulsion of her husband, who

had been in Botswana for 15 years, and potential adverse consequences of a speculative nature were not sufficient to confer *locus standi* under section 18. Section 5 of the Citizenship Act, the appellant argued, had no relevance at all to the respondent; the argument advanced that she was still of child-bearing age and might choose to have another child outside Botswana was too remote for consideration.

[**112.**] And, in the case of her present children, it was submitted that there were strong reasons for holding that she was not sufficiently closely affected by any action taken against them as a result of section 4 of the Act to enable her to claim that the provisions of the Constitution were being or likely to be contravened in relation to her by such action as required by section 18.

[**113.**] I do not think a person should be prejudiced in the enjoyment of his or her constitutional rights just because that person is a lawyer.

[**114.**] On the *locus* point, the appellant further argued that the *popularis actio* of Roman law, which gave an individual a right of action in matters of public interest was not a part of Roman-Dutch common law. The principle of our law being that a private individual must sue on his own behalf; the right he sought to enforce must be available to him personally, or the injury for which he or she claimed redress must be sustained or apprehended by himself. The cases of *Darymple v Colonial Treasurer* 1910 TS 372; *Director of Education, Tvl v MacCagie* 1918 AD at 621; *Veriava v President of SA Medical and Dental Council* 1985 (2) SA 293 (T) at 315; and *Cabinet of the Transitional Government of SWA v Eins* 1988 (3) 369 (A) were cited as authorities to show that section 18 of the Constitution reflected this principle when it provided that the wrong (that is, the actual threatened contravention of the relevant sections) must be in relation to the applicant.

[**115.**] But the point made by those authorities has been distinguished in cases affecting the liberty of the subject by the South African Appellate Division in *Wood v Odangwa Tribal Authority* 1975 (2) SA 294 (A) at 310 where Rumpff CJ, after analysing the proposition that the *actio pupularis* did not apply in Roman-Dutch law, said:

> Nevertheless, I think it follows from what I have said above, that although the *actiones populares* generally have become obsolete in the sense that a person is not entitled 'to protect the rights of the public', or 'champion the cause of the people' it does not mean that when the liberty of a person is at stake, the interest of the person who applies for the interdict *de libero homine exhibendo* should be narrowly construed. On the contrary, in my view it should be widely construed because illegal deprivation of liberty is a threat to the very foundation of a society based on law and order.

[**116.**] I need not, however, go into these cases in detail. Section 18 speaks for itself. I have recited the relevant provisions in subsection (1) earlier on in this judgment. It says that 'if any person alleges that any of the provisions of sections 3 to 16 (inclusive) of this Constitution has been, is being

or is likely to be contravened in relation to him', that person may apply to the High Court for redress. The section shows that the applicant must 'allege' that one of the named sections of the Constitution has been, is being or is likely to be infringed in respect of him. He must therefore sue only for acts or threats to himself. But the section does not say that the applicant must establish as a matter of proof that any of these things has or is likely to happen to him. The meaning of 'allege' is 'declare to be the case, especially without proof' or 'advance as an argument or excuse' (see *Concise Oxford Dictionary* (8th ed 1990)). I believe that in the context of section 18(1), it is the earlier of the two meanings that the word has.

[**117.**] Of course, the allegation to enable the applicant to seek the aid of the courts must not be frivolous or without some foundation. But that is not the same thing as a requirement to establish positively. In my opinion, we here see an example of a case where constitutional rights should not be whittled down by principles derived from the common law, whether Roman-Dutch, English or Botswana. Under section 18(1), an applicant has the right to come before the courts for redress if he declares with some foundation of fact that the breach he complains of has, is in the process of being or is likely to be committed in respect of him. Where a person comes requesting the aid of the courts to enforce a constitutional right, therefore, the question which has to be asked in order that the courts might listen to the merits of his case is whether he makes the required allegation with reasonable foundation. If that is shown, the courts ought to hear him. Any more rigid test would deny persons their rights on some purely technical grounds.

[**118.**] In this connection I refer to a parallel situation in the case of *Craig v Boren* cited earlier in which the United States Supreme Court at 194 *et seq* demonstrated, on the point of *locus* to bring a constitutional challenge on the grounds of discrimination, that persons not directly affected within the class discriminated against could bring the action if they could show that they were or could be adversely affected by the application of the law. In that case, the question was whether a law prohibiting the sale of 'non-intoxicating' 3.2 per cent beer to males under the age of 21 and to females under the age of 18 constituted gender-based discrimination that denied males between 18 and 20 years of age the equal protection of the laws. The Court held that a licensed vendor of the beer had standing to challenge the law.

[**119.**] Did the applicant allege that her constitutional right had been, was being, or was likely to be infringed? That question I now proceed to answer in the case of the respondent. We recall from the paragraphs of her founding affidavit which are recited in the earlier part of this judgment that after setting out what she believed to be the constitutional provisions which had been infringed, she continued in paragraph 19 thereof to state that as set out above she verily believed that 'the provisions of section 3 of

the Constitution had been contravened in relation to myself'. I do not think the allegation could be clearer.

[**120.**] Has that allegation some basis of truth? No doubt due to a mixture of some adventitious claims made by her with respect to her husband, who is without doubt an alien and could under the Constitution be placed under some disabilities, her case seems to have been misunderstood. It was, for example, argued by the appellant that the Citizenship Act laid down how citizenship should be acquired and taken away, and therefore, for a person to attack the Act he or she must be shown to be a person who did not enjoy the rights of citizenship, not one, like respondent who was enjoying full rights of citizenship. In this case, the respondent's children might, according to the argument, have been affected by the Citizenship Act, not herself. But the Citizenship Act, although defining who should be a citizen, has consequences which affect a person's right to come into, live in and go out of this country, when he likes. Such consequences may primarily affect the person declared not to be a citizen. But there could be circumstances where such consequences would extend to others. In such circumstances, the courts are not entitled to look at life in a compartmentalised form, with the misfortunes and disabilities of one always kept separate and sanitised from the misfortunes and disabilities of others.

[**121.**] The case which I understand the respondent to make is that due to the disabilities under which her children were likely to be placed in her own country of birth by the provisions of the Citizenship Act, her own freedom of movement protected by section 14 of the Constitution was correspondingly likely to be infringed and that gave her the right under section 18(1) to come to court to test the validity of the Act. What she says is that it is her freedom which has been circumscribed by the disabilities placed on her children. If there is any substance to this allegation, the courts ought to hear her. The argument that a mother's relationship to her children is entirely emotional and that an emotional feeling cannot found a legal right does not sound right to me.

[**122.**] Nor am I impressed by the argument that a mother has no responsibility towards a child because it is only the guardian who has a responsibility recognised by law, and in Botswana, that guardian is the father. The very Constitution which all in Botswana must revere recognises a parent's, as distinct from the guardian's, responsibility towards the child. Recall that section 5(1)(f) states that:

> 5(1) No person shall be deprived of his personal liberty save as may be authorised by law in any of the following cases, that is to say — (f) under the order of a court or with the consent of his parent or guardian, for his education or welfare during any period ending not later than the date when he attains the age of 18 years.

[**123.**] This provision assumes that before the child is 18 years of age, the parent, a term which we all must agree includes a mother, also has some responsibility towards the child's education and welfare. In any case he or she

can control what happens to the child. During that period, especially at the younger end of the infant's lifespan, the parents', especially, the mother's, movements are to a large extent determined by the child's. At about this same time, the welfare of a child in a broken home is generally considered better protected in the custody of the mother than that of the father.

[**124.**] It is totally unrealistic to think that you could permanently keep the child out of Botswana and yet by that not interfere with the freedom of movement of the mother. When the freedom of the mother to enter Botswana to live and to leave when she wishes is indirectly controlled by the location of the child, excluding the child from Botswana is in effect excluding the mother from Botswana. If the exclusion is the result of a determination of the child's citizenship which is wrong, surely this would amount to an interference with, and therefore an infringement of, the mother's freedom of movement.

[**125.**] But, then, the argument goes, the respondent has not shown that there was any likelihood of her non-Botswana children being kept out of Botswana. The answer to that is that governments with a discretion to exercise do not always give advance notice of how they intend to exercise that discretion. It is not unknown for a government which decides to deport or expel an alien to do so without prior notice of its intention. Must the person who is subject to, or may indirectly be affected by, such expulsion wait until the expulsion order is made before he or she can bring legal proceedings? When is he or she threatened with the likelihood that an order could be made? To the question whether the immigration officers in Botswana had a discretion to turn away an alien from entering the country, the appellant's reply was that they had.

[**126.**] The appellant also put in an affidavit made by the immigration officers at the Gabarone Airport with respect to the latest entry into Botswana of the respondent's husband and her non-citizen children. I believe this was intended to refute allegations indicating various forms of harassment or inconveniences that the respondent claimed the husband and children had suffered. I quote it because it is educative. The senior immigration officer in charge of the department's affairs at the airport on the date of arrival deposed to the fact that the respondent was known to her, and that at no time did the respondent complain to her of any harassment or threats made to her family by the immigration officers. She had consulted her officers, none of whom had any recollection of the incident referred to by the respondent. Then she proceeded to state the normal procedure followed by persons arriving at the airport. She said:

> When passengers arrive at Sir Seretse Khama Airport, Botswana passport holders are not required to fill in forms, but proceed straight through the booth reserved for them to the immigration checkpoint, then on to clear customs. In the case of visitors or returning residents holding foreign passports, these fill in entry forms which they produce with their passports to the immigration officers in the booths reserved for foreign passport holders. If everything is in order they are

> given a green card which is presented at the immigration checkpoint and they pass through to customs.
>
> If there is a query then the passport holder is given a red card to present at the immigration checkpoint, where further inquiries are made and the problem is sorted out. Where a returning resident does not have a valid residence permit or visitor's permit endorsed in his passport then one of two things will happen — either (a) a form 7 is served upon the visitor, requiring him to appear before an immigration officer at a given time for examination as to whether he is entitled to remain in Botswana; or (b) his passport is endorsed for a short period to enable him to regularise his stay in Botswana.
>
> The latter is what appears to have happened to Mr Dow and his non-citizen children, as it appears that his passport did not reflect a valid residence permit or visitor's permit at that time. The record of his entry is not, however, available as this was over twelve months ago.

[**127.**] Botswana is entitled to deal with aliens in the manner described. The Constitution allows it and international law and practice recognise it. The respondent in the affidavit to which the senior immigration officer's was in answer alleged that she was in the company of her husband and her three children on that occasion, all having arrived back from holiday. She and the eldest daughter, the Botswana citizen, were granted unconditional entry into Botswana, while the husband and her other two children were put through the alien treatment. The senior immigration officer's affidavit did not deny that the respondent and the eldest daughter were also present at the time. It also, at least, confirmed that different treatment was normally accorded to citizens and non-citizens. The chief immigration officer also made an affidavit in answer to the respondent's. In it he said:

> 4. According to the file Mr Dow arrived in Botswana on 12 October 1977 as a United States Peace Corps Volunteer teacher. He remained exempted from holding a residence permit as an employee of the Botswana Government until 21 January 1990. On 16 July 1990 Mr Dow submitted an application for a residence permit for himself and his two younger children. While his application was being processed, he continued his studies on the basis of three months waivers, which is standard procedure in a case such as this. This was the situation during December 1990/January 1991.
>
> 5. Mr Dow's application was duly approved by the Immigration Selection Board on 17 April 1991. After preparation of the permit, this was despatched to the Dean of Students, University of Botswana on 29 May 1991, marked 'for Peter Nathan Dow'. It appears from the affidavit that Mr Dow did not receive the permit, but merely continued having the waiver certificate in his possession stamped every three months by his nearest immigration officer.
>
> 6. On 8 January 1992, at his request, a replacement permit was issued to Mr Dow, including the two children and valid 17 April 1991 to 30 June 1992, when his course was to expire.

[**128.**] I do not think I need comment on the disturbing experiences of a mother who finds different and unfavourable treatment as to residence meted by authority to some of her three children in comparison to others who are accorded completely opposite treatment by the same authority. Whether or not the authorities think that eventually the required permis-

sion sought by the disadvantaged children will be given, during her wait she must go through a period of uncertainty, anxiety and mental agony. In this case, it seems that for some time, at least, two of the respondent's three children had no more than three months granted each time for their stay in Botswana. Chasing after the extensions itself cannot be a matter of joy. The mother's concern for permission for her children to stay cannot be lightly dismissed on the ground that it was no business of hers, the responsibility being the children's father's. Well-knit families do not compartmentalise responsibilities that way. As long as the discretion lies with the governmental authorities to decide whether or not to extend further the residence permit of the husband, on whose stay in Botswana the stay of the respondent's children depends, the likelihood of the children's sudden exhaustion of their welcome in the country of their mother's birth and citizenship is real.

[**129.**] Those with the power to grant the permission have the power to refuse. Were they to be refused continued stay, not only the children's position but the mother's enjoyment of life and her freedom of movement would be prejudiced. It does seem to me not unreasonable that a citizen of Botswana should feel resentful and aggrieved by a law which puts her in this invidious position as a woman when that same law is not made to apply in the same manner to other citizens, just because they are men. Equal treatment by the law irrespective of sex has been denied her.

[**130.**] The respondent has, in my view, substantiated her allegation that the Citizenship Act circumscribes her freedom of movement given by section 14 of the Constitution. She has made a case that as a mother her movements are determined by what happens to her children. If her children are liable to be barred from entry into or thrown out of her own native country as aliens, her right to live in Botswana would be limited. As a mother of young children she would have to follow them. Her allegation of infringement of her rights under section 14 of the Constitution by section 4 of the Citizenship Act seems to me to have substance. The Court *a quo*, therefore, had no alternative but to hear her on the merits.

[**131.**] The appellant has argued that if even the respondent had *locus standi* with respect to a challenge to section 4 of the Citizenship Act, she certainly did not have *locus* with respect to section 5, as the situation which that section provides for, namely, the citizenship of children born outside Botswana, does not apply to the respondent in any of the cases of her children. The possibility of the respondent giving birth at some future date to children abroad was too remote to form a basis for a challenge to section 5. With this submission I agree. But I must point out that the objections to section 4 may well apply to section 5. I, however, make no final judgment on that.

[**132.**] The appellant has argued that because of the manner in which the repeal and re-enactment of the laws on citizenship was done, declaring that section 4 was unconstitutional would create a vacuum. On that I

would like to adopt the words of Centlivres CJ in the case of *Harris v Minister of Interior* 1952 (2) SA 428 (A) at 456 where he says:

> The Court in declaring that such a statute is invalid is exercising a duty which it owes to persons whose rights are entrenched by statute; its duty is simply to declare and apply the law and it would be inaccurate to say that the Court in discharging that is controlling the legislature. See Bryce's *American Constitution* (3rd ed, volume 1 at 582). It is hardly necessary to add that Courts of law are not concerned with the question whether an Act of Parliament is reasonable, politic or impolitic. See *Swart NO and Nicol NO v De Kock and Garner* 1951 (3) SA 589 at 606 (AD).

[**133.**] I expect if there is indeed a vacuum, Parliament would advise itself as to how to meet the situation.

[**134.**] The upshot of this discourse is that in my judgment the Court *a quo* was right in holding that section 4 of the Citizenship Act infringes the fundamental rights and freedoms of the respondent conferred by sections 3 (on fundamental rights and freedoms of the individual), 14 (on protection of freedom of movement) and 15 (on protection from discrimination) of the Constitution. The respondent has, however, not given a satisfactory basis for *locus standi* with respect to section 5 of the Act. And I therefore make no pronouncement in that regard. The learned judge *a quo* in the course of his judgment accepted the argument of counsel for the respondent that sections 4 and 5 of the Act denied the respondent protection from subjection to degrading treatment. I do not think it necessary to go into that question for the purposes of this decision. The declaration of the Court *a quo* that sections 4 and 5 of the Citizenship Act (Cap 01:01) are *ultra vires* the Constitution, is, accordingly, varied by deleting the reference to section 5. Otherwise the appeal is dismissed.

[**135.**] It remains for me to thank counsel for the very able and painstaking manner in which they have researched and presented their cases. I think here I speak for all my brothers if I say that we have indeed profited from, and enjoyed the manner of presentation of their arguments.

GHANA

New Patriotic Party v Inspector-General of Police

(2001) AHRLR 138 (GhSC 1993)

New Patriotic Party v Inspector-General of Police
Supreme Court, 30 November 1993
Judges: Archer, Hayfron-Benjamin, Francois, Amua-Sekyi, Aikins, Wiredu, Bamford-Addo
Extract: Hayfron-Benjamin JSC, delivering the leading judgment; full text on www.up.ac.za/chr
Previously reported: [1993-94] 2 GLR 459; [2000] 2 HRLRA 1

Assembly (permission required to assemble, 26, 35, 38, 39, 48, 51, 54, 58-60)
Interpretation (intention of framers of Constitution, 22-24, 53; international standards, 26, 27; interpretation guided by foreign case law, 57; wide interpretation, 58-59)
Limitations of rights (restrictions must neither be inconsistent with, nor in contravention of the provisions of the Constitution, 27, 48, 59)

Charles Hayfron-Benjamin JSC

[**1.**] On 3 February 1993 the police in Sekondi in the Western Region granted the plaintiff a permit to hold a rally on 6 February 1993 in Sekondi. However, on 5 February 1993 the police withdrew the permit and prohibited the holding of the rally. Yet again on 16 February 1993 the plaintiff in conjunction with other political parties embarked on a peaceful demonstration in Accra 'to protest against the 1993 budget of the Government of Ghana'.

[**2.**] This 'peaceful demonstration' was, according to the plaintiff, violently broken up by the police and some of those taking part in the demonstration were arrested and charged before the Circuit Court, Accra, with demonstrating without a permit and failing to disperse contrary to sections 8, 12(c) and 13 of the Public Order Decree, 1972 (NRCD 68).

[**3.**] The plaintiff complained further that, on 17 February 1993 the Kyebi Police in the Eastern Region granted the plaintiff a permit to hold a rally at Kyebi 'to commemorate the 28th anniversary of the tragic death of Dr Joseph Boakye Danquah'. On the day when the rally was to be held, the police withdrew the permit and prohibited the holding of the rally. The plaintiff therefore filed a writ in this Court wherein it claimed:

A declaration that —

(a) Section 7 of the Public Order Decree, 1972 (NRCD 68) which gives the Minister for the Interior the power to prohibit the holding of public meetings or processions for a period in a specified area; section 8 of the said Decree which provides that the holding of all public processions and meetings and the public celebration of any traditional custom shall be subject to the obtention of prior police permission; section 12(c) of the said Decree which gives to a superior police officer the power to stop or disperse such a procession or meeting; and section 13 of the said Decree which makes it an offence to hold such processions, meetings and public celebrations without such permission, are inconsistent with and a contravention of the Constitution, 1992, especially article 21(1)(d) thereof, and are therefore null, void and unenforceable.

(b) Under the Constitution, 1992, no permission is required of the police or any other authority for the holding of a rally or demonstration or procession or the public celebration of any traditional custom by any person, group or organisation.

[**4.**] By his statement of case, the defendant, while not specifically admitting the allegation that the plaintiff and other members of some other political parties were embarked on a 'peaceful demonstration through the streets of Accra on 16 February 1993', nevertheless denied that he had violently broken up the demonstration. In the view of the defendant, the procession was 'an unlawful demonstration'. The defendant, however, admitted the other two actions alleged in the plaintiff's statement of case and claimed that the actions complained of were lawful exercise of authority within the intendments of the Public Order Decree, 1972 (NRCD 68). The defendants stated their case thus:

(9) The defendant admits paragraphs 9 and 10 of the statement of the plaintiff's case. (10) The defendant says further that the allegations contained in paragraphs 9 and 10 of the statement of the plaintiff's case were the result of a lawful and reasonable exercise of authority vested in the police by the Public Order Decree, 1972 (NRCD 68). (11) The defendant also says in further answer to paragraphs 9 and 10 of the statement of the plaintiff's case that the said paragraphs are irrelevant to the present action.

[**5.**] There was a clear misunderstanding of the procedural rules of this Court as to the filing of the memorandum of issues. The parties separately filed what they termed agreed issues even though the same were not signed by each other's counsel. However, paragraph 6 of the plaintiff's memorandum of issues was identical to the single issue raised by the defendant in his memorandum of issues. This issue was, in my respectful opinion, the kernel of the matters in controversy between the parties. It reads:

Whether or not sections 7, 8, 12(c) and 13 of the Public Order Decree, 1972 (NRCD 68) are inconsistent with and a contravention of the Constitution, 1992, particularly article 21(1)(d) thereof and are therefore null, void and unenforceable.

[**6.**] In other words, whether (1) a ministerial, police or other permit is required for the exercise of any public activity envisaged by sections 7

and 8 of NRCD 68; (2) the superior police officer or other authorised public officer may stop and disperse citizens taking part in any such public activity as is envisaged by sections 7 and 8 of NRCD 68; and (3) citizens may be punished for taking part in any such public activity.

[**7.**] For the purpose of this case the first provisions of the Constitution, 1992, which need to be set out are article 21(1)(d)and (4)(a), (b) and (c):

> 21(1) All persons shall have the right to — . . . (d) freedom of assembly including freedom to take part in processions and demonstrations . . . (4) Nothing in, or done under the authority of, a law shall be held to be inconsistent with, or in contravention of, this article to the extent that the law in question makes provision — (a) for the imposition of restrictions, by order of a court, that are required in the interest of defence, public safety or public order, on the movement or residence within Ghana of any person; (b) for the imposition of restrictions by order of a court, on the movement or residence within Ghana of any person either as a result of his having been found guilty of a criminal offence under the laws of Ghana or for the purposes of ensuring that he appears before a court at a later date for trial for a criminal offence or for proceedings relating to his extradition or lawful removal from Ghana, (c) for the imposition of restrictions that are reasonably required in the interest of defence, public safety, public health or the running of essential services, on the movement or residence within Ghana of any person or persons generally, or any class of persons.

[**8.**] Before coming to NRCD 68 itself, some account should be given of the history leading up to it. This Court cannot be insensible to the fact of the colonial status from which we have evolved into a nation; nor can we be oblivious of the fact that while in the main we have received the laws from our British colonial masters — the common law — these laws were often qualified by ordinances and regulations designed to remind us of our subject status and to ensure that our colonial masters had the peace and quiet necessary to enable them live among us and rule us.

[**9.**] In his learned treatise on *The Constitutional Law of Great Britain and the Commonwealth* (2nd ed), Hood Phillips cites from Professor Dicey's classic treatise on *Law of the Constitution* (9th ed) wherein the latter author states the general principle of English law respecting the right of assembling and processing as follows:

> The right of assembling is nothing more than a result of the view taken by the Courts as to individual liberty of person and individual liberty of speech. There is no special law allowing A, B and C to meet together either in the open air or elsewhere for a lawful purpose, but the right of A to go where he pleases so that he does not commit a trespass, and to say what he likes to B so that his talk is not libellous or seditious, the right of B to do the like, and the existence of the same rights of C, D, E and F and so on *ad infinitum* lead to the consequence that A, B, C and D and a thousand or ten thousand other persons, may (as a general rule) meet together in any place where otherwise they each have a right to be for a lawful purpose and in a lawful manner.

Hood Phillips continues with his own observation at that:

> There is a general right to promote or take part in a public meeting on private

premises, and to promote or take part in a public procession, subject in either case to the infringement of particular legal rules.

[**10.**] Within our municipality — and in colonial times — our courts have not been bound in the construction of the Criminal Code by any judicial decision or opinion on the construction of any other stature, or of the common law as to the definition of any offence or of any element of any offence. The distinction between common law offences and statutory offences therefore does not exist in our criminal jurisprudence.

[**11.**] The first Criminal Code — Ordinance no 12 of 1892 — was passed on 31 October 1892 and included such common law offences as sedition, unlawful assembly, rout and riot. By various later arrangements in the order in which it stood in the statute book, the Criminal Code became Ordinance no 50 of 1952 and was until 1960 known as 'Cap 9'. On a close examination of Cap 9, it will be found that the nearest mention of a 'permit' is contained in section 142(10) where it is stated that whoever:

> (10) In any town, without a *licence in writing* from the Governor or a District Commissioner beats or plays any drum, gong, tom-tom, or other similar instrument of music between eight o'clock at night and six in the morning, shall be liable to a fine of forty shillings.

(The emphasis is mine.)

[**12.**] The concept of a permit, however, first appears in 1926 in pursuance of authority granted to the Governor by the Police Force Ordinance, 1922 (Cap 37). By virtue of the powers granted the Governor under Cap 37, the Public Meetings and Processions Regulations, 1926 (no 10 of 1926) was made on 26 April 1926. Section 2 of the regulations states:

> 2. Any person who desires to hold or form any meeting or procession in a *public way* shall first apply to a police officer not below the rank of Assistant Commissioner of Police, or, if there be no such officer, then to the District Commissioner, for permission to do so; and, if such police officer or District Commissioner is satisfied that the meeting or procession is not likely to cause a breach of peace, he may issue a permit authorising the meeting or procession, and may in such permit prescribe any special conditions, limitations, or restrictions to be observed with respect thereto.

(The emphasis is mine.)

[**13.**] Such was the state of the law on public meetings and processions until 1961 when the Public Order Act, 1961 (Act 58) was passed and received the presidential assent on 29 May 1961. Section 6 thereof was identical to section 2 of the regulations of 1926 set out above. There were, however, three important differences between the two sections. The long title of Act 58 was:

> An act to replace, with minor modifications, enactments relating to the control of the procession or carrying of arms, the holding of public meetings and processions and the imposition of curfews.

[**14.**] First, whereas the regulations mentioned 'public way', Act 58 men-

tioned 'public place'. The interpretation section of Act 58 did not provide any definition of a 'public place'. Cap 9 however refers to the definition of 'public place' and 'public way' as bearing the same meaning as are contained in the Criminal Code. Under the Code, the expression 'public place' is all-embracing and includes a 'public way'. But a 'public way' is defined as including: 'any highway, market place, lorry park, square, street, bridge, or other way which is lawfully used by the public.' Yet again, the application of the regulations was limited to the towns mentioned in the schedule as amended by the Public Meetings and Processions (no 2) Regulations, 1954 (LN 415) made under Cap 37. I do not think that it was for nothing that the expression 'public way' was used in the regulations. The regulations were applicable only to the towns named in the Schedule. As I understand it, the regulations were made to control traffic, the assembling and procession of rival parades at the same place and time and to give the authorities advance notice to afford them proper opportunity for effective policing.

[**15.**] Secondly, Act 58 effectively revoked LN 415. Consequently, Act 58 applied to the whole country.

[**16.**] Thirdly, Act 58 came into force after the promulgation of the Constitution, 1960. The relevant provision in the Constitution, 1960, which appeared to assure the citizen of 'the right to move and assemble without hindrance' was contained in article 13(1). If indeed there was such a 'right', then section 6 of Act 58 was clearly inconsistent with the Constitution, 1960, and was therefore null, void and unenforceable. But in the case of *Re Akoto* [1961] GLR (Pt II) 523, the Supreme Court held otherwise. *Re Akoto* is often considered as a case on the validity of the Preventive Detention Act, 1958 (no 17 of 1958). What many fail to appreciate is that article 13(1) of the Constitution, 1960, contained many provisions which in later constitutions have been expanded into substantive articles. In *Re Akoto* learned counsel for the appellants submitted, *inter alia* at 533:

> 3. That the Preventive Detention Act, 1958, which was not passed upon a declaration of emergency or as a restriction necessary for preserving public order, morality or health, but which nevertheless placed a penal enactment in the hands of the President to discriminate against Ghanaians, namely to arrest and detain any Ghanaian and to imprison him for at least five years and thus deprive him of his freedom of speech, or of the right to move and assemble without hindrance, or of the right of access to the courts of law, constitutes a direct violation of the Constitution of the Republic of Ghana and is wholly invalid and void.

[**17.**] The clear answer given by their lordships is stated at 533-534 and it reads:

> All the grounds relied upon appear to be based upon article 13 of the Constitution. It is contended that the Preventive Detention Act is invalid because it is repugnant to the Constitution of the Republic of Ghana, 1960, as article 13(1) requires the President upon assumption of office to declare his adherence to certain fundamental principles which are:

> That the powers of Government spring from the will of the people and should be exercised in accordance therewith; That freedom and justice should be honoured and maintained; That the union of Africa should be striven for by every lawful means and when attained, should be faithfully preserved; That the Independence of Ghana should not be surrendered or diminished on any grounds other than the furtherance of African unity; That no person should suffer discrimination on grounds of sex, race, tribe, religion or political belief; That Chieftancy in Ghana should be guaranteed and preserved; That every citizen of Ghana should receive his fair share of the produce yielded by the development of the country; That subject to such restrictions as may be necessary for preserving public order, morality or health, no person should be deprived of freedom of religion, of speech, of the right to move and assemble without hindrance or of the right of access to courts of law.

This contention, however, is based on a misconception of the intent, purpose and effect of article 13(1) the provisions of which are, in our view, similar to the Coronation Oath taken by the Queen of England during the Coronation Service. In the one case the President is required to make a solemn declaration, in the other the Queen is required to take a solemn oath. Neither the oath nor the declaration can be said to have a statutory effect of an enactment of Parliament. The suggestion that the declarations made by the President on assumption of office constitute a 'Bill of Rights' in the sense in which the expression is understood under the Constitution of the United States of America is therefore untenable.

[**18.**] I have not been able to resist setting down the whole of article 13(1) of the Constitution, 1960, as stated by their lordships in the *Akoto* case (*supra*), the better to demonstrate the extent to which that judgment undermined the very fabric of that Constitution and literally pushed aside certain principles and fundamental human and civil rights which have become the bulwark of the Constitution, 1992. Act 58 thus lost none of its operational efficacy and the consent of the minister or 'permit' from the police remained a necessary prerequisite for the holding or formation of 'any meeting or procession in a public place'. The Public Order (Amendment) Act, 1963 (Act 165) restated section 16 of Act 58 and extended the permit requirement to the celebration of traditional customs and the display of Asafo company flags.

[**19.**] NRCD 68, parts of which form the basis of the plaintiff's complaint in the present case, is in essence a consolidation of the previous public order legislations and the public meetings and processions regulations. Sections 7 and 8 of NRCD 68 read:

> 7(1) The Commissioner may by executive instrument prohibit for a specified time (not being more than one week) in a specified place or area the holding of a public meeting or procession, and any meeting or procession held in contravention of any such instrument shall be unlawful. (2) It shall not be lawful to hold a public meeting or public procession within five hundred yards of — (a) any meeting place of the National Redemption Council, the Executive Council or any Committee thereof, (b) any official residence of a member of the National Redemption Council or the Executive Council, (c) any office or official residence

> of a Regional Commissioner, or (d) any port or airport, except with the written consent of the Commissioner or any person authorised by him.
>
> 8(1) Any person who intends — (a) to hold or form any meeting or procession; or (b) to celebrate any traditional custom, in any public place shall first apply to a superior police officer for permission to do so. (2) The superior police officer shall consider the application fairly and impartially, and shall issue a permit authorising the meeting, procession or celebration unless he is satisfied upon reasonable grounds that it is likely to cause a breach of the peace or to be prejudicial to national security. (3) The superior police officer may prescribe in the permit such conditions and restrictions as are reasonably required — (a) in the interests of defence, public order, public safety, public morality, public health or the running of essential services; or (b) to protect the rights and freedoms of other persons. (4) Where an officer refuses to grant a permit under this section he shall inform the applicant in writing of the reasons for his refusal.

[**20**.] It is evident that the public order laws in one form or the other have existed during the period of all four Republican Constitutions which we have had in this country. Yet, it seems it is only now that a challenge has been raised as to their constitutionality. The answers are clear. As I have already stated, *Re Akoto* (*supra*) denuded article 13(1) of the Constitution, 1960, of any constitutional force. Next, the relevant articles in the Constitutions, 1969 and 1979, did not confer the right to process. The right of assembly and association was 'for the protection of his [the citizen's] interest'. Article 23(1) of the Constitution, 1969, and article 29(1) of the Constitution, 1979, are [exactly the same] and read:

> 29(1) No person shall be hindered in the enjoyment of his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to trade unions or other associations, national and international, for the protection of his interests.

[**21**.] It is clear from the above article that the Constitutions, 1969 and 1979, only granted limited freedoms. Further, there was no constitutional right to form or hold a procession or demonstration in a public place. As to the right to hold or form a procession, I do not think article 24(1) of the Constitution, 1969, or article 30(1) of the Constitution, 1979, on the freedom of movement is the same as the freedom to hold and form processions. Indeed, I am fortified in my view by the manner in which these freedoms are treated in the Constitution, 1992. The freedom of association as envisaged in the former constitutions is clearly stated in article 21(1)(e) of the Constitution, 1992, while the corresponding freedom of movement is stated in article 21(1)(g) of the Constitution, 1992. The matter in issue between the parties before us concerns article 21(1)(d) of the Constitution, 1992, which has been set out above, and whether the allegedly offending sections of NRCD 68 are inconsistent with it and therefore null, void, and unenforceable.

[**22**.] In argument before us the Deputy Attorney-General, Mr Martin Amidu, referred to the case of *Tuffuor v Attorney-General* [1980] GLR 637, CA sitting as SC and the dictum of Sowah JSC (as he then was) at

661-662 and submitted that this Court must be guided by the intentions of the framers of the Constitution, 1992. I agree with him.

[**23.**] Before the framers of the Constitution, 1992, embarked upon the exercise of writing that Constitution, the desires and views of the citizens on their constitutional expectations had been collated by the National Commission on Democracy. The Commission's report formed the basis of the recommendations of the Committee of Experts. The experts adopted the Directive Principles of State Policy as first enunciated in the Constitution, 1979. The experts acknowledged that they had used that charter in the Constitution, 1979, a's a basis for its deliberation on this subject'.

[**24.**] In the *Report of the Committee of Experts*, page 49, paragraph 94 it is stated:

> The NCD report speaks of the need to include in the new Constitution '*core principles around which national political, social and economic life will revolve'*. This is precisely what the Directive Principles of State Policy seeks to do. Against the background of the achievements and failings of our post-independence experience, and our aspirations for the future as a people, the Principles attempt to set the stage for the enunciation of political, civil, economic and social rights of our people. They may thus be regarded as spelling out in broad strokes the *spirit* or *conscience* of the Constitution. (The emphasis is mine.)

The experts recognised that the directive principles were not justiciable. Nevertheless, they gave convincing reasons for including them in the Constitution, 1992, and concluded at page 49, paragraph 95 that their usefulness lies in the fact that 'they provide goals for legislative programmes and a guide for judicial interpretation'. For the first time there was a recommendation for the inclusion of political objectives in the Constitution, 1992, and at page 50, paragraph 100 of its report, the Committee of Experts suggested that: 'The state should cultivate among all Ghanaians respect for fundamental human rights and for the dignity of the human person.'

[**25.**] The framers of the Constitution, 1992, having adopted the directive principles stated in article 34(1) of the Constitution, 1992, the scope for their implementation thus:

> The Directive Principles of State Policy contained in this Charter shall guide all citizens, Parliament, the President, the Judiciary, the Council of State, the Cabinet, political parties and other bodies and persons in applying or interpreting this Constitution or any other law and in taking and implementing any policy decisions, for the establishment of a just and free society.

[**26.**] The political objectives were stated in article 35 of the Constitution, 1992. In the main, article 35 of the Constitution, 1992, sufficiently reflects the recom-mendations of the committee of experts. This Court — and indeed all courts — is therefore entitled to take into consideration political matters in 'applying or interpreting this Constitution'. I do not, however, think it appropriate to dilate on political matters in the consideration of

this opinion. Suffice it to say that this Court cannot ignore the fact that at the close of this second millennium of the modern era the attainment and enjoyment of fundamental human rights have become prime instruments of international relations. In rendering this opinion therefore, we must take into serious consideration the struggles, exploits and demands of the oppressed and struggling peoples in Africa, America and elsewhere led by such men as Nelson Mandela and Dr Martin Luther King Jr in their fight for fundamental human and civil rights. Judging by the frequency with which the African National Congress and other political parties hold rallies and demonstrations in South Africa, the police would be very hard put to it, if they were to issue a permit for any such rally or demonstration to be held. I do not believe a permit is required in that country to enable any person or group of persons to assemble, process or demonstrate. We cannot wish for these others anything more than we wish for ourselves. Indeed, the very constitutional provision — article 21(1)(d) of the Constitution, 1992 — which has provoked this litigation, is firmly rooted in chapter 5 of our Constitution, 1992, which deals with fundamental human rights and freedoms. Within our municipality I do not think that I can contemplate a better statement of our national attitude on fundamental human rights than the editorial comment in the state-owned national weekly, *The Mirror* of Saturday, 10 July 1993, parts of which read:

> The problem of human rights violations has become a disturbing source of concern to all peace-loving people of the world. For a long time now, governments of various countries have been accused of violating the rights of their peoples by way of trampling upon their fundamental human rights with impunity.
>
> What is more, these governments do not take cognisance of the fact that every human being was born into the world to enjoy maximum freedom — freedom to associate, of movement, and indeed freedom to express one's views freely without looking over one's shoulders to see whether there is the big stick in waiting.
>
> Looking seriously at the human rights record of some governments, it is sad to conclude that the freedoms of their peoples are toyed with, if that is the only means to keep them in perpetual power.
>
> A lot has been said about the violation of human rights but mere talks on human rights violation and denial of fundamental freedoms will be totally meaningless unless concrete measures are put in place to enforce the laws and prevent occurrences.
>
> The absence of civil and political rights certainly creates a sordid situation which enables authoritarian and autocratic regimes to blossom and thus take the opposite direction as far as human rights are concerned.
>
> It is in this regard that [*The Mirror*] wishes to urge all governments to realise that the people they govern should be made to enjoy all the God-given freedoms they deserve.
>
> The Constitution of the Fourth Republic provides for the strict adherence of human rights and it is anticipated that every effort must be made to uphold the dignity of man in the interest of peace and stability.

[**27.**] The 'spirit or conscience' of the Constitution, 1992, as epitomised by the above-cited comment must therefore be our guide in considering this

opinion. Next, it was submitted by the Deputy Attorney-General that the Constitution, 1992, has reserved to the sovereign authority the right to provide for order. He referred to article 21(4)(c) of the Constitution, 1992, as being the constitutional force behind the submission. Article 21(4)(c) of the Constitution, 1992, has been stated *supra in extenso* and therefore there is no need to repeat it. The submission, however, cannot be right. A brief comparison between article 21(4)(a) and 21(4)(c) of the Constitution, 1992, shows that the expression 'public order' does not occur in the latter. By itself the expression 'public safety' is used in contradistinction to the expression 'public order'.

[**28.**] True, in accordance with the canons of interpretation sometimes 'or' can be interpreted to mean 'and'. In *Green v Premier Glynrhonwy Slate Co Ltd* [1928] 1 KB 561 at 568, CA is stated *per* Scrutton LJ:

> You do sometimes read 'or' as 'and' in a statute . . . But you do not do it unless you are obliged, because 'or' does not generally mean 'and' and 'and' does not generally mean 'or'.

In my respectful opinion, I am not obliged to read in the context of article 21 of the Constitution, 1992, the expression 'or' in subsection (4)(a) as 'and'. First, in article 21(4)(a) the imposition of the restrictions as they apply to article 21(d) of the Constitution, 1992, is by the Court, while in article 21(4)(c) whoever is imposing the restrictions is required to exercise his discretion — that is to say, the 'restrictions are reasonably required'. Secondly, article 21(4)(a) provides for the imposition of prior restraint by the Court on the exercise of the fundamental freedoms, while article 21(4)(c) is akin to the emergency powers which, short of a presidential declaration of a state of emergency, may be exercised under the authority of any law made to cover the situations and the persons mentioned in that subsection — see article 31(9) of the Constitution, 1992. Clearly, article 21(4)(c) cannot be invoked in aid of a valid exercise of authority under NRCD 68.

[**29.**] Again it was submitted on behalf of the defendant that sections 7, 8, 12(c) and 13 of NRCD 68 constitute reasonable restrictions as are required by article 21 of the Constitution, 1992, and that the said sections are in accord with the spirit of the Constitution, 1992.

[**30.**] It will be useful to deal first with the provisions of section 12(a) of NRCD 68 and then with the provisions of section 13 thereof, as it is clear that if the provisions of sections 7 and 8 of NRCD 68 are unconstitutional, then no meeting or procession can be held or formed in contravention of section 12(a) of NRCD 68, which confers on the police officer or the authorised public officer unfettered powers, and without ascribing any reasons therefore, to 'stop and cause to be dispersed any meetings or processions in any public place'. Such absolute power conferred upon a police or administrative officer or a minister of state to abridge the fundamental human rights of the citizen is unconstitutional.

[**31.**] When citizens meet or process in a public place in pursuance of their constitutional right to hold meetings and form processions they are only subject to the criminal law which for the present is contained in our Criminal Code, 1960 (Act 29). In *Republic v Kambey* [1991] 1 GLR 235, SC the accused persons were convicted of murder and sentenced to death. They appealed against their convictions to the Court of Appeal which allowed their appeal. The state then appealed against the judgment of the Court of Appeal to this Court. In this Court, one of the issues raised at 243 was:

> whether by their conduct the Duusi chief and his subjects had assembled with intent to commit an offence, and if not, whether being assembled to collect dawadawa fruits, which may be taken as a common purpose, they so conducted themselves as to cause persons in the neighbourhood reasonably to fear that the persons so assembled would commit a breach of the peace.

[**32.**] My learned and respected brother Aikins JSC, writing for the Court in considering the issue of the quality of such an assembly, referred to sections 202, 202A(1) and 201(1) of Act 29 and said at 245:

Such an assembly to be unlawful must be for purposes forbidden by law or with intent to carry out their common purpose in such a manner as to endanger public peace. Even if having assembled there for a lawful purpose, and with no intention of carrying it out unlawfully, they had knowledge that their assembly would be opposed, and had good reason to suppose that a breach of the peace would be committed by the first prosecution witness and others who opposed it, they would not be guilty of an unlawful assembly.

[**33.**] Aikins JSC cited the English case of *Beatty v Gillbanks* (1882) 9 QBD 308, DC in support of the above statement and for emphasis on the right of citizens to assemble in public for a lawful purpose.

[**34.**] This leads me to a consideration of section 13(a) of NRCD 68. Certainly if a meeting, procession or demonstration is being held lawfully and nothing done by persons attending such a meeting or forming the procession or demonstration contravenes the criminal law, such persons shall not be guilty under section 13(a) of NRCD 68. *Beatty v Gillbanks* (*supra*) is illustrative of the scope of the freedom articulated by article 21(d) of the Constitution, 1992. At 314 of the report of that case, Field J rightly said:

> What has happened here is that an unlawful organization has assumed to itself the right to prevent the appellants and others from lawfully assembling together, and the finding of the justices amounts to this, that a man may be convicted for doing a lawful act if he knows that his doing it may cause another to do an unlawful act. There is no authority for such a proposition, and the question of the justices whether the facts stated in the case constituted the offence charged in the information must therefore be answered in the negative.

[**35.**] By its writ of summons the plaintiff sought declarations concerning the constitutionality of sections 12(c) and 13 of NRCD 68. The orders which this Court made on 22 July 1993, however, affect only sections

12(a) and 13(a) of NRCD 68. In my respectful opinion, we could not grant a declaration in favour of the plaintiff affecting section 12(c) of NRCD 68. It would have been irresponsible for a court to order in the light of section 12(c) of NRCD 68, which deals with the powers of the police and other authorised public officers to stop and disperse unlawful assemblies, that the police should remain helpless onlookers in a situation in which a 'breach of the peace has taken or is taking place or is considered by the officer as likely to take place'. It is, however, obvious that the subsection which the plaintiff sought to attack was subsection 12(a) of NRCD 68, which is the corresponding power vested in the police or other authorised public authority with respect to breaches of sections 7 and 8 of NRCD 68. It will therefore be amended to read section 12(a) in place of section 12(c) of NRCD 68. The relief affecting the whole of section 13 of NRCD 68 was also restricted to section 13(a) of NRCD 68 as section 13(b) of NRCD 68 had no relevance to any activity as was envisaged by sections 7 and 8 of NRCD 68. In any case, the plaintiff made no complaint concerning the provisions contained in sections 10 and 11 of NRCD 68.

[**36.**] One little difficulty however arises. Section 8(1)(b) of NRCD 68 refers to the celebration of a 'traditional custom' while section 10(2)(a) of NRCD 68 speaks of the celebration of 'any custom'. It seems to me that 'traditional customs' are such notorious affairs that we can take judicial notice of them. These come under section 8 of NRCD 68 and will thus be affected by the unconstitutionality of that section. On the other hand such customs as may be prohibited under section 10(2)(a) of NRCD 68 are those customs which from the intendments of that section are antisocial, degenerative of morals or involve lewd and profane singing and dancing in connection with fetish or other worship or activity.

[**37.**] Section 7 of NRCD 68 has been stated *supra* and need not be repeated here. The essential feature of that section is that the commissioner (now Minister for the Interior) may by executive instrument prohibit for not more than one week the holding of a public meeting or procession in a specified place. Indeed, in their respective statements of case none of the parties suggested or submitted that an executive instrument had been passed by the Minister in respect of any of the incidents complained of. However, the defendant made two averments which brought section 7 of NRCD 68 into issue. First, the defendant averred that sections 7, 8, 12(a) and 13 of NRCD 68 were 'reasonable and lawful restrictions on the freedom stipulated in article 21(d) of the Constitution, 1992 by virtue of article 21(4) of the Constitution, 1992'. Next, the defendant traversed generally 'every allegation of fact and law contained in the plaintiff's statement of case'. The issue joined by the parties consequently required this Court to determine, *inter alia*, whether section 7 was inconsistent with and a contravention of the Constitution, 1992. Since the plaintiff was seeking a declaration to that effect against which the defendant was contesting, and there was no challenge as to whether the plaintiff had *locus standi* in the matter, this Court had jurisdiction to entertain that issue.

[**38.**] The generality of section 7 of NRCD 68 is to create a prior restraint on the freedom of the citizen to hold a meeting or form a procession and in terms of article 21(d) of the Constitution, 1992, also to demonstrate in a public place. A prior restraint is an injunction prohibiting the freedom of assembly, procession or demonstration, whether such injunction or prohibition is imposed by stature or by an order of the court. It may be said that in this case, the prohibition or injunction may not be for more than one week. But then neither the section nor the whole of NRCD 68 assures that the prohibiting executive instrument cannot be repeated. Consequently, when such a power is exercised by the minister it becomes a [hinderance to] the citizen's freedom to assemble, process and demonstrate. In *Kunz v New York* 340 US 290 (1951) the US Supreme Count said:

> It is noteworthy that there is no mention in the ordinance of reasons for which such a permit application can be refused. This interpretation allows the police commissioner, an administrative official, to exercise discretion in denying subsequent permit applications on the basis of his interpretation, at that time, of what is deemed to be conduct condemned by the ordinance. We have here, then, an ordinance which gives an administrative official discretionary power to control in advance the right of citizens to speak on religious matters on the streets of New York. As such, the ordinance is clearly invalid as a prior restraint on the exercise of First Amendment rights.

[**39.**] Section 7(1) of NRCD 68 constitutes a prior restraint on the freedom of the citizen with respect to his rights under article 21(d) of the Constitution, 1992, and is unconstitutional and void.

[**40.**] However, the principle of prior restraint is not unknown to our Constitution, 1992. Article 21(4)(a) of the Constitution, 1992, and to a certain extent and in special circumstances, article 21(4)(e) of the Constitution, 1992, clearly enunciate the principle. It will be observed that under article 21(4)(a) of the Constitution, 1992, the power to impose restrictions is vested in the courts, while in article 21(4)(c) of the Constitution, 1992, the power as required to control those situations mentioned therein must be granted by a law which imposes reasonable restrictions on the fundamental freedoms, but does not deny the citizen the fundamental freedoms to which he is entitled. In other words, the citizen's freedoms may be restricted by law on the grounds stated in the Constitution, 1992, but they cannot be denied. Any such denial will be unconstitutional and void. Again with respect to restrictions imposed by a court, the *audi alterem partem* rule must be adhered to. In *Carroll v President & Commissioners of Princess Anne*, 393 US 175 (1968) the US Supreme Court held that an *ex parte* order forbidding a rally was unconstitutional where the applicants could not demonstrate that it was impossible to notify the opposing party in order to afford it the opportunity of contesting the application.

[**41.**] Section 7(2) of NRCD 68 raises an entirely different issue from section 7(1) of NRCD 68. In section 7(2) of NRCD 68 no lawful public meeting or procession can be held in the places mentioned therein 'except with the

written consent of the Commissioner or any person authorised by him'. It will be noted that for the first time in the history of our constitutional development, article 21(d) of the Constitution, 1992, provides for the right of the citizen to demonstrate. To demonstrate means either to petition for the redress of grievances or express support for or opposition to a cause. Once again, whereas in the former constitutions, the citizen was not to be 'hindered' in the enjoyment of his fundamental freedoms, in the Constitution, 1992, there is a 'right' conferred on the citizen in the enjoyment of his freedoms. This positive attitude towards the enjoyment of the freedoms cannot be abridged by a law which prevents the citizen from delivering his protest even to the seat of government. In *Adderley v Florida*, 385 US 39 at 54 (1966), one Adderley and others were convicted for trespassing upon the premises of a Florida county jail. The defendants had gone on the jail premises to protest against the arrest of their fellow students. They refused to leave on being notified that they would be arrested for trespassing. The defendants claimed that the conviction violated their constitutional right of assembly. The US Supreme Court affirmed their convictions. I, however, incline to the views of Mr Justice Douglas expressed in his dissent, with which Chief Justice Warren and Mr Justice Brennan concurred, and I adopt them in support of my opinion in the present case. He said:

> There may be some public places which are so clearly committed to other purposes that their use for the airing of grievances is anomalous. There may be some instances in which assemblies and petitions for redress of grievances are not consistent with other necessary purposes of public property. A noisy meeting may be out of keeping with the serenity of the statehouse or the quiet of the courthouse. No one, for example, would suggest that the Senate gallery is the proper place for a vociferous protest rally. And, in other cases, it may be necessary to adjust the right to petition for redress of grievances to the other interest inhering in the uses to which the public property is normally put . . . But this is quite different from saying that all public places are off limits to people with grievances . . . And it is farther yet from saying that the 'custodian' of the public property, in his discretion, can decide when public places shall be used for the communication of ideas, especially the constitutional right to assemble and petition for redress of grievances . . . For to place such discretion in any public official, be he the 'custodian' of the public property or the local police commissioner . . . is to place those who assert their First Amendment rights at his mercy. It gives him the awesome power to decide whose ideas may be expressed and who shall be denied a place to air their claims and petition their government.

[**42.**] The section 72 of NRCD 68 also provides that any such meeting or procession cannot be lawfully held 'except with the consent of the [Minister] or any person authorised by him'. This provision gives the minister an unfettered right to refuse his consent. To invest the minister with such unfettered discretion is to place those who assert their constitutional rights of assembly, procession and demonstration at his mercy. 'It gives him the awesome power' to decide who shall be permitted to approach those

places mentioned in NRCD 68. Section 7(2) of NRCD 68 is also clearly unconstitutional.

[**43.**] In his statement of case, the defendant admits having withdrawn two permits and breaking up a third procession — though he did not apply any violence. In his view, his actions were 'lawful and reasonable exercise of authority vested in the police by the Public Order Decree, 1972 (NRCD 68)'.

[**44.**] Before us the Deputy Attorney-General submitted that as long as the police were not vested with unfettered authority, their actions could be reviewed by the courts. He could not say under what law such actions as were complained of against the defendant could be reviewed by the courts.

[**45.**] Section 8 of NRCD 68 provided for the obtaining of a 'permit'. It was not denied by the defendants that in all the three instances the plaintiff had applied for permits and had been so granted. What section of NRCD 68 entitled them to withdraw the permits they did not say. By section 8(4) of NRCD 68 it was only where a police officer refuses to grant a permit under section 8 of NRCD 68 should he 'inform the applicant *in writing* of the reasons for his refusal'. (The emphasis is mine.) It is clear that even if the provisions of section 8 of NRCD 68 were lawful, which they are not, once the permit was granted there was no lawful authority for the police to withdraw it. The fact that other persons might disturb that meeting or procession and thereby cause a breach of the peace would not be a sufficient reason or grounds for withdrawing the permit.

[**46.**] The complaint before us was that section 8 of NRCD 68 was inconsistent with the provisions of article 21(d) of the Constitution, 1992, and therefore null, void and unenforceable. The single issue raised by this section is the validity of permits as abridgments of the constitutional rights enshrined in article 21(d) of the Constitution, 1992. The matter is not without authority. There are relevant cases decided in the United States, Canada, India, Pakistan, the West Indies and in the Privy Council in the United Kingdom. The United States cases predominate because the issue of the validity of local and state permits for meetings, assemblies, processions and demonstrations of the civil rights movements and activists have been considered in a variety of landmark judgments.

[**47.**] The history of the civil rights movement in the United States led by Martin Luther King Jr and other American southern black people and organisations in the 1950s and 1960s are too well documented to require repetition in this opinion. It must be admitted that this movement by the southern blacks fuelled the wrath of the southern white communities who employed two techniques against the black protesters, namely (a) prosecutions for criminal trespass; and (b) breaches of the peace. The basis of these two techniques was the laws relating to licensing and permits. In the *Adderley* case (*supra*) [at 56] Mr Justice Douglas concluded his dissent thus:

> Today a trespass law is used to penalize people for exercising a constitutional right. Tomorrow a disorderly conduct statute, a breach-of-the-peace statute, a vagrancy statute will be put to the same end. It is said that the sheriff did not make the arrests because of the view which petitioners espoused. That excuse is usually given, as we know from the many cases involving arrests of minority groups for breaches of the peace, unlawful assemblies, and parading without a permit.

[**48.**] We are here concerned with permits. Section 8(2) of NRCD 68 requires that the superior police officer shall consider the application for a permit 'fairly and impartially'. The duty to act fairly and impartially presupposes a duty to make a determination between competing interests. In the instant subsection it involves the choice between two positions, one of which is illusory — the citizen's rights of assembly, procession and demonstration as against the discretion of the senior police officer in determining whether to refuse a permit on the grounds that there is the likelihood of a breach of the peace or that the meeting or procession will be prejudicial to national security. The subsection provides no guide as to the form and content of an application for a permit nor the yardstick nor the standard which the senior police officer shall apply in determining whether or not he shall grant a permit. Although the senior police officer must inform the applicant of the reasons for his refusal to grant the permit, such refusal cannot be challenged in any court. Thus a senior police officer may, out of prejudice, bias or even political preference refuse a permit on flippant and untenable grounds. I have already referred to Mr Justice Douglas's dissenting opinion in the *Adderley* case (*supra*) and the necessity to prevent any abridgment of the fundamental human rights of the citizen. With our political history then as a guide, the danger that such awesome power as is contained in section 8 of NRCD 68 will be used to suppress the fundamental freedoms and civil rights of our people becomes real and must be struck down as unconstitutional.

[**49.**] In *Saia v New York*, 334 US 558 at 560-561 (1948) Mr Justice Douglas delivering the majority opinion of the US Supreme Court said:

> In *Hague v CIO* [307 US 496 (1939)], we struck down a city ordinance which required a licence from a local official for a public assembly on the streets or highways or in the public parks or public buildings. The official was empowered to refuse the permit if in his opinion the refusal would prevent 'riots, disturbances or disorderly assemblage'. We held that the ordinance was void on its face because it could be made 'the instrument of arbitrary suppression of free expression of views on national affairs'. The present ordinance has the same defects. The right to be heard is placed in the uncontrolled discretion of the Chief of Police. He stands athwart the channels of communication as an obstruction which can be removed only after criminal trial and conviction and lengthy appeal.

[**50.**] In *Saia v New York* (*supra*) the ordinance complained of required any one seeking to use a loudspeaker system in a public place to obtain a permit. But absolute discretion to grant or refuse such permit was vested

in the Chief of Police. The ordinance was held to be unconstitutional. In *Hague v CIO*, 307 US 496 at 515-516 (1939) Mr Justice Roberts said:

> Wherever title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights and liberties of citizens. The privilege . . . to use the streets and the parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative and must be exercised in subordination to the general comfort and convenience and in consonance with peace and good order; *but it must not, in the guise of regulation, be abridged or denied.*

(The emphasis is mine.)

[**51.**] Under our present Constitution, 1992, therefore, while in appropriate cases either the courts or a relevant law may impose a restriction on any of the freedoms contained in article 21 of the Constitution, 1992, the requirement that a permit be obtained before the exercise thereof will be unconstitutional and void.

[**52.**] The Deputy Attorney-General referred to the First Amendment to the United States Constitution and submitted that that amendment was a restriction on the United States Congress to make laws abridging certain freedoms. He may well be right. The civil rights cases however show that the major victories won in aid of the improvement in the social and political standing of the African-American have succeeded on the combined application of the First and Fourteenth Amendments to that Constitution. It is said that the first ten amendments to the United States Constitution constitute a Bill of Rights. In 1961 in the *Akoto* case (*supra*), our Supreme Court missed the opportunity to designate article 13 of the Constitution, 1960, as a Bill of Rights. The Court said at 534 of the report:

> The suggestion that the declarations made by the President on assumption of office constitute a 'Bill of Rights' in the sense in which the expression is understood under the Constitution of the United States of America is therefore untenable.

[**53.**] I think the court proceeded on the principle of *ubi jus, remedium*. Since no remedy was provided for a breach of article 13 of the Constitution, 1960, the matter was not justiciable. Of course our countrymen and women learnt a bitter lesson from that judgment. Every constitution since then has provided for punishment for the infringement or breach of the Presidential Oath. In the present Constitution, 1992, the framers have done the reverse of the United States First Amendment provisions. They have set out in clear and unmistakable terms the fundamental human and civil rights which our people must enjoy. In Chapter 5 of the Constitution, 1992, appropriate procedures for redress and enforcement of these rights are provided for in article 33 of the Constitution, 1992. It is interesting to note that article 33(5) of the Constitution, 1992, extends the scope of

human rights enjoyment when it says that the rights mentioned in Chapter 5 '. . . shall not be regarded as excluding others not specifically mentioned which are considered to be inherent in a democracy and intended to secure the freedom and dignity of man'. I have no doubt in my mind that the framers of the Constitution, 1992, intended that the citizens of this country should enjoy the fullest measure of responsible human and civil rights. Therefore any law which seeks to abridge these freedoms and rights must be struck down as unconstitutional. The requirement of a permit or licence is one such abridgement of the constitutional right.

[**54.**] Finally, the Deputy Attorney-General submitted that this court should consider the necessity for the police to have the power to perform their duties effectively. He cited the timely police and security forces intervention in the recent spate of ethnic conflicts. In his view, the police could only perform their duties effectively if they could rely on the provisions of NRCD 68. Further, that with respect to the exercise of the undoubted constitutional rights of the citizen to meet, process and demonstrate the retention of sections 7 and 8 of NRCD 68 with their consent and permit requirements was necessary to ensure that the police are able to 'prevent actions which are prejudicial to the rights and freedoms of others or the public peace'. The meaning of the word 'permit' therefore becomes crucial in the consideration of this submission. The police have undoubted peacekeeping powers. But can they prevent the citizen by the use of their permit from exercising his fundamental human and civil rights? In *Berton v Alliance Economic Investment Co Ltd* [1922] 1 KB 742 at 759, CA Lord Atkin defined a permit in this manner:

> To my mind the word permit means one of two things, either to give leave for an act which without that leave could not be legally done, or to abstain from taking reasonable steps to prevent the act where it is within a man's power to prevent it.

[**55.**] I subscribe wholly to the above *dictum*. The object of the consent or permit requirement within the intendments of sections 7 and 8 of NRCD 68 is to give leave for the performance of an act which without such consent or permit is forbidden by law. The necessary implication therefore is that under NRCD 68 meetings, processions and demonstrations are prohibited by law unless sanctioned by the police or other such authority. This proposition — and I cannot think of a better statement of the legal position — clearly violates the enshrined provisions of article 21(d) of the Constitution, 1992, as it constitutes a serious abridgment of the human rights of the citizen. Where any law or action is in conflict with the letter and spirit of the Constitution, 1992, which is the fundamental law of the land, then to the extent of such conflict or inconsistency that law is unconstitutional, void and unenforceable.

[**56.**] In *Francis v Chief of Police* [1973] AC 761 (PC) — a case from which I have derived much assistance in preparing this opinion — their lordships of the board of the Privy Council had occasion to examine the issue of

permits and their constitutionality with respect to the Constitution of the West Indian state of St Christopher, Nevis and Anguilla. The matter concerned in that case was the constitutionality of section 5(1) of the Public Meetings and Processions Act, 1969, of that country which gave unfettered discretion to 'the Chief of Police to grant or refuse permission for the use of noisy instruments at a public meeting'. Mr Francis was charged with using a noisy instrument — a loudspeaker — at a public meeting without first having obtained a permit from the Chief of Police. The issue raised for determination by their lordships in the Privy Council was whether section 5(1) of the Act constituted an unreasonable restriction of the freedoms contained in section 10 of that country's Constitution? In the *Francis* case (*supra*) at 769 the board advised that section 5(1) of the Act was not unconstitutional as 'the use of loudspeakers and other noisy instruments is an adjunct or accessory' to the holding of meetings, processions and demonstrations. Interest in the *Francis* case (*supra*) arises because the St Christopher Public Meetings and Processions Ordinance is in content almost similar to our NRCD 68. The essential differences are that (1) the St Christopher Ordinance deals separately with each fundamental freedom and provides a necessary regulation for the enjoyment of each right by the citizen; and (2) there is a right of appeal to the Governor in the event of a refusal to grant a permit. Thus under section 3 of the St Christopher Ordinance which requires any person wishing to hold a public meeting to inform the police, the board said at 768 of the report:

> It is to be noted that under section 3 a person who wishes to hold a public meeting, though he does have to give notice of it, *does not have to ask permission*, and the holding of the meeting cannot be prohibited or restricted except in special circumstances connected with the preservation of public order.

(The emphasis is mine.)

On the other hand under our NRCD 68, as I have said earlier, there are no such freedoms save those that are permitted by the police or other authority. The *Francis* case (*supra*) therefore distinguished permits which affect the fundamental human and civil rights from those that are adjunct or accessory to the enjoyment of those freedoms. The former are unconstitutional. In my respectful opinion, it is not necessary for effective policing that the police or any other authority shall be invested with the power to consent or issue permits for the enjoyment or exercise of the fundamental human and civil rights of the citizen as enshrined in the Constitution, 1992.

[**57.**] In rendering this opinion I have considered and applied the views — both the majority and the dissenting — contained in the judgments of the United States Supreme Court which show the principles and policy considerations involved. In my respectful opinion, they constitute useful guides to the interpretation of our Constitution, 1992 — particularly the charter on fundamental human and civil rights. In the *Francis* case (*supra*) at 772 Lord Pearson writing for the board noted that:

> The American judges look for the inherent limitations which there must be in the fundamental freedoms of the individual if the freedom of others and the interests of the community are not to be infringed.

[**58.**] Lord Pearson suggests two ways which will be useful in our context in construing constitutional provisions affecting fundamental human and civil rights. One way will be to read into our article 21(1)(d) of the Constitution, 1992, 'the necessary limitations as are inherent' in the fundamental freedoms of assembly including the freedom to take part in processions and demonstrations. The other way will be to examine article 21(1)(d) of the Constitution, 1992, to see whether 'according to the literal meaning of the words there is a *prima facie* hindering of or interference with the freedom of assembly, procession or demonstration' and, if there is, to examine article 21(4) of the Constitution 'to see whether such hindering or interference is justifiable'.

[**59.**] I fully subscribe to the two ways stated above for construing the constitutionality of article 21(d) of the Constitution, 1992. The first way does not impose any difficulty in its construction. The necessary limitations which are inherent in the exercise or enjoyment of any 'right' of assembly, procession or demonstration are that the citizen must observe the law — in particular that part of the Criminal Code, 1960 (Act 29) which deals with the preservation of the public peace. The other way however presents some difficulty. The literal meaning of article 21(4) of the Constitution, 1992, implies that in certain circumstances there can be laws to restrict the constitutional provisions under article 21 of the Constitution, 1992. The rider to the construction of article 21(4) of the Constitution, 1992, is, as I have stated earlier, that the law must provide for restrictions to be imposed by a court or spell out restrictions which must be neither inconsistent with nor in contravention of the provisions or the Constitution, 1992. Within the intendments of article 21(4) of the Constitution, 1992, the phrase 'public order' appearing therein must be given such a wide interpretation as will protect the constitutional rights of other citizens.

[**60.**] In construing article 21(1)(d) and (4) of the Constitution, 1992, therefore, it is clear (1) that the concept of consent or permit as prerequisites for the enjoyment of the fundamental human right to assemble, process or demonstrate is outside their purview. Sections 7 and 8 of NRCD 68 are consequently patently inconsistent with the letter and spirit of the provisions of article 21(d) of the Constitution, 1992, and are unconstitutional, void and unenforceable; and (2) some restrictions as are provided for by article 21(4) of the Constitution, 1992, may be necessary from time to time and upon proper occasion. But the right to assemble, process or demonstrate cannot be denied. The sections of NRCD 68 which formed the basis of the plaintiff's writ were *ex facie* unconstitutional, void and unenforceable. It is for these reasons that the plaintiff's writ succeeded, and the declarations were granted and the orders made.

NAMIBIA

State v Tcoeib

(2001) AHRLR 158 (NaSC 1996)

S v Tcoeib
Supreme Court, 6 February 1996
Judges: Mahomed, Dumbutshena, Leon
Previously reported: 1996 (1) SACR 390 (NmS); 1996 (7) BCLR 996 (NS)

Life (constitutionality of life imprisonment, 4, 16, 17, 18, 31)
Cruel, inhuman or degrading punishment (constitutionality of life imprisonment, 4, 16, 19, 20, 22, 24, 31, 33, 35)
Interpretation (interpretation guided by foreign case law, 20, 21, 25; international standards, 27, 28)

Mahomed CJ

[**1.**] The appellant was indicted in the Court *a quo,* on two counts of murder and one count of theft. He was convicted on all three counts. On each of the counts of murder he was sentenced to life imprisonment and on the count of theft he was sentenced to two years' imprisonment. The Court *a quo* directed that the latter two sentences were to run concurrently with the life sentence imposed on the first count of murder. The Court *a quo* further recommended that the appellant ought not to be 'released on parole or probation before the lapse of at least 18 years' imprisonment calculated from the date of sentence'.[1]

[**2.**] An application for leave to appeal was made to, and refused by, the trial judge who was O'Linn J.[2] The 'main thrust' of the application was that a sentence of life imprisonment was unconstitutional in Namibia. That contention had not previously been advanced during the trial.

[**3.**] Following the dismissal of the application for leave to appeal by the Court *a quo,* the appellant petitioned the Chief Justice for leave to appeal to the Supreme Court of Namibia in terms of section 316(6) of the Criminal Procedure Act 51 of 1977, as amended. Substantially because of certain conflicting *dicta* on the constitutionality of a sentence of life imprisonment emanating from the High Court, leave to appeal was granted on this petition in the following terms:

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1 *S v Tcoeib* 1991 (2) SACR 627 (Nm).
2 Reported in 1993 (1) SACR 274 (Nm).

> Leave is granted to Lukas Tcoeib to appeal to the Supreme Court against sentence only and in particular whether a sentence to life imprisonment is competent in terms of the Constitution of Namibia.

[**4.**] Although it was not analysed in that way by counsel for the appellant, the attack on the sentence imposed on the appellant involves a consideration of three issues: (1) Is the imposition of a sentence of life imprisonment *per se* unconstitutional in Namibia? (2) If it is not *per se* unconstitutional, is such a sentence nevertheless unconstitutional in the circumstances of the present case? (3) Apart from the issue of the constitutionality of the sentence, is it a sentence of such harshness in the present case as to justify an interference therewith by the Supreme Court pursuant to its ordinary appeal jurisdiction?

The basic facts

[**5.**] The appellant perpetrated two vicious murders. He had planned to kill five members of the Otner family, who were his employers. He went to the farm of the Otners to execute that plan. He killed the adopted son and the wife of his employer in cold blood with a .308 rifle which he found at the residence of the Otners. He thereafter took some moneys from the residence, the keys of a motor vehicle and some wine. He then waited for his employer, Mr Max Otner and two other members of the Otner family, including a child, to return to the homestead. His intention was to shoot and kill them as well. When they did not return after some time, the appellant decided to flee in the motor vehicle, but before that he cut the telephone wires and placed near the body of one of the deceased he had killed, another .308 rifle which he had found in the Otner residence.

[**6.**] The appellant's only excuse for these acts of viciousness was that his employer, Mr Max Otner, had wrongly accused him of stealing four bottles of wine either on the previous day or a few days prior to the murders. The trial judge assumed the correctness of that explanation but rightly pointed out that none of the persons whom the accused had killed had anything to do with that incident, that the murders were committed 'on unsuspecting and helpless people' and that they were carefully planned. The trial judge was alive to all the relevant factors in favour of the accused, including the fact that he was a first offender; that he was between 23 and 25 years old and still relatively young; and that he was unsophisticated; that he was angry when he committed the crimes; that he cooperated with the police and the prosecution upon his arrest and that he was a 'good worker'. The court concluded nevertheless that:

> The accused has shown himself as a dangerous person who murdered for the flimsiest of reasons and can do so again because this type of reason can recur in his life at any stage.[3]

[3] *S v Tcoeib* (at 635 i-j).

[**7.**] In the result, the Court decided that 'the aggravating factors greatly overshadow the mitigating factors' and that in this kind of case the factors of deterrence, prevention and retribution deserved 'more emphasis and weight'.[4] This caused the learned judge to impose the sentences of life imprisonment which counsel now seeks to attack on the appellant's behalf.

Is a sentence of life imprisonment *per se* unconstitutional?

[**8.**] In order to determine whether a sentence of life imprisonment is *per se* unconstitutional in Namibia, it is necessary to analyse the relevant provisions of the Constitution, to consider the applicable statutory mechanisms pertaining to such punishment and then to enquire whether such statutory provisions are consistent with the Constitution.

The relevant constitutional provisions

[**9.**] The Constitution of Namibia, in its preamble, expresses that 'recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is indispensable for freedom, justice and peace'; that 'the right of the individual to life, liberty and the pursuit of happiness' is afforded to all 'regardless of race, colour, ethnic origin, sex, religion, creed or social or economic status'; and that the Namibian people, by their adoption of a Constitution founded on these values and principles, have articulated their 'desire to promote amongst all of us the dignity of the individual and the unity and integrity of the Namibian nation among and in association with the nations of the world'.

Chapter 3 of the Constitution defines a number of 'fundamental rights and freedoms' to be respected and upheld. Included in these rights and freedoms are those enshrined in articles 6, 7, 8 and 18.

Article 6 of the Constitution states that:

> The right to life shall be respected and protected. No law may prescribe death as a competent sentence. No court or tribunal shall have the power to impose a sentence of death upon any person. No executions shall take place in Namibia.

Article 7 provides that:

> No person shall be deprived of personal liberty except according to procedures established by law.

Article 8 stipulates that:

> (1) The dignity of all persons shall be inviolable.
> (2)(a) In any judicial proceedings or in other proceedings before any organ of the state, and during the enforcement of a penalty, respect for human dignity shall be guaranteed.
> (b) No person shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.

[4] *S v Tcoeib* (at 636 a-b).

Article 18 prescribes that:

> Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal.

Article 25 of the Namibian Constitution provides that the legislature shall make no laws and the executive shall take no action which abolishes or abridges the fundamental rights and freedoms conferred in Chapter 3 and any law or action in contravention thereof shall be invalid to the extent of such contravention, provided that a competent court may direct the appropriate authority to correct the defect in the law or action within a specified period during which time the impugned law or action shall remain valid. These provisions apply *mutatis mutandis* to laws enacted prior to independence.

The relevant statutory mechanisms

[**10.**] Section 276(1) of the Criminal Procedure Act 51 of 1977 (the Criminal Procedure Act), which provides that it is competent for a court of law to impose a sentence of imprisonment upon a person convicted of an offence, does not place any limit on the period of imprisonment which can be imposed. This section must be read together with section 283 (1) of the Criminal Procedure Act which provides that: '(1) A person liable to a sentence of imprisonment for life or for any period may be sentenced to imprisonment for any shorter periods . . . There is no provision in the Criminal Procedure Act or any other law in Namibia which obliges a court to impose life imprisonment in respect of any particular offence. The sentence of life imprisonment is thus a *discretionary* sentence in Namibia, available for a court to impose should such court believe that the particular circumstances of a particular case warrant the imposition of such a sentence.

[**11.**] However, the fact that an accused may be sentenced to imprisonment for life in Namibia does not mean that such an accused is thereby never able to regain his or her freedom. Life imprisonment *may* mean imprisonment for the rest of the natural life of the accused, but this is not always the position.[5] The sections of the Criminal Procedure Act relating to the discretionary imposition of the sentence of life imprisonment must be read together with those provisions of the Prisons Act 8 of 1959 (the Prisons Act), as amended by Act 13 of 1981 (SWA), relating to the treatment of prisoners, the system of release on parole and the granting of executive pardons. Section 2(b) of the Prisons Act, as amended by section 2 of Act 13 of 1981 (SWA), states that:

[5] See Du Toit *et al Commentary on the Criminal Procedure Act* (Juta & Co Ltd) at 28-20A; *R v Mzwakala* 1957 (4) SA 273 (A); *S v Tuhadeleni and Others* 1969 (1) SA 153 (A); *S v Whitehead* 1970 (4) SA 424 (A); *S v Sibiya* 1973 (2) SA 51 (A).

> (2) The functions of the Prisons Service shall be:
> (a) . . .
> (b) as far as practicable, to apply such treatment to convicted prisoners as may lead to their reformation and rehabilitation and to train them in habits of industry and labour;

[**12.**] Section 61 of the Prisons Act, as amended by section 34 of Act 13 of 1981 (SWA), provides that:

> An institutional committee shall, with due regard to any remarks made by the court in question at the time of the imposition of the sentence and at such times and intervals (which intervals shall not be longer than six months) as may be determined by the Commissioner or when otherwise required by the Commissioner or release board:
> (a) make recommendations as to the training and treatment to be applied to any prisoner referred to in para (b);
> (b) submit reports . . . to the Commissioner and the release board on, inter alia, the conduct, adaptation, training, aptitude, industry, physical and mental state of health and the possibility of relapse into crime of every prisoner who is detained in the prison in respect of which it has been established and:
> . . .
> (iv) upon whom a life sentence has been imposed;

[**13.**] Section 61 *bis* of the Prisons Act, as inserted by section 35 of Act 13 of 1981 (SWA), provides that:

> A release board shall at such times and intervals as may be determined by the Commissioner or when otherwise required by the Commissioner:
> (a) with due regard to any remarks made by the court in question at the time of the imposition of the sentence on the prisoner concerned and of any report on that prisoner furnished to it in terms of s 61(&) by the institutional committee concerned, make recommendations as to:
> (i) the release of that prisoner either on probation or on parole at the expiration of his sentence;
> (ii) the period for and the conditions on which that prisoner may be released on probation;
> (iii) the period for supervision under and conditions on which that prisoner may be released on parole; . . .

[**14.**] Section 64 of the Prisons Act, as amended by subsection 5(2), 36 and 53 (a) of Act 13 of 1981 (SWA) and as further read with article 140(5) of the Namibian Constitution, provides that:

> (1) Upon receipt of a report from the release board regarding a prisoner upon whom a life sentence has been imposed and containing a recommendation for the release of such prisoner, the Commissioner shall submit such report to the President of Namibia.
> (2) . . .
> (3) The President of Namibia may authorize the release of such prisoner on the date recommended by the release board or on any other date, either unconditionally or on probation or on parole as he may direct.

[**15.**] Section 67 of the Prisons Act, as amended by subsection 39 and 53

(a) of Act 13 of 1981 (SWA) and as read with article 140(5) of the Namibian Constitution, provides that:

> (1) The Commissioner may:
> (a) . . .
> (b) on the authority of the President of Namibia or any other competent authority granted under any provision of any law in respect of a prisoner serving any period of imprisonment, and irrespective of whether the imprisonment was imposed with or without the option of a fine, release such prisoner before the expiration of the period in question either on probation or on parole for such period and on such conditions as may be specified in the warrant of release.
> (2) If any prisoner so released either on probation or on parole completes the period thereof without breaking any condition of the release, he shall no longer be deemed to be liable to any punishment in respect of the conviction upon which he was sentenced.

Application of the relevant constitutional provisions to the statutory mechanisms

[**16.**] Article 6 of the Namibian Constitution has expressly abolished the death penalty in Namibia. By so doing the Namibian people have recognised, protected and entrenched their commitment to the inalienable right of every person to enjoy respect for his or her life and dignity.[6] In *Tjtjo's* case[7], Levy J expressed the view that life imprisonment was unconstitutional. His reasons for that view were expressed as follows:

> Mr Small has argued that this Court should take into account the fact that the trial court could have imposed a sentence of 'life imprisonment'. In my view, the provision in article 6 of the Constitution of Namibia that 'no Court or Tribunal shall have the power to impose a sentence of death upon a person' categorically prohibits a sentence of life imprisonment. 'Life imprisonment' is a sentence of death.
>
> Furthermore, life imprisonment, as a sentence, is in conflict with article 8(2)(b) of the Constitution in that it is 'cruel, inhuman and degrading punishment'. It removes from a prisoner all hope of his or her release. When a term of years is imposed, the prisoner looks forward to the expiry of that term when he shall walk out of gaol a free person, one who has paid his or her debt to society. Life imprisonment robs the prisoner of this hope. Take away his hope and you take away his dignity and all desire he may have to continue living. Article 8 of our Constitution entrenches the right of all people to dignity. This includes prisoners. The concept of life imprisonment destroys human dignity reducing a prisoner to a number behind the walls of a jail waiting only for death to set him free.
>
> The fact that he may be released on parole is no answer. In the first place for a judicial officer to impose any sentence with parole in mind is an abdication by such officer of his function and duty and to transfer his duty to some administrator probably not as well equipped as he may be to make judicial decisions. It also puts into the hands of the Executive, where the sentence is life imprisonment, the power to detain a person for the remainder of his life irrespective of

6 See *S v Makwanyane and Another* 1995 (3) SA 391 (CC), 1995 (2) SACR 1, 1995 (6) BCLR 665 (CC).

7 *S v Nehemia Tjijo*, High Court of Namibia, 4/9/91, unreported.

> the fact that the person may well be reformed and fit to take his place in society. Furthermore, even though he or she may be out of gaol on parole such person is conscious of his life sentence and conscious of the fact that his or her debt to society can never be paid. Life imprisonment makes a mockery of the reformative end of punishment.
>
> I am satisfied that it is in the interests of justice and in keeping with the spirit of the Constitution that all sentences should be quantified so that a prisoner knows with certainty what his penalty is. I therefore dismiss any argument suggesting that the appellant could in law have been sentenced to life imprisonment.

[**17.**] If Levy J was correct in his conclusion that life imprisonment was a sentence of death, the conclusion that a sentence of life imprisonment is unconstitutional would be inescapable because the death sentence is prohibited by article 6 of the Constitution. I am, however, unable to agree that life imprisonment constitutes a sentence of death. The Constitution itself distinguishes between protection of life guaranteed in article 6 and protection of liberty guaranteed in article 7. Life imprisonment does not terminate the life of the imprisoned. It invades his liberty. The two cannot be equated. As was observed in the United States:

> . . . the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality differs more from life imprisonment than a 100-year prison term differs from one of a year or two.[8]

[**18.**] Both on textual and on inherently conceptual grounds there seems to me to be a clear distinction between the death penalty which is prohibited by article 6 and life imprisonment and I am satisfied that Levy J was not correct in equating the two. The other High Court judges who have refused to equate life imprisonment with the death sentence were in my view correct.[9] This conclusion does not, however, end the debate on the constitutionality of a sentence of life imprisonment. Even if such a sentence does not conflict with article 6 of the Constitution, it might still be unconstitutional if it is inconsistent with article 8(1) of the Constitution which protects the dignity of all persons or article 8(2)(b) which protects all persons from cruel, inhuman or degrading treatment or punishment or if such a sentence is in conflict with any of the other constitutional provisions to which I have previously referred.

[**19.**] Can it properly be said that life imprisonment unconstitutionally violates the dignity of the person sentenced or constitutes an invasion of the right of every person to be protected from cruel, inhuman or degrading treatment or punishment? There can be little doubt that a sentence which compels any person to spend the whole of his or her natural life in

8 *Woodson v North Carolina* 428 US 280 at 305.

9 See the judgment of OLinn J in the application for leave to appeal in the present matter, *supra* n 2; see also the remards of Frank J and Muller AJ in *Tjijos* case, *supra* n 8; *S v Hilunaye Moses*, High Court of Namibia (CC 2/92) 22/4/1992, unreported; *S v Immanuel Kaukungwa and three Others*, High Court of Namibia, 12/12/1991, unreported; *S v M Shikongo*, High Court of Namibia, 23/10/91, and *S v Paulus Alexander and Another*, High Court of Namibia (CC 77/92) 29/5/1992, unreported.

incarceration, divorced from his family and his friends in conditions of deliberate austerity and deprivation, isolated from access to and enjoyment of the elementary bounties of civilised living is indeed a punishment of distressing severity. Even when it is permitted in civilised countries, it is resorted to only in extreme cases either because society legitimately needs to be protected against the risk of a repetition of such conduct by the offender in the future or because the offence committed by the offender is so monstrous in its gravity as to legitimise the extreme degree of disapprobation which the community seeks to express through such a sentence. These ideas were expressed by the Court in the case of *Thynne, Wilson and Gunnell v The United Kingdom,*[10] where it stated that:

> Life sentences are imposed in circumstances where the offence is so grave that even if there is little risk of repetition it merits such a severe, condign sentence and life sentences are also imposed where the public require protection and must have protection even though the gravity of the offence may not be so serious because there is a very real risk of repetition . . .

[**20.**] But, however relevant such considerations may be, there is no escape from the conclusion that an order deliberately incarcerating a citizen for the rest of his or her natural life severely impacts upon much of what is central to the enjoyment of life itself in any civilised community and can therefore only be upheld if it is demonstrably justified. In my view, it cannot be justified if it effectively amounts to a sentence which locks the gates of the prison irreversibly for the offender without any prospect whatever of any lawful escape from that condition for the rest of his or her natural life and regardless of any circumstances which might subsequently arise. Such circumstances might include sociological and psychological re-evaluation of the character of the offender which might destroy the previous fear that his or her release after a few years might endanger the safety of others or evidence which might otherwise show that the offender has reached such an advanced age or become so infirm and sick or so repentant about his or her past, that continuous incarceration of the offender at state expense constitutes a cruelty which can no longer be defended in the public interest. To insist, therefore, that regardless of the circumstances, an offender should always spend the rest of his natural life in incarceration is to express despair about his future and to legitimately induce within the mind and the soul of the offender also a feeling of such despair and helplessness. Such a culture of mutually sustaining despair appears to me to be inconsistent with the deeply humane values articulated in the preamble and the text of the Namibian Constitution which so eloquently portrays the vision of a caring and compassionate democracy determined to liberate itself from the cruelty, the repression,

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[10] 13 EHRR 666 at 669 [quoting the Court of Appeal (Criminal Division)]. See also, *S v Letsolo* 1970 (3) SA 476 (A); *S v Mdau* 1991 (1) SA 169 (A).

the pain and the shame of its racist and colonial past.[11] Those values require the organs of that society continuously and consistently to care for the condition of its prisoners, to seek to manifest concern for, to reform and rehabilitate those prisoners during incarceration and concomitantly to induce in them a consciousness of their dignity, a belief in their worthiness and hope in their future. It is these concerns which influenced the German Federal Court in the life imprisonment case[12] to hold, *inter alia*, that: 'the essence of human dignity is attacked if the prisoner, notwithstanding his personal development, must abandon any hope of ever regaining his freedom.'[13]

[**21.**] The German Federal Court in that matter also referred to the German Prison Act in this context and stated:

> The threat of life imprisonment is contemplated, as is constitutionally required, by meaningful treatment of the prisoner. The prison institutions also have the duty in the case of prisoners sentenced to life imprisonment, to strive towards their resocialisation, to preserve their ability to cope with life and to counteract the negative effects of incarceration and destructive personality changes which go with it. The task which is involved here is based on the Constitution and can be deduced from the guarantee of the inviolability of human dignity contained in article 1(1) of the *Grundgesetz.*[14]

[**22.**] It seems to me that the sentence of life imprisonment in Namibia can therefore not be constitutionally sustainable if it effectively amounts to an order throwing the prisoner into a cell for the rest of the prisoner's natural life as if he was a 'thing' instead of a person without any continuing duty to respect his dignity (which would include his right not to live in despair and helplessness and without any hope of release, regardless of the circumstances).

[**23.**] The crucial issue is whether this is indeed the effect of a sentence of life imprisonment in Namibia. I am not satisfied that it is. Section 2(b) of the Prisons Act expressly identifies the treatment of convicted prisoners with the object of their reformation and rehabilitation as a function of the Prison Service and section 61 as read with section 5 *bis* provides a mechanism for the appointment of an institutional committee with the duty to make recommendations pertaining to the training and treatment of prisoners upon whom a life sentence has been imposed. Section 61 *bis* as read

[11] *S v Acheson* 1991 (2) SA 805 (Nm) at 813A-C; G*overnment of the Republic of Namibia and Another v Cultura 2000 and Another* 1994 (1) SA 407 (NmS) at 411 C-412D. No evidential enquiry is necessary to identify the content and impact of such constitutional values. The value judgment involved is made by an examination of the aspirations, norms, expectations and sensitivities of the Namibian people as they are expressed in the Constitution itself and in their national institutions. Of the remarks of OLinn J in the application for leave to appeal in the present matter *supra* n 2 at 281f-287e.

[12] 45 BverfGE 187.

[13] *Ibid* 245 (Translation from the German text by Dirk van Zyl Smit in the article 'Is life imprisonment constitutional? The German experience' published in *Public Law* (1992) 263 at 271).

[14] *Ibid* 238 (Van Zyl Smits translation, *supra* n 13 at 270).

with section 5 of that Act creates machinery for the appointment of a release board which may make recommendations for the release of prisoners on probation and section 64 (as amended) *inter alia* empowers the President of Namibia, acting on the recommendation of the release boards, to authorise the release of prisoners sentenced to life, and there are similar mechanisms for release provided in section 67. It therefore cannot properly be said that a person sentenced to life imprisonment is effectively abandoned as a 'thing' without any residual dignity and without affording such prisoner any hope of ever escaping from a condition of helpless and perpetual incarceration for the rest of his or her natural life. The hope of release is inherent in the statutory mechanisms. The realisation of that hope depends not only on the efforts of the prison authorities, but also on the sentenced offender himself. He can, by his own responses to the rehabilitatory efforts of the authorities, by the development and expansion of his own potential and his dignity and by the reconstruction and realisation of his own potential and personality, retain and enhance his dignity and enrich his prospects of liberation from what is undoubtedly a humiliating and punishing condition, but not a condition inherently or inevitably irreversible.

[**24.**] The nagging question which still remains is whether the statutory mechanisms to which I have referred, constitute a sufficiently 'concrete and fundamentally realisable expectation'[15] of release adequate to protect the prisoner's right to dignity, which must include belief in, and hope for, an acceptable future for himself. It must, I think, be conceded that if the release of the prisoner depends entirely on the capricious exercise of the discretion of the prison or executive authorities, leaving them free to consider such a possibility at a time which they please or not at all, and to decide what they please when they do, the hope which might yet flicker in the mind and heart of the prisoner is much too faint and much too unpredictable to retain for the prisoner a sufficient residue of dignity which is left uninvaded.

[**25.**] That kind of concern very much dominated the thinking of the German Federal Court in the life imprisonment case.[16] In my view, however, it would be incorrect to interpret the relevant statutory mechanisms pertaining to the release of prisoners sentenced to life imprisonment as if they permitted a totally unrestrained, unpredictable, capricious and arbitrary exercise of a discretion by the prison authorities. These mechanisms must be interpreted having regard to the discipline of the Constitution as well as the common law. The relevant authorities entrusted with these functions have not only to act in good faith, but they must properly apply their minds to each individual case, the relevant circumstances impacting on the exercise of a proper discretion, the objects of the relevant legislation

[15] Van Zyl Smit, *supra*, at 271.
[16] The life imprisonment case, *supra*, 246, (translation in English by Van Zyl Smit, *supra*, at 271).

creating such mechanisms and the values and protections of the Constitution. They must not allow their minds to be affected by irrelevant considerations, they must act impartially, without unfairly or irrationally discriminating between different persons and they must refrain from acting oppressively or arbitrarily.[17] If this kind of discipline is not maintained in the application of the statutory mechanisms and the exercise of any discretion pursuant thereto, the prisoner adversely affected might have a legitimate remedy in the courts. Every prisoner, however dastard be the crime he or she has committed, is entitled to be treated lawfully and fairly and every official entrusted with the administration of the Prisons Act, however eminent be his or her office, is obliged, in terms of article 18 of the Constitution, to act fairly and reasonably. That obligation is a continuing obligation and requires such officials to apply their minds to the merits of the case of each prisoner continuously after the lapse of periods which must reasonably be determined.

[**26.**] Properly considered, therefore, the statutory mechanisms to which I have referred and which pertain to the release of prisoners sentenced to life, do not in fact permit the relevant officials charged with the onerous functions of administering these mechanisms arbitrarily to decide which such prisoners they would consider for release and when they would do so. The objection based on the assumption that they can act so arbitrarily cannot therefore be upheld.

[**27.**] A sentence of life imprisonment sometimes, but not always, has mixed components. One component, in such cases, is intended to reflect the period of imprisonment which the convicted person deserves as a form of punishment for his or her wrongful act; the other component reflects the anxiety of the court to ensure that the convicted person remains incarcerated after he or she has served the punitive component of his or her sentence, simply because the court is not satisfied that society may not be endangered by his or her release either because of some mental instability or some other defect in the character of the person. That second component effectively reflects the need for judicial protection of society against the risks of recidivism. The problem which has in recent times engaged some jurists in Europe has been the distinction between these two components and the consequences of such a distinction.[18] It has been suggested, with some force, that upon the expiry of the punitive component of a sentence of life imprisonment, the further continued incarceration of the prisoner should be open to judicial monitoring because some

[17] *North-West Townships (Pty) Ltd v The Administrator, Transvaal and Another* 1975 (4) SA 1 (T) at 8; *Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd and Another* 1988 (3) SA 132 (A).

[18] In the European jurisprudence this is expressed by the difference between mandatory and discretionary sentences of life imprisonment. The former does not have a mixed component: the whole of the sentence is intended to express the punitive component. In the latter case both components are present. See, for example, *Wynne v United Kingdom* (1995) 19 EHRR 333.

kind of assessment needs periodically to be made about the risk of recidivism at any particular time.[19] In approaching this debate, the European Court of Human Rights has substantially been influenced by article 5(4) of the European Convention on Human Rights, which reads as follows:

> Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

Applying this article, the European Court of Human Rights has sometimes upheld applications made by prisoners for a declaration that in the particular circumstances of their case their incarceration after the expiry of the punitive component of their sentences of life imprisonment constituted a violation of article 5(4).[20]

[**28.**] Many interesting questions arise from this approach. Firstly, there may be problems following upon the practical difficulties of isolating from a composite sentence of life imprisonment the period which represents the punitive element of the sentence from the element of protection against recidivism. Secondly, there may be considerable debate which may ensue about the merits and the practicability of any system which vests in the courts the authority to determine the legitimacy of the detention of any sentenced prisoner after the expiry of the punitive period of a sentence at any particular stage, as against the merits of allowing that power, in the first instance, to reside with the executive and administrative organs of the state, with their infrastructure and access to monitoring facilities and psychiatric and sociological expertise. If such power is to be vested in the courts, there may also be interesting problems about the degree of latitude which must be allowed to the prison and executive authorities in making their assessments and whether or not it is possible to define some judicial standard which is more generous than the ordinary standard of judicial review of administrative actions, but something less than a standard which would allow a court to substitute its own discretion for the discretion of the administrative and executive authority.

[**29.**] It is not necessary in the present case to deal with any of these complexities or their consequences for the application of sentences of life imprisonment in this country. This is not an application by a prisoner who claims to have already served any period of imprisonment which could conceivably be said to have constituted the punitive part of the sentence imposed by the Court. Indeed, O'Linn J had in his judgment expressly taken the precaution of recommending to the executive that the appellant not be released on parole or probation before the lapse of

[19] *Weeks v United Kingdom* (1988) 10 EHRR 293; *Thyme, Wilson and Gunnell v United Kingdom* (*supra* n 10); *Wynne v United Kingdom* (*supra* n 18).

[20] See for example *Thynnes* case, *supra*, page 695, paragraph 81 and *Weeks* case, *supra*, page 318, paragraph 68.

at least 18 years of imprisonment, calculated from the date of the sentence. It is therefore not necessary to anticipate what approach the Court should adopt to any application which might be made in the future by a prisoner sentenced to life who has properly identified the punitive period of his or her imprisonment and who contends that, notwithstanding the expiry of that period and notwithstanding the fact that his or her further incarceration is not necessary for the protection of society, the administrative and executive organs of the state have wrongfully and unreasonably insisted on the perpetuation of that incarceration.

[**30**.] Suffice it for me to say that if and when such issues are properly raised in the future, they will have to be addressed by having regard to the international jurisprudence but ultimately, by the proper interpretation of the relevant provisions of the Namibian Constitution and the applicable statutes to which I have referred.

[**31**.] For the reasons which I have articulated I am unable to hold that life imprisonment as a sentence is *per se* unconstitutional in Namibia, regard being had to the fact that the relevant legislation permits release on parole in appropriate circumstances.

Is the sentence of life imprisonment unconstitutional on the facts of the present case?

[**32**.] Can it be contended that even if the sentence of life imprisonment is not *per se* unconstitutional in this country its imposition in the circumstances of the present case is unconstitutional because it amounts to inhuman or degrading treatment of the appellant or a violation of his dignity?

[**33**.] It may very well be that even if the sentence of life imprisonment is not *per se* unconstitutional its imposition in a particular case may indeed be unconstitutional if the circumstances of that case justify the conclusion that it is so grossly disproportionate to the severity of the crime committed that it constitutes cruel, inhuman or degrading punishment in the circumstances or impermissibly invades the dignity of the accused. This approach finds judicial resonance in some of the jurisprudence of the United States. Where sentences are grossly disproportionate to the offence committed they have sometimes been held to constitute a transgression of the eighth Amendment of the Constitution of the United States which prohibits the imposition of cruel and unusual punishment.[21]

[**34**.] Whatever be the merits of such an approach and its proper parameters in Namibia, it can be of no assistance to the appellant in the present case. The offences committed by the appellant were vicious in the extreme. They were executed with singular ruthlessness and premeditation. Having executed them remorselessly, the appellant waited to repeat the same acts upon other innocent members of the Otner family and,

[21] *Gregg v Georgia* 428 US 153; *Rummel v Estelle* 445 US 263 at 274; *McDonald v Commonwealth of Massachusetts* 180 US 311; *Barber v Gladden* (cert denied) 359 US 948.

when they did not make their appearance, he sought insensitively to cut the telephone wires, presumably to obstruct any communication and detection, and thereafter cunningly to place near the body of the deceased he had killed a rifle he had found in the house. The mitigation was tenuous in the extreme: a resentment apparently generated by an accusation of theft which the appellant considered to be untrue. The acts of the appellant were brutal and merciless. There is absolutely nothing disproportionate between the gravity of the offences and the sentences imposed. There is simply no factual basis to support any argument based on the jurisprudential approach which I have just described. The sentence imposed could not, on the facts of the case, conceivably be described as cruel, inhuman or degrading.

[**35.**] The obligation to undergo imprisonment would undoubtedly have some impact on the appellant's dignity, but some impact on the dignity of a prisoner is inherent in all imprisonment. What the Constitution seeks to protect are impermissible invasions of dignity not inherent in the very fact of imprisonment or indeed in the conviction of a person *per se.* No such protection in this case has been invaded.

[**36.**] Apart from the constitutionality of the sentence, is the Supreme Court entitled to interfere with the sentence imposed upon the appellant pursuant to its ordinary appeal jurisdiction?

[**37.**] I have already described the seriousness of the offence and the relatively trivial nature of the motivation which prompted it. The learned trial judge was perfectly alive to that motivation, the fact that the appellant was a first offender and all the other facts which were urged in mitigating. He was plainly correct in his conclusion, however, that the mitigating factors were completely outweighed by those which operated in aggravation of sentence. He in no way misdirected himself. He took into account all relevant facts and ignored what was irrelevant. The sentence imposed by him is severe but there is no striking disparity between that sentence and any sentence which I would have imposed if I had sat as a judge of first instance. The sentence imposed by the trial court constituted a proper exercise of the discretion vested in a court of first instance. No sufficient grounds have been advanced which would entitle us to interfere with that sentence. It induces no feeling of shock or outrage in me.[22]

Order

[**38.**] The appeal is dismissed and the conviction and sentence of the appellant is confirmed.

Dumbutshena AJ and Leon AJ concurred.

[22] *S v Hlapezula and Others* 1965 (4) SA 439 (A) at 444A; *S v Anderson* 1964 (3) SA 494 (A) at 495 G-H; *S v Narker and Another* 1975 (1) SA 583 (A) at 585 D; *S v Ivanisevic and Another* 1967 (4) SA 572 (A) at 575 H.

NIGERIA

Abacha and Others v Fawehinmi

(2001) AHRLR 172 (NgSC 2000)

General Sani Abacha, Attorney-General of the Federation, State Security Service and Inspector-General of the Police v Chief Gani Fawehinmi
Supreme Court, 28 April 2000 (SC 45/97)
Judges: Belgore, Ogundare, Mohammed, Iguh, Achike, Uwaifo, Ejiwunmi
Extract: Ogundare JSC delivering the leading judgment; full text on www.chr.up.ac.za
Previously reported: (2000) 4 FWLR 533; (2001) 1 CHR 20; (2000) 6 NWLR 228; (2002) 3 LRC 296

State responsibility (African Charter incorporated into domestic law - justiciable, status higher than ordinary legislation, but lower than Constitution, 11-15, 23-26, 28)
Fair trial (independence of courts — ousting of jurisdiction of ordinary courts, 30-34)
Personal liberty and security (arbitrary arrest and detention, 36-41)

Ogundare JSC

[**1.**] The facts of this case are simple enough. The respondent, a legal practitioner, was arrested without warrant at his residence on Tuesday 30 January 1996 at about 6 am by six men who identified themselves as operatives of the State Security Service (SSS) and policemen, and taken away to the office of the SSS at Shangisha where he was detained. At the time of arrest the respondent was not informed of, nor charged with, any offence. He was later detained at the Bauchi prison. In consequence, he applied *ex-parte* through his counsel, to the Federal High Court, Lagos, pursuant to the Fundamental Rights (Enforcement Procedure) Rules 1979 for the following reliefs against the four respondents who are now appellants before us and shall hereinafter be referred to as appellants:

> (i) A declaration that the arrest of the applicant, Chief Gani Fawehinmi, at his residence at 9A Ademola Close GRA, Ikeja, Lagos, on Tuesday, 30 January 1996, by the State Security Service (SSS) or officers, servants, agents, privies of the respondents and/or of the Federal Military Government constitutes a violation of the applicant's fundamental rights guaranteed under sections 31, 32 and 38 of the 1979 Constitution and articles 4, 5, 6 and 12 of the African Charter on Human and

> Peoples' Rights (Ratification and Enforcement) Act Cap 10 Laws of Federation of Nigeria 1990 and is therefore illegal and unconstitutional.
> (ii) A declaration that the detention and the continued detention of the applicant without charge since Tuesday 30 January 1996 when the applicant was arrested by the officers, servants, agents, privies of the respondents at his residence 9A Ademola Close GRA, Ikeja, Lagos, constitutes a gross violation of the applicant's fundamental rights guaranteed under sections 31, 32 and 38 of the 1979 Constitution and articles 5, 6 and 12 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Cap 10 Laws of Federation of Nigeria 1990 and is therefore illegal and unconstitutional.
> (iii) A mandatory order compelling the respondents, whether by themselves or by their officers, agents, servants privies or otherwise howsoever to forthwith release the applicant.

Alternatively:

> (a) An Order of *Mandamus* compelling the respondents to forthwith arraign the applicant before a properly constituted court or tribunal as required by section 33 of 1979 Constitution of the Federal Republic of Nigeria 1979 as preserved by Decree 107 of 1993 and article 7 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Cap 10 Laws of the Federation 1990.
> (b) An injunction restraining the respondents, whether by themselves or by their officers, agents, servants, privies or otherwise howsoever from further arresting, detaining or in any other manner infringing on the fundamental rights of the applicant.
> (c) N10,000,000 (ten million naira) damages for the unlawful and unconstitutional arrest and/ or detention of the applicant — Chief Gani Fawehinmi.

[**2.**] Leave having been granted, he applied by motion on notice for the said reliefs. On being served with the motion papers, learned counsel for the appellants filed a preliminary objection to the effect that the respondent could not maintain the action against the appellants on the grounds that the Court lacked competence to entertain it. The reasons given for the objection were:

> (i) By a subsidiary legislation made by the Inspector-General of Police in exercise of the powers conferred on him by State Security (Detention of Persons) Decree no 2 of 1984 (as amended) and further by section 4 of the aforementioned Decree no 2 of 1984 (as amended). The respondent/applicants are immune to any legal liabilities in respect of any action done pursuant to the Decree.
> (ii) The Federal Military Government (Supremacy and Enforcement) of Powers Decree no 12 of 1994 and Constitution (Suspension and Modification) Decree no 107 ousts the jurisdiction of this Honourable Court to entertain any civil proceedings that arise from anything done pursuant to the provisions of any Decree.
> (iii) This Honourable Court lacks the constitutional jurisdiction to entertain any action relating to the enforcement of any of the provisions of chapter IV of the 1979 Constitution (as amended) and the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act.

[**3.**] Arguments on the preliminary objection were taken from learned counsel appearing for the parties in the course of which a detention order,

no 00455, dated 3 February 1996, by which the respondent was detained, was shown to the Court and counsel for the respondent. In a reserved ruling given on 26 March 1996, the learned trial judge found:

> (i) That the Inspector-General of Police has been given the power to detain a person by the provisions of the State Security (Detention of Persons) Decree no 2 of 1984 as amended by the State Security (Detention of Persons) Amendment Decree no 11 of 1994.
> (ii) That the Court cannot question the legality of the detention order since it was made by the appropriate authority under the decree.
> (iii) That any of the provisions of the African Charter on Human and Peoples' Rights which are inconsistent with Decree no 107 of 1993 (the *grundnorm*) are void to the extent of their inconsistency.
> (iv) That the African Charter on Human and Peoples' Rights cannot stand on its own under the Nigerian law. It cannot be enforced as a distinct law as such; it is subject to our domestic law and ouster decrees.

[**4.**] The learned judge concluded:

In the result, I hold that the jurisdiction of this Court is ousted by Decree no 2 of 1984 and, therefore, it cannot entertain the action. Consequently, the objection raised by the Respondents is sustained; this suit is accordingly struck out. This ruling affects the order of this Court made on the 14 February 1996.

[**5.**] The respondent, being dissatisfied with the decision of the Federal High Court, appealed to the Court of Appeal, which Court, in a unanimous decision given on 12 December 1996, allowed the appeal in part and remitted 'the case back to the trial court to consider the issue of the consequences of the detention for the four days of the (detention of the) appellant which is apparently not covered by the order'. In coming to this conclusion, the Court of Appeal found:

> (i) That the learned trial judge was right in coming to the conclusion that the Inspector-General of Police is empowered to issue a detention order under the provision of Decree no 2 of 1984 as amended and that he has no jurisdiction to entertain the matter in that, by virtue of the provision of section 4 of Decree no 2 of 1984 as amended and Decree no 12 of 1994, the jurisdiction of the Court is ousted to entertain the appellant's case.
> (ii) That though the detention order should have been exhibited to the notice of preliminary objection, the way and the manner it was introduced in the court below did not occasion any miscarriage of justice.
> (iii) That notwithstanding the fact that Cap 10 was promulgated by the National Assembly in 1983, it is a legislation with international flavour and the ouster clauses contained in Decree no 107 of 1993 or no12 of 1994 cannot affect its operation in Nigeria.
> (iv) That the provisions of Cap 10 (The African Charter on Human and Peoples' Rights Act) of the Laws of the Federation 1990 are provisions in a class of their own. While the Decrees of the Federal Military Government may over-ride other municipal laws, they cannot oust the jurisdiction of the Court whenever properly called upon to do so in relation to matters pertaining to human rights under the African Charter. They are protected by the interna-

tional law and the Federal Military Government is not legally permitted to legislate out of its obligations.
(v) That the appellant (respondent before us) was wrong in the procedure he adopted to enforce the Charter under the special jurisdictions of the Court in reliance on section 42 of the Constitution. The learned trial Judge was right to decline jurisdiction under the circumstances on the basis of the procedure adopted.
(vi) That the detention order is not a legislative judgment by any means.

[**6.**] Pats-Acholonu, JCA in his concurring judgment observed:

When I look at this case I observe that one of the respondents is the Head of State — General Sani Abacha himself. I wonder whether the appellant is unaware of the provisions of section 67 of the Constitution of the Federal Republic of Nigeria. That section provides immunity against the civil or criminal action or proceedings against the person of the President or the Head of State. It is wrong in law to have joined him as a party. The Constitution is the primary law of the land. I hold therefore, that the name of the Head of State should not have been reflected in the suit in the first place. It offends the provision of the Constitution.

[**7.**] No other judge of the Court below who sat on the appeal made any observation to the same effect. But this observation of Pats-Acholonu JCA is now made a ground of appeal in the cross-appeal.

[**8.**] Both parties are aggrieved by the decision of the Court below and have appealed to this Court. In the main appeal the appellants complained against those parts of the judgment of the Court below that relate to findings on the status of the African Charter on Human and Peoples' Rights and the order remitting the case to the trial court for the action before the latter court to be resolved in the period of four days not covered by the detention order. The respondent cross-appealed against those parts of the decision of the Court below relating to:

(i) Power of Inspector-General to sign and issue a detention order;
(ii) Mode of enforcement of fundamental rights guaranteed under the African Charter on Human and Peoples' Rights (hereinafter referred to simply as the African Charter);
(iii) Procedure for tendering a detention order; and
(iv) Immunity of the Head of State.

[**9.**] Pursuant to the rules of this Court the parties filed and exchanged their respective written briefs of argument. And at the oral hearing of the appeal, their learned counsel proffered oral arguments in further elucidation of the issues raised in their respective briefs. I have fully considered the submissions made by learned counsel both in their briefs and in oral arguments. I will consider first the main appeal under two broad headings:

(i) Status of the African Charter *vis-à-vis* the country's municipal laws including the Constitution; and
(ii) The period of four days not covered by the detention order.

[**10.**] These two broad headings cover all the issues formulated by the

parties in their respective briefs. The status of the African Charter is strictly not necessary for the determination of the main appeal in that, in spite of what their lordships of the Court below said on it, it did not affect the final decision they arrived at. The respondent has, however, raised it again in his cross-appeal in arguing that his case should be sent back to the trial court for trial not in respect of the period of four days before the detention order was issued, but in respect of the entire period of his detention.

Status of the African Charter

[**11.**] The Organisation of African Unity of which Nigeria is a member, on 19 January 1981 adopted the African Charter on Human and Peoples' Rights providing for rights and obligations between member states (eg article 23) and between citizens and member states (eg article 19). Nigeria adopted the treaty in 1983 when the National Assembly enacted the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, 1983 (now Cap 10 Laws of the Federation of Nigeria, 1990).

[**12.**] I have carefully considered all that has been said by learned counsel for the parties on the status of the Charter as an international treaty entered into by our country. I do not consider it necessary to set out *in extenso* in this judgment their submissions. Suffice it to say that an international treaty entered into by the government of Nigeria does not become binding until enacted into law by the National Assembly. See section 12(1) of the 1979 Constitution which provides:

> No treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly (AFRC).

(See now the re-enactment in section 12(1) of the 1999 Constitution.) Before its enactment into law by the National Assembly, an international treaty has no such force of law as to make its provisions justiciable in our courts. See the recent decision of the Privy Council in *Higgs & Another v Minister of National Security & Others*. [See also] *The Times* of 23 December 1999 where it was held that:

> In the law of England and The Bahamas, the right to enter into treaties was one of the surviving prerogative powers of the Crown. Treaties formed no part of domestic law unless enacted by the legislature. Domestic courts had no jurisdiction to construe or apply a treaty, nor could unincorporated treaties change the law of the land. They had no effect upon citizens' rights and duties in common or statute law. They might have an indirect effect upon the construction of statutes or might give rise to a legitimate expectation by citizens that the government, in its acts affecting them, would observe the terms of the treaty.

[**13.**] In my respectful view, I think the above passage represents the correct position of the law, not only in England but in Nigeria as well.

[**14.**] Where, however, the treaty is enacted into law by the National Assembly, as was the case with the African Charter which is incorporated into our municipal (ie domestic) law by the African Charter on Human and

Peoples' Rights (Ratification and Enforcement) Act Cap 10 Laws of the Federation of Nigeria 1990 (hereafter is referred to simply as Cap 10), it becomes binding and our courts must give effect to it like all other laws falling within the judicial powers of the courts. By Cap 10 the African Charter is now part of the laws of Nigeria and like all other laws the courts must uphold it. The Charter gives to citizens of member states of the Organisation of African Unity rights and obligations, which rights and obligations are to be enforced by our courts, if they must have any meaning. It is interesting to note that the rights and obligations contained in the Charter are not new to Nigeria as most of these rights and obligations are already enshrined in our Constitution. See Chapter IV of the 1979 and 1999 Constitutions.

[**15.**] No doubt Cap 10 is a statute with international flavour. Being so, therefore, I would think that if there is a conflict between it and another statute, its provision will prevail over those of that other statute for the reason that it is presumed that the legislature does not intend to breach an international obligation. To this extent I agree with their lordships of the Court below that the Charter possesses 'a greater vigour and strength' than any other domestic statute. But that is not to say that the Charter is superior to the Constitution as erroneously, with respect, was submitted by Mr Adegboruwa, learned counsel for the respondent. Nor can its international flavour prevent the National Assembly or the Federal Military Government from removing it from our body of municipal laws by simply repealing Cap 10. Nor also is the validity of another statute necessarily affected by the mere fact that it violates the African Charter or any other treaty. For that matter see *Chae Chan Ping v United States* 130 US 581 where it was held that treaties are of no higher dignity than Acts of Congress, and may be modified or repealed by Congress in like manner, and whether such modification or repeal is wise or just is not a judicial question.

[**16.**] With all I have said above, I now come back to the case in hand. The respondent was said to have been detained by virtue of a detention order issued by the Inspector-General of Police in exercise of the powers conferred on him by section 1(1) of the State Security (Detention of Persons) Act, Cap 414 Laws of the Federation of Nigeria, 1990 (formerly Decree no 2 of 1984). It is the case of the appellants that the Act ousted the jurisdiction of the courts in respect of anything done under the Act. This submission found favour with the Court below. For Musdapher JCA who delivered the lead judgment of that Court, with which the other justices that sat with him agreed, said:

> In such matters involving the ordinary laws, the courts in this country have the jurisdiction to examine in appropriate cases how discretionary powers are exercised. It is part of the administrative law which frowns at abuse or misuse of power. But in Nigeria there are provisions in decrees such as no 2 of 1984 which empower the executive to detain people without trial. Usually no reasons are given by the detaining authority as to how a detainee constitutes a menace or

threat to the state. It is regarded as a matter of the security of the state which is not open to probing by the courts, also for security reason. Attempts by courts to order the release of such detainees on application by *habeas corpus* is even ousted. See Decree no 22 of 1986. In *Lekwot v Judicial Tribunal* (1993) 2 NWLR (Pt 276) 410 at 447, I quoted as follows from a paper presented by the Chief Justice of Nigeria at the Sixth International Appellate Judges Conference, 1991:

> Human rights under a military regime may be aberrations. In a democratic government under the rule of law, all judicial powers of the state are vested in the judiciary. Under the military regimes, the powers are invariably eroded. The erosion may be creating military (or special) tribunals. It may also be the ouster of the jurisdiction of courts of law.

In *Okeke v A-G Anambra State* (1992) 1 NWLR (Pt 215) 60 at 86, Uwaifo, JCA observed as follows:

> Decree no 13 of 1984 is an ouster legislation. Once the provisions of a Decree or Constitution ousting the jurisdiction of the Courts on any specific matters are clear and unambiguous, the Courts are bound to observe and apply them. They are not entitled, even when the ouster has drastic effect on the right of any person, to approach its interpretation by a false or twisted meaning given to it by unacceptable restricted construction.

In view of the authorities, I have to resolve the 5th and 6th issues against the appellant.

[**17.**] It is as a result of this conclusion that the learned Justice of Appeal finally held:

> In the result, this appeal partially succeeds. I remit the case back to the trial Court to consider the issue of the consequences of the detention for the four days of the (detention of the) Appellant which is apparently not covered by the order.

[**18.**] Muhammad JCA in his own judgment observed:

> The *Grundnorm* in Nigeria under the present military administration is the Constitution (Suspension and Modification) Decree no 107 of 1993 and the subsequent decrees regulating the exercise of executive, legislative and judicial powers in the country. Section 5 of Decree no 107 enacts as follows: 'no question as to the validity of this Decree or any other decree made during the period 31 December 1983 to 26 August 1993 or made after the commencement of this Decree or of an Edict shall be entertained by any court of law in Nigeria.'
>
> The Federal Military Government (Supremacy and Enforcement of Powers) Decree no 12 of 1994 provides: 'No civil proceedings shall lie or be instituted in any Court for or on account of or in respect of any act, matter or thing done or purported to be done under or pursuant to any Decree or Edict and if such proceedings are instituted before or after the commencement of this Decree, the proceedings shall abate, be discharged and made void.
>
> These two enactments, which have been judicially examined since the inception of the Military regimes in Nigeria in a plethora of cases, leave no room for any interpretative mechanisms to found jurisdiction when jurisdiction has been effectively ousted. The courts have always construed such clauses strictly. However, where, as in this case, the language is plain the courts have to give effect to

it. The legislations are undoubtedly drastic, but the courts are bound to give effect to them and decline adjudicating.

[**19.**] And Pats-Acholonu JCA, for his part, said:

> Let me pause here and examine the case in hand with the background of section 4 of the State Security (Detention of Persons) Act Cap 414:
>
> > 4(1) No suit or other legal proceedings shall be taken against any person for anything done or intended to be done in pursuance of this Act. (2) Chapter IV of the Constitution of the Federal Republic of Nigeria is hereby suspended for the purposes of this Act and any question whether any provision thereof has been or is being or would be contravened by anything done or proposed to be done in pursuance of this Act shall not be inquired into in any court of law and accordingly sections 219 and 259 of that Constitution shall not apply in relation to any such question.
>
> (Before going further, I wish to remark in passing and in further buttressing of my opinion and holding that the suspension of operation of the provisions of the African Charter and the Incorporating Act have never been intended nor to my mind carried out.) On the face of it the purport of the provision is that the jurisdiction of the court is completely ousted.

[**20.**] The respondent has argued strenuously against the position taken by their lordships. I, too, must say that I find it rather strange that after the views expressed by them on the status and applicability of the African Charter, they could turn round as they did to reach the position that the courts' jurisdiction was ousted in detention cases. It looks like a somersault!

[**21.**] Now section 4 of the State Security (Detention of Persons) Act provides:

> (1) No suit or other legal proceedings shall lie against any person for anything done or intended to be done in pursuance of this Act.
>
> (2) Chapter IV of the Constitution of the Federal Republic of Nigeria is hereby suspended for the purposes of this Act and any question whether any provision thereof has been or is being or would be contravened by anything done or proposed to be done in pursuance of this Act shall not be inquired into in any court of law, and accordingly sections 219 and 259 of that Constitution shall not apply in relation to any such question.

[**22.**] Be it noted that while Chapter IV of the Constitution was suspended for the purposed of the Act, no mention was made of Cap 10 which was then already in existence. I would think that Cap 10 remained unaffected by the provisions of section 4(1). A treaty is not deemed abrogated or modified by later statute unless such purpose has been clearly expressed in the later statute — see *Cook v United States*, 288 US 102. This is more so in this case as section 1 of Cap 10 provides:

> As from the commencement of this Act, the provisions of the African Charter on Human and Peoples' Rights which are set out in the Schedule to this Act shall, subject as thereunder provided, have force of law in Nigeria and shall be given full recognition and effect and be applied by all authorities and persons exercising legislative, executive or judicial powers in Nigeria.

[**23.**] It is thus enacted that *all* authorities and persons exercising *legislative, executive* or *judicial* powers in Nigeria are enjoined to give full recognition and effect to the African Charter. That is, the plenitude of the government of Nigeria cannot do anything inconsistent with the Charter. Section 1 was never suspended or repealed by any of the Constitution (Suspension and Modification) Decrees enacted between 1983 and 1999; it remained in force throughout this period. The position then is that the courts' jurisdiction to give 'full recognition and effect' to the African Charter remained unimpaired.

[**24.**] This conclusion is, in my respectful view, further reinforced by sections 16(1), 16(2) and 17 of the Constitution (Suspension and Modification) Decree no 107 of 1993, in force at all times relevant to the proceedings leading to this appeal. The sections read:

> 16(1) Subject to this Decree or any other Decree made during the period 31 December 1983 to 26 August 1993 or made after the commencement of this Decree, all existing law, that is to say, all laws (other than the Constitution of the Federal Republic of Nigeria 1979) which whether being a rule of law or a provision of an Act of the National Assembly or of a law made by a State House of Assembly or any other enactment or instrument whatsoever, shall, until that law is altered by an authority having power to do so, continue to have effect with such modifications (whether by way of addition, alteration or omission) as may be necessary to bring that law into conformity with the Constitution of the Federal Republic of Nigeria 1979, as amended, suspended, modified or otherwise affected by this Decree or any other Decree made during the period 31 December 1983 to 26 August 1993 or made after the commencement of this Decree, and with the provisions of any Decree made after the commencement of this Decree or Edict relating to the performance of any functions which are conferred by law on any person or authority. (2) It is hereby declared that the continued suspension by this Decree or any other Decree made after the commencement of this Decree by any Decree or any provision of the Constitution of the Federal Republic of Nigeria 1979 shall be without prejudice to the continued operation in accordance with subsection (1) of this section of any law which immediately before the commencement of this Decree was in force by virtue of that provision.
>
> 17. All laws (other than any law to which section 16 of this Decree applies) which, whether being a rule of law or a provision of an Act, a Decree, an Edict or a By-law or of any other enactment or instrument whatsoever, was in force immediately before the commencement of this Decree or made before that date but comes into force on or after the commencement of this Decree shall until that law is altered by an authority having power to do so, continue to have effect as if made in exercise of the powers conferred by or derived under this Decree.

[**25.**] By these provisions, Cap 10 remained in full force and effect as it was never at any time altered by the Provisional Ruling Council nor was there any need for its modification to bring it into conformity with the 1979 Constitution (as amended, suspended or modified) or any decree made after the commencement of Decree no 107 of 1993, that is, after 17 November 1993. Cap 10 was not inconsistent with any provision of the 1979 Constitution or any such decree.

[**26**.] I think both Courts below were in error to decline, pursuant to Cap 10, jurisdiction to entertain the respondent's case for the entire period of his detention.

[**27**.] One reason given by the Court below for abruptly denying the respondent redress under the Charter is that he came by way of a wrong procedure. With profound respect to their lordships, I think they are wrong for so holding. In *Fajinmi v The Speaker*, Western House of Assembly (1962) Volume 4 NSCC 144; (1962) 1 ANLR (Pt 1) page 206, this Court held that where there is no provision as to the procedure to be followed in enforcing the jurisdiction conferred; the plaintiff was entitled to bring the case in the usual form of an action and to have it heard. And in *Ogugu v The State* (1994) 9 NWLR (Pt 366) 1, again this Court, per Bello CJN, at pages 26-27 held:

> However, I am unable to agree with Mr Agbakoba that because neither the African Charter nor its Ratification and Enforcement Act has made a special provision like section 42 of the Constitution for the enforcement of its human and peoples' rights within a domestic jurisdiction, there is a *lacuna* in our laws for the enforcement of these rights. Since the Charter has become part of our domestic laws, the enforcement of its provisions like all our other laws fall within the juridical powers of the courts as provided by the Constitution and all other laws relating thereto . . . It is apparent from the aforegoing that the human and peoples' rights of the African Charter are enforceable by the several High Courts depending on the circumstances of each case and in accordance with the rules, practice and procedure of each court.

[**28**.] From these authorities the Court below could not be right when it held that the respondent came by a wrong procedure. The respondent could have come by way of any action commenced by a writ or by any other permissible procedure such as the Fundamental Rights (Enforcement Procedure) Rules, 1979. The trial court, therefore, wrongly declined jurisdiction to entertain respondent's action before it for the same reason.

[**29**.] It has been suggested that section 1(2)(b)(i) of the Federal Military Government (Supremacy and Enforcement of Powers) Decree 1994, no 12 of 1994, ousted the jurisdiction of the courts in this matter. My simple answer is that the Decree would not apply. The Decree provides:

> Whereas the military revolution which took place on 17 November 1993 effectively abrogated the whole pre-existing legal order in Nigeria except what has been preserved under the Constitution (Suspension and Modification) Decree no 107 of 1993 . . . and whereas by section 5 of the said Constitution (Suspension and Modification) Decree, no question as to the validity of any Decree or any Edict (in so far as by section thereof the provisions of the Edict are no inconsistent with the provisions of a Decree) shall be entertained by any Court of Law in Nigeria . . .
>
> 1(1) The preamble hereto is hereby affirmed and declared as forming part of this Decree.
>
> 2. It is hereby declared also that: (a) for the efficacy and stability of the Government of the Federal Republic of Nigeria; and (b) with a view to assuring

> the effective maintenance of the territorial integrity of Nigeria and the peace, order and good government of the Federal Republic of Nigeria:
>
> (i) no civil proceedings shall lie or be instituted in any Court for or on account of or in respect of any act, matter or thing done or purported to be done under or pursuant to any Decree or Edict and if such proceedings are instituted before, on or after the commencement of this Decree the proceedings shall abate, be discharged and made void; (ii) the question whether any provision of Chapter IV of the constitution of the Federal Republic of Nigeria 1979 has been, is being or would be contravened by anything done or purported to be done in pursuance of any Decree shall not be inquired into in any Court of law and accordingly, no provision of the Constitution shall apply in respect of any such question.

[**30**.] As earlier observed in this judgment, Cap 10 is preserved by sections 16 and 17 of Decree no 107 of 1993. By virtue of the preamble to Decree no 12 of 1994 and section (1) thereof, Cap 10 is equally preserved by the said decree. I can find nothing in the claims of the respondent that calls in question the validity of any decree. The only evidence before the trial court was the affidavit of Ganiyat Fawehinmi in which she deposed *inter alia*, as follows:

> 3. That on Tuesday, 30 January 1996 at about 6.00 am, six (6) men who identified themselves as operatives of the State Security Service (SSS) and policemen invaded our residence at 9A Ademola Close GRA, Ikeja, Lagos, and arrested the applicant.
>
> 4. That no warrant of arrest was shown to the Applicant before and after his arrest although the applicant demanded for same.
>
> 5. That thereafter the Applicant was taken away in a light blue Peugeot 504 Station Wagon car with reg no LA3123H to the State Security Service, Shangisha, and detained there.
>
> 6. That at the time of the said arrest the applicant was not informed of the offence he had committed.
>
> 7. That the applicant has not been charged with the commission of any crime in any court.

[**31**.] There was no counter-affidavit impugning the facts deposed to above. The notice of preliminary objection filed by the appellants to the respondent's application for the enforcement of his rights did not say that the respondent was detained pursuant to any detention order. Nor was there any affidavit evidence to that effect. I cannot therefore, see how it could be said that the respondent's action is a challenge to any decree.

[**32**.] I am not unmindful that in the course of proceedings in the trial court a detention order was shown to the Court. As it was never tendered and admitted in evidence, it did not form part of the proceedings in this case. Nor was it evidence on which the Court could act.

[**33**.] Ouster of a court's jurisdiction is not a matter of course. For the court's jurisdiction to be ousted it must be clearly shown that a particular action falls within the ouster clause. That is not the case here. With respect to their lordships of the Court below, I am not impressed by the views expressed by them on the failure of the appellants to tender in evidence

the detention order they relied on. The conclusion I reach is that on the record before us, Decree no 12 of 1994 does not apply.

[**34.**] From all I have said above, it is crystal clear that the issues raised in the main appeal must be resolved against the appellants. I unhesitatingly dismiss their appeal. For the same reasons, issue 3 of the cross-appeal is resolved in favour of the respondent as cross-appellant.

[**35.**] I am now left with issues 1, 2 and 4 of the cross-appeal. Issue 1 raises the question of the competence of the Inspector-General of Police to issue the detention order in this case. Decree no 2 of 1984 empowered the Chief of Staff to issue a detention order. By amendments to the decree, the power was given variously to the Chief Staff or the Inspector-General of Police (State Security (Detention of Persons) (Amendment) Decree no 12 of 1986), Chief of General Staff, Inspector-General of Police or the Minister of Internal Affairs (State Security (Detention of Persons) (Amendment) Decree 1988), Chief of General Staff only (State Security (Detention of Persons) (Amendment) Decree no 3 of 1990) and the Vice-President (State Security (Detention of Persons) (Amendment) Decree no 24 of 1990). The changes in the designation of Chief of Staff to Chief of General Staff to Vice-President followed the constitutional changes made to the nomenclature of the office of [the second in command] in the military regime. In the Constitution (Suspension and Modification) Decree no 107 of 1993, the office of the Vice-President disappeared and we have instead the office of the Chief of General Staff — a return to the 1985 position. No consequential amendment was, however, made to the State Security (Detention of Persons) Decree as to the person entitled to issue a detention order. The position remained as it was in 1990 when the Vice-President was given that power.

[**36.**] Then came 1994 when another amendment was made to the Decree. The State Security (Detention of Persons) Decree no 11 of 1994, which came into force on 18 August 1994, provided as follows:

> 1. The State Security (Detention of Persons) Decree 1984 as amended by State Security (Detention of Persons) (Amendment) Decree 1984, 1986, 1988 and 1990 is further amended:
>
> (a) By inserting immediately after the words 'Chief of General Staff' the words 'or the Inspector-General of Police' wherever they occur in the Decree . . .

[**37.**] It would appear that this amendment overlooked Decree no 24 of 1990 which substituted the Vice-President for the Chief of General Staff. The position in law was that as at the time of the promulgation of Decree no 11 of 1994 only the Vice-President, a non-existing office at the time, could issue a detention order [since] the Chief of General Staff had not been given back that power. It is the muddle in Decree no 11 of 1994 that the respondent is now capitalising on to submit that:

> Since the Chief of General Staff was non-existent under and unknown to Decree no 2 of 1984 as amended by Decree no 24 of 1990, the office of the Inspector-

General of Police cannot, with respect, be inserted after an office that does not exist.

[**38.**] With respect, I do not accept this submission. As a result of the muddle made in Decree no 11 of 1994 only the Inspector-General of Police was left to issue a detention order. And since he was the one who signed the order detaining the respondent, the order could not be faulted on this ground. Had the order been signed by the Chief of General Staff, I would not have hesitated in declaring it void as his power to issue such an order had been taken away by Decree no 24 of 1990. In conclusion I resolve issue 1 against the respondent.

[**39.**] On issue 2, I think the respondent misconstrued what the Court below decided. That Court did not say that the procedure adopted by the trial court dealing with the detention order was right, but that the irregularity did not occasion a miscarriage of justice. This is what Musdapher JCA who read the lead judgment said:

> There is no dispute that the Detention Order in the instant case was produced in Court and was examined by the learned trial Judge and the Appellant's counsel. The issue of admissibility of the Detention Order was not raised at the trial. It is a new issue first raised on appeal without leave. Throughout his lengthy submissions in the Court below, the learned counsel for the Appellant did not protest the manner the Detention Order was introduced in the proceedings. He not only referred to it in his submissions but used it to show that the Appellant was arrested and detained days before the Detention Order was signed. A party to any civil proceedings who, knowing of an irregularity, allows the irregular procedure to be adopted and indeed used a document irregularly produced in the proceedings cannot complain on appeal on the procedure adopted: see *Akhiwu v The Principal Lotteries Officer, Mid-Western State* (1972) 1 ALL NLR (Pt 1) 229. The Detention Order should have been exhibited or somehow tendered. It was not tendered. The learned counsel for the respondents produced it. It was accepted by the learned counsel for the appellant who not only read it, but also relied upon it to show the illegality of the arrest or detention of the appellant for a few days. I am of the view, that under these circumstances, the appellant cannot now at the appeal stage impugn the admissibility of the Detention Order. In any event, the substantive action has not commenced. What is in contest is whether the court has jurisdiction to entertain the suit. It was on that preliminary issue [that] the Detention Order was examined by all concerned, the appellant's counsel relying on it to argue that the Inspector-General of Police could not in law issue it. I do not think it is of any moment to now argue that the Detention Order was not formally admitted in evidence. Though the Detention Order should have been exhibited to the Notice of Preliminary objection, the way and the manner it was introduced in the court below did not occasion any miscarriage of justice.

[**40.**] It is not disputed here that the irregularity did not occasion a miscarriage of justice. The failure to fault this finding puts an end to the case of the respondent on this complaint. I, therefore, resolve the issue against the respondent.

[**41.**] On issue 4, the unsolicited passing remark of Pats-Acholonu JCA, not

being a decision, cannot be made a subject of an appeal. The learned Justice of Appeal had observed:

> When I look at this case, I observe that one of the respondents is the Head of State, General Sani Abacha himself. I wonder whether the appellant is unaware of the provisions of section 267 of the Constitution of the Federal Republic of Nigeria. That section provides immunity against the civil or criminal action or proceeding against the person of the President or the Head of State. It is wrong in law to have joined him as a party. The Constitution is the primary law of the land. I hold therefore that the name of the Head of State should not have been reflected in the suit in the first place. It offends the provision of the Constitution.

[**42.**] The observation above did not arise out of any issue canvassed before the Court below nor were arguments advanced on it. It is, therefore, not a decision that could be appealed against; it is only a mere remark. All this notwithstanding, it is patently clear that the observation is erroneous in law. Section 267 referred to therein had been suspended by Decree no 107 of 1993. Even if it were not suspended it is clear that by its provisions it would not apply to a case where the official concerned (here, General Sani Abacha) was sued in his official capacity — see subsection (2) of section 267:

> (2) The provisions of subsection (1) of this section shall not apply to civil proceedings against a person to whom this section applies in his official capacity or to civil or criminal proceedings in which such a person is only a nominal party.

I leave the matter at that and say no more on it.

[**43.**] Since I have resolved issue 3 in favour of the respondent, it follows that his cross-appeal must succeed and it is allowed by me. I set aside the consequential order made by the Court below and in its place I order that respondent's case be remitted to the Federal High Court for trial of all his claims by another judge of that Court. I award to him N10,000.00 costs in this Court.

SOUTH AFRICA

Hoffmann v South African Airways

(2001) AHRLR 186 (SACC 2000)

Jacques Charl Hoffmann v South African Airways
Constitutional Court, 28 September 2000, CCT 17/00
Judges: Chaskalson, Langa, Ackermann, Goldstone, Kriegler, Mokgoro, Ngcobo, O'Regan, Sachs, Yacoob, Madlanga
Previously reported: 2001 (1) SA 1 (CC); 2000 (11) BCLR 1211 (CC); 2001 (10) BHRC 571

Equality, non-discrimination (discrimination on the grounds of HIV status, 15, 41; right to equality, unfair discrimination, 24, 27, 29, 32, 37)
Dignity (27, 28, 34, 37, 41)
Work (employment discrimination, 28, 41; instatement, 50-56)
Remedies (appropriate relief, 45)
Interpretation (international standards, 51)

Ngcobo J

Introduction

[**1.**] This appeal concerns the constitutionality of South African Airways' (SAA) practice of refusing to employ as cabin attendants people who are living with the Human Immunodeficiency Virus (HIV). Two questions fall to be answered: first, is such a practice inconsistent with any provision of the Bill of Rights; and second, if so, what is the appropriate relief in this case?

[**2.**] Mr Hoffmann, the appellant, is living with HIV. He was refused employment as a cabin attendant by SAA because of his HIV-positive status. He unsuccessfully challenged the constitutionality of the refusal to employ him in the Witwatersrand High Court (the High Court) on various constitutional grounds. The High Court issued a positive certificate and this Court granted him leave to appeal directly to it.[1]

[**3.**] The AIDS Law Project (ALP)[2] sought, and was granted, leave to be admitted as an *amicus curiae* in support of the appeal. In addition, the ALP

[1] In terms of rule 18 of the Constitutional Court Rules.

[2] The ALP is a project of the Centre for Applied Legal Studies at the University of the Witwatersrand. One of the objects of the ALP is to prevent discrimination against people living with HIV/AIDS.

sought leave to introduce factual and expert material that had been placed before the Labour Court in a case that also involved the refusal by SAA to employ as a cabin attendant someone who was living with HIV.[3] The additional material included opinions by various medical experts on the transmission, progression and treatment of HIV, as well as the ability of people with HIV to be vaccinated against yellow fever. In particular, it included minutes reflecting the unanimous view of these medical experts. Leave to introduce the additional material was granted subject to any written argument on its admissibility. Neither party objected to the admission of the additional material.

[**4.**] The ALP submitted written argument and was represented by Mr Tip, together with Mr Boda. We are indebted to the ALP and counsel for their assistance in this matter.

The factual background

[**5.**] In September 1996 the appellant applied for employment as a cabin attendant with SAA. He went through a four-stage selection process comprising a pre-screening interview, psychometric tests, a formal interview and a final screening process involving role-play. At the end of the selection process the appellant, together with 11 others, was found to be a suitable candidate for employment. This decision, however, was subject to a pre-employment medical examination, which included a blood test for HIV/AIDS. The medical examination found him to be clinically fit and thus suitable for employment. However, the blood test showed that he was HIV positive. As a result, the medical report was altered to read that the appellant was 'HIV positive' and therefore 'unsuitable'. He was subsequently informed that he could not be employed as a cabin attendant in view of his HIV-positive status. All this was common cause. In the course of his argument, Mr Cohen, who, together with Mr Sibeko, appeared for SAA, raised an issue as to whether HIV-positive status was the sole reason for refusing to employ the appellant. Mr Trengove, who, together with Mr Katz and Ms Camroodien, appeared on behalf of the appellant, submitted that it was. I deal with this issue later in the judgment.[4]

[**6.**] The appellant challenged the constitutionality of the refusal to employ him in the High Court, alleging that the refusal constituted unfair discrimination and violated his constitutional right to equality, human dignity and fair labour practices. He sought an order in motion proceedings, among other things, directing SAA to employ him as a cabin attendant.

[3] The additional material was introduced in terms of rule 30 of the Constitutional Court Rules. The Labour Court case was *A v South African Airways (Pty) Ltd*, Case J1916/99. The case was settled on the basis of payment of damages by SAA to the claimant.

[4] See below paragraph 47-49.

[**7.**] SAA denied the charge. It asserted that the exclusion of the appellant from employment had been dictated by its employment practice, which required the exclusion from employment as cabin attendant of all persons who were HIV positive. SAA justified this practice on safety, medical and operational grounds. In particular, SAA said that its flight crew had to be fit for worldwide duty. In the course of their duties they are required to fly to yellow fever endemic countries. To fly to these countries they must be vaccinated against yellow fever in accordance with guidelines issued by the National Department of Health. Persons who are HIV positive may react negatively to this vaccine and may, therefore, not take it. If they do not take it, however, they run the risk not only of contracting yellow fever, but also of transmitting it to others, including passengers. It added that people who are HIV positive are also prone to contracting opportunistic diseases.[5] There is a risk, therefore, that they may contract these diseases and transmit them to others. If they are ill with these opportunistic diseases, they will not be able to perform the emergency and safety procedures that they are required to perform in the course of their duties as cabin attendants. SAA emphasised that its practice was directed at detecting all kinds of disability that make an individual unsuitable for employment as flight crew. In this regard it pointed out that it had a similar practice that excluded from employment as cabin crew individuals with other disabilities, such as epilepsy, impaired vision and deafness. SAA added that the life expectancy of people who are HIV positive was too short to warrant the costs of training them. It also pointed out that other major airlines utilised similar practices.

[**8.**] It must be pointed out immediately that the assertions by SAA were inconsistent with the medical evidence that was proffered in their support. SAA's medical expert, Professor Barry David Schoub, in an affidavit, told the High Court that only those persons whose HIV infection had reached the immunosuppression stage and whose CD4+ count had dropped below 300 cells per microlitre of blood were prone to the medical, safety and operational hazards asserted.[6] The assertions made by SAA, therefore, were not only not true of all persons who are HIV positive, but they were not true of the appellant. According to SAA's medical expert, at the time of the medical examination there was nothing 'to indicate that the infection has reached either the asymptomatic immunosuppressed state or the AIDS stage'. On the medical evidence placed before the High Court, therefore, it was not established that the appellant posed the risks asserted. Yet he was excluded from employment.

5 Such as chronic diarrhoea and pulmonary tuberculosis.
6 The immunosuppressed stage is one of the stages in the progression of the HIV infection. The progress of HIV is discussed in more detail below at paragraph 11.

[**9.**] The High Court, however, agreed with SAA.[7] It found that the practice was 'based on considerations of medical, safety and operational grounds';[8] did not exclude persons with HIV from employment in all positions within SAA, but only from cabin crew positions; and was 'aimed at achieving a worthy and important societal goal'.[9] The High Court noted that if the employment practices of SAA were not seen to promote the health and safety of its passengers and crew, its 'commercial operation, and therefore the public perception about it, will be seriously impaired'.[10] A further factor that it took into consideration was the allegation by SAA that its competitors apply a similar employment policy. The Court reasoned that if SAA were obliged to employ people with HIV, it 'would be seriously disadvantaged as against its competitors'.[11] It concluded that 'it is an inherent requirement for a flight attendant, at least for the moment, to be HIV-negative' and that the practice did not unfairly discriminate against persons who are HIV positive.[12] If it did, the Court found, such discrimination was 'justifiable within the meaning of section 36 of the Constitution'.[13] In the result it dismissed the application. The present appeal is the sequel.

[**10.**] To put the issues on appeal in context it is necessary to refer to the medical evidence placed before this Court by the *amicus*, for it is this medical evidence that altered the course of argument on appeal. This evidence, however, told SAA nothing new. Indeed, it said nothing that SAA's expert did not already know.

Medical evidence on appeal

[**11.**] The medical opinion in this case tells us the following about HIV/AIDS: it is a progressive disease of the immune system that is caused by the Human Immunodeficiency Virus, or HIV. HIV is a human retrovirus that affects essential white blood cells, called CD4+ lymphocytes. These cells play an essential part in the proper functioning of the human immune system. When all the interdependent parts of the immune system are functioning properly a human being is able to fight off a variety of viruses and bacteria that are commonly present in our daily environment. When

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7 The judgment of the High Court is reported as *Hoffmann v South African Airways* 2000 (2) SA 628 (W).

8 At paragraph 26 of the judgment.

9 At paragraph 28.

10 At paragraph 28.

11 At paragraphs 26-28.

12 At paragraph 29.

13 At paragraph 28. It does not appear from the judgment of the High Court on what basis the practice was found to be justifiable under section 36 of the Constitution, as that section is only applicable to a law of general application. This is dealt with at paragraph 41 below.

the body's immune system becomes suppressed or debilitated, these organisms are able to flourish unimpeded. Professor Schoub identifies four stages in the progression of untreated HIV infection:

> (a) Acute stage — this stage begins shortly after infection. During this stage the infected individual experiences flu-like symptoms which last for some weeks. The immune system during this stage is depressed. However, this is a temporary phase and the immune system will revert to normal activity once the individual recovers clinically. This is called the window period. During this window period, individuals may test negative for HIV when in fact they are already infected with the virus.
>
> (b) Asymptomatic immunocompetent stage — this follows the acute stage. During this stage the individual functions completely normally and is unaware of any symptoms of the infection. The infection is clinically silent and the immune system is not yet materially affected.
>
> (c) Asymptomatic immunosuppressed stage — this occurs when there is a progressive increase in the amount of virus in the body which has materially eroded the immune system. At this stage the body is unable to replenish the vast number of CD4+ lymphocytes that are destroyed by the actively replicating virus. The beginning of this stage is marked by a drop in the CD4+ count to below 500 cells per microlitre of blood. However, it is only when the count drops below 350 cells per microlitre of blood that an individual cannot be effectively vaccinated against yellow fever. Below 300 cells per microlitre of blood, the individual becomes vulnerable to secondary infections and needs to take prophylactic antibiotics and anti-microbials. Although the individual's immune system is now significantly depressed, the individual may still be completely free of symptoms and be unaware of the progress of the disease in the body.
>
> (d) AIDS (Acquired Immune Deficiency Syndrome) stage — this is the end stage of the gradual deterioration of the immune system. The immune system is so profoundly depleted that the individual becomes prone to opportunistic infections that may prove fatal because of the inability of the body to fight them.

[**12.**] HIV is transmitted through intimate contact involving the exchange of body fluid. Thus sexual intercourse, receipt of or exposure to the blood, blood products, semen, tissues or organs of the infected person or transmission from an infected mother to her foetus or suckling child are known methods by which it can be transmitted. HIV has never been shown to be transmitted through intact skin or casual contact.

[**13.**] It will be convenient at this stage to refer to the medical evidence which was placed before us on appeal by the *amicus*. The relevant evidence is contained in the minutes of the meetings of the medical experts of the parties in the Labour Court case, held on 28 April and 8 May 2000.[14]

[14] At these meetings SAA was represented by its expert Professor Schoub, who, as mentioned in paragraph 8 above, also deposed to an affidavit in these proceedings in the High Court.

The minutes of the first meeting reflect the unanimous view of these experts on the nature of the HIV disease, its progression, treatment and transmission, as well as the ability of people living with HIV to be vaccinated against yellow fever. The sole subject of the second meeting was the exact point at which HIV-positive persons can no longer be effectively vaccinated against yellow fever and the effectiveness of Highly Active Antiretroviral Therapy, which is a combination of drugs, referred to as HAART treatment. These minutes concluded that a person with a CD4+ count below 350 cells per microlitre could not be vaccinated against yellow fever. The minutes of the first meeting record that:

1. HIV is a progressive illness characterised by decreasing immunocompetence over time.

2. HIV is an infectious disease that requires intimate contact for transmission. By far the predominant mode of transmission is via sexual contact. A small number of medical work-related injuries from needlestick or sharp instruments have accounted for some cases of HIV transmission. Transmission also occurs through mother-to-child routes, through transfusion of blood products and through needle sharing by intravenous drug users.

3. HIV has never been demonstrated to be transmissible through intact skin or through casual contact. It is not a highly transmissible infection.

4. The standard test to diagnose HIV is a screening ELISA test followed by confirmatory tests. There is a window period of between two to 12 weeks, depending on the tests used, within which an HIV-positive individual will test negative.

5. Predicting an individual's risk of developing AIDS can be done accurately by assessing the immune function and the level of HIV burden.

6. Immune function is determined by measuring a particular immune cell count in the blood, which is accepted as a marker. This is the CD4+ lymphocyte cell, which is attacked and destroyed by HIV. The CD4+ count is used to assess the risk of various opportunistic diseases.

7. The level of HIV replication is assessed by quantifying the amount of HIV genetic material in the blood (HIV-1 RNA). This measurement is usually referred to as the individual's viral load.

8. The viral load and the CD4+ lymphocyte count are now routinely used in patient management.

9. During the asymptomatic phase, HIV-infected individuals are able to maintain productive lives and can remain gainfully and productively employed, particularly if they are properly treated with antiretrovirals and prophylactic antibiotics appropriate to their condition.

10. The natural progression of HIV has been dramatically altered in consequence of recent advances in the available medication. There are now combinations of drugs that are capable of completely suppressing the replication of the virus within an HIV-positive individual. This combination of drugs has been described as Highly Active Antiretroviral Therapy or HAART. It is available in South Africa and is increasingly accessible.

11. With successful HAART treatment, the individual's immune system recovers, together with a very marked improvement in the CD4+ lymphocyte count. A significant improvement in survival rates and life expectancy results.

[**14.**] With regard to the ability of people with HIV to perform employment duties, and in particular the work of a cabin attendant, the minutes record that:

> 12. With the advent of [HAART] treatment, individuals are capable of living normal lives and they can perform any employment tasks for which they are otherwise qualified.
> 13. The reasons for testing employees and potential employees for any medical condition are in general:
> - to see whether they are fit for the inherent requirements of the job;
> - to protect them from hazards inherent in the job;
> - to protect others (clients, third parties etc) from hazards;
> - to promote and maintain the health of employees.
>
> 14. Within this framework, as applied to the circumstances of a cabin crew member:
> - the inherent requirements of a cabin crew attendant's position are such that an asymptomatic HIV-positive person could perform the work competently;
> - the hazards to the immunocompetent employee inherent in the job of cabin crew attendant can be reasonably managed by counselling, monitoring, vaccination and the administration of appropriate antibiotic prophylaxis if required;
> - the hazards to the clients and third parties arising from a cabin crew attendant being an asymptomatic HIV-positive individual are inconsequential and, insofar as it may ever be necessary, well-established universal precautions can be utilised.
>
> 15. There is no well-founded medical support for a policy that *all* persons who are HIV positive are unable to be vaccinated for yellow fever. Whether or not a particular individual should receive such vaccination should be assessed on the basis of a proper clinical examination of that individual, having regard to *inter alia* the individual's CD4+ count.
> 16. Thus, where an HIV-positive individual is asymptomatic and immunocompetent, he or she will, in the absence of any other impediment, be able both
> - to meet the performance requirements of the job; and
> - to receive appropriate vaccination as required for the job.
>
> 17. On medical grounds *alone*, exclusion of an HIV-positive individual from employment *solely* on the basis of HIV positivity cannot be justified.

(Emphasis in the original.)

[**15.**] On the medical evidence, an asymptomatic HIV-positive person can perform the work of a cabin attendant competently. Any hazards to which an immunocompetent cabin attendant may be exposed can be managed by counselling, monitoring, vaccination and the administration of the appropriate antibiotic prophylaxis if necessary. Similarly, the risks to passengers and other third parties arising from an asymptomatic HIV-positive cabin crew member are therefore inconsequential and, if necessary, well-established universal precautions can be utilised. In terms of Professor Schoub's affidavit, even immunosuppressed persons are not prone to opportunistic infections and may be vaccinated against yellow fever as long as their CD4+ count remains above a certain level.

The issues on appeal

[**16.**] Confronted by the consensus among medical experts, including its own expert, on the nature of the HIV disease, its transmission, progression, tracking its progression and treatment, as well as the ability of HIV-positive persons to be vaccinated against yellow fever, SAA now concedes that (a) its employment practice of refusing to employ people as cabin attendants because they are living with HIV cannot be justified on medical grounds; and (b) therefore, its refusal to consider employing the appellant because he was living with HIV was unfair.

[**17.**] Despite these concessions, it is the duty of this Court to determine whether any constitutional rights of the appellant were violated by SAA and, if so, the appropriate relief to which the appellant is entitled.

[**18.**] Before turning to these questions, it is necessary to dispose at once of one matter. We were invited to express an opinion on SAA's policy of testing applicants for employment for HIV/AIDS status and thereafter of refusing employment if the infection has progressed to such a stage that the person has become unsuitable for employment as a cabin attendant. This policy, we were told, represents SAA's true policy, but in the case of the appellant was incorrectly applied. It was desirable for this Court to express such opinion, we were further told, in order to give guidance to the Labour Court, a Court that has a statutory duty to address issues relating to testing to determine suitability for employment.[15]

[**19.**] This invitation must be declined because the policy that is now being urged on appeal was not in issue in the High Court. That policy, therefore, cannot be in issue on appeal.

[**20.**] There is a further consideration that militates against this Court making any decision on the policy put forward by SAA. The question of testing in order to determine suitability for employment is a matter that is now governed by section 7(2), read with section 50(4), of the Employment Equity Act.[16] In my view there is much to be said for the view that where a matter is required by statute to be dealt with by a specialist tribunal, it is that tribunal that must deal with such a matter in the first instance. The Labour Court is a specialist tribunal that has a statutory duty to deal with labour and employment issues. Because of this expertise, the legislature

[15] In terms of section 7(2), read with section 50(4), of the Employment Equity Act, 55 of 1998.

[16] Act 55 of 1998. Section 7 came into effect on 9 August 1999.

has considered it appropriate to give it jurisdiction to deal with testing in order to determine suitability for employment. It is therefore that Court which, in the first instance, should deal with issues relating to testing in the context of employment.

[**21.**] I now turn to consider whether any constitutional rights have been violated by the refusal to employ the appellant as a cabin attendant. The appellant alleges that his rights to equality, human dignity and fair labour practices have been violated.

The right to equality

[**22.**] The relevant provisions of the equality clause, contained in section 9 of the Constitution, provide:

> (1) Everyone is equal before the law and has the right to equal protection and benefit of the law. . . .
> (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. . . .
> (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

[**23.**] Transnet is a statutory body, under the control of the state, which has public powers and performs public functions in the public interest.[17] It was common cause that SAA is a business unit of Transnet. As such, it is an organ of state and is bound by the provisions of the Bill of Rights in terms of section 8(1), read with section 239, of the Constitution. It is, therefore, expressly prohibited from discriminating unfairly.[18]

[**24.**] This Court has previously dealt with challenges to statutory provisions and government conduct alleged to infringe the right to equality. Its

[17] Transnet Limited has its origin in the South African Railways and Harbours Administration, which was administered by the state under the Railway Board Act, 73 of 1962. In terms of section 2(1) of the South African Transport Services Act, 65 of 1981 the South African Railways and Harbours Administration was renamed the South African Transport Services. In terms of section 3(1), it was not a separate legal person, but a commercial enterprise of the state. It was empowered, in terms of section 2(2)(a), among other things, to control, manage, maintain and exploit air services (under the title South African Airways or any title in the Ministers discretion. Pursuant to sections 2(1) and 3(2) of the Legal Succession to the South African Transport Services Act, 9 of 1989, Transnet was incorporated as a public company, and took transfer of the whole of the commercial enterprise of the South African Transport Services. SAA is a business unit within Transnet, established in terms of section 32(1)(b) of that Act. In terms of section 2(2), the state is the only member and shareholder of Transnet. Section 15 requires it to provide certain services in the public interest. Its services must be performed in accordance with the provisions of schedule 1 to the Act.

[18] In terms of section 9(3) of the Constitution.

approach to such matters involves three basic enquiries: first, whether the provision under attack makes a differentiation that bears a rational connection to a legitimate government purpose.[19] If the differentiation bears no such rational connection, there is a violation of section 9(1). If it bears such a rational connection, the second enquiry arises. That enquiry is whether the differentiation amounts to unfair discrimination. If the differentiation does not amount to unfair discrimination, the enquiry ends there and there is no violation of section 9(3). If the discrimination is found to be unfair, this will trigger the third enquiry, namely whether it can be justified under the limitations provision. Whether the third stage, however, arises will further be dependent on whether the measure complained of is contained in a law of general application.

[**25.**] Mr Trengove sought to apply this analysis to SAA's employment practice in the present case. He contended that the practice was irrational because, first, it disqualified from employment as cabin attendants all people who are HIV positive, yet objective medical evidence shows that not all such people are unsuitable for employment as cabin attendants; second, the policy excludes prospective cabin attendants who are HIV positive, but does not exclude existing cabin attendants who are likewise HIV positive, yet the existing cabin attendants who are HIV positive would pose the same health, safety and operational hazards asserted by SAA as the basis on which it was justifiable to discriminate against applicants for employment who are HIV positive.

[**26.**] In the view I take of the unfairness of the discrimination involved here, it is not necessary to embark upon the rationality enquiry or to reach any firm conclusion on whether it applies to the conduct of all organs of state or whether the practice in issue in this case was irrational.

[**27.**] At the heart of the prohibition of unfair discrimination is the recognition that under our Constitution all human beings, regardless of their position in society, must be accorded equal dignity.[20] That dignity is impaired when a person is unfairly discriminated against. The determining factor regarding the unfairness of the discrimination is its impact on the person discriminated against.[21] Relevant considerations in this regard include the position of the victim of the discrimination in society, the

[19] The three stages were set out concisely in *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC) at paragraph 53. In *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour Intervening)* 1999 (2) SA 1 (CC); 1999 (2) BCLR 139 (CC) at paragraph 17, the Court noted that the only purpose of the first stage of the test was an inquiry into whether the differentiation is arbitrary or irrational, or manifests naked preference . In *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 paragraph 18, the Court held that the rationality test does not inevitably precede the unfair discrimination test, and that the rational connection inquiry would be clearly unnecessary in a case in which a court holds that the discrimination is unfair and unjustifiable.

[20] *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) at paragraph 41.

[21] *Harksen v Lane*, above n 19, at paragraph 50.

purpose sought to be achieved by the discrimination, the extent to which the rights or interests of the victim of the discrimination have been affected and whether the discrimination has impaired the human dignity of the victim.[22]

[**28.**] The appellant is living with HIV. People who are living with HIV constitute a minority. Society has responded to their plight with intense prejudice.[23] They have been subjected to systemic disadvantage and discrimination.[24] They have been stigmatised and marginalised. As the present case demonstrates, they have been denied employment because of their HIV-positive status without regard to their ability to perform the duties of the position from which they have been excluded. Society's response to them has forced many of them not to reveal their HIV status for fear of prejudice. This in turn has deprived them of the help they would otherwise have received. People who are living with HIV/AIDS are one of the most vulnerable groups in our society. Notwithstanding the availability of compelling medical evidence as to how this disease is transmitted, the prejudices and stereotypes against HIV-positive people still persist. In view of the prevailing prejudice against HIV-positive people, any discrimination against them can, to my mind, be interpreted as a fresh instance of stigmatisation and I consider this to be an assault on their dignity. The impact of discrimination on HIV-positive people is devastating. It is even more so when it occurs in the context of employment. It denies them the right to earn a living. For this reason they enjoy special protection in our law.[25]

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[22] Ibid, paragraph 51.

[23] Ngwena HIV In the Workplace: Protecting Rights to Equality and Privacy (1999) 15 *SA Journal of Human Rights* 513 at 514.

[24] See section 34 of the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000, 4 of 2000.

[25] Section 6(1) of the Employment Equity Act, which section came into effect on 9 August 1999, specifically mentions HIV status as a prohibited ground of unfair discrimination; section 7(2) prohibits the testing of an employee for HIV status unless the Labour Court, acting under section 50(4), determines that such testing is justifiable. Section 34(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000, 4 of 2000, which section came into effect on 1 September 2000, requires the Minister of Justice and Constitutional Development to give special consideration to the inclusion of, among other things, HIV/AIDS as a prohibited ground of discrimination; the schedule to that Act lists, as part of an illustrative list of unfair practices in the insurance services, unfairly disadvantaging a person or persons, including unfairly and unreasonably refusing to grant services, to persons solely on the basis of HIV/AIDS status. The National Department of Education has, in terms of section 3(4) of the National Education Policy Act, 27 of 1996, issued a national policy on HIV/AIDS which, among other things, prohibits unfair discrimination against learners, students and educators with HIV/AIDS. The National Department of Health has, in terms of the National Policy for Health Act, 116 of 1990, issued a national policy on testing for HIV. The Medical Schemes Act, 131 of 1998 obliges all medical schemes to provide at least a minimum cover for HIV-positive persons. Finally, a draft code of good practice on key aspects of HIV/AIDS and employment issued under the Employment Equity Act has been published for public comment. This draft code has, as one of its goals, the elimination of unfair discrimination in the workplace based on HIV status.

[**29.**] There can be no doubt that SAA discriminated against the appellant because of his HIV status. Neither the purpose of the discrimination nor the objective medical evidence justifies such discrimination.

[**30.**] SAA refused to employ the appellant, saying that he was unfit for worldwide duty because of his HIV status. But, on its own medical evidence, not all persons living with HIV cannot be vaccinated against yellow fever or are prone to contracting infectious diseases — it is only those persons whose infection has reached the stage of immunosuppression and whose CD4+ count has dropped below 350 cells per microlitre of blood.[26] Therefore, the considerations that dictated its practice as advanced in the High Court did not apply to all persons who are living with HIV. Its practice, therefore, judged and treated all persons who are living with HIV on the same basis. It judged all of them to be unfit for employment as cabin attendants on the basis of assumptions that are true only for an identifiable group of people who are living with HIV. On SAA's own evidence, the appellant could have been at the asymptomatic stage of infection. Yet, because the appellant happened to have been HIV positive, he was automatically excluded from employment as a cabin attendant.

[**31.**] A further point must be made here. The conduct of SAA towards cabin attendants who are already in its employ is irreconcilable with the stated purpose of its practice.[27] SAA does not test those already employed as cabin attendants for HIV/AIDS. They may continue to work despite the infection and regardless of the stage of infection. Yet they may pose the same health, safety and operational hazards as prospective cabin attendants. Apart from this, the practice also pays no attention to the window period. If a person happens to undergo a blood test during the window period, the person can secure employment. But if the same person undergoes the test outside of this period, he or she will not be employed.

[**32.**] The fact that some people who are HIV positive may, under certain circumstances, be unsuitable for employment as cabin attendants does not justify the exclusion from employment as cabin attendants of all people who are living with HIV. Were this to be the case, people who are HIV positive would never have the opportunity to have their medical condition evaluated in the light of current medical knowledge for a determination to be made as to whether they are suitable for employment as cabin attendants. On the contrary, they would be vulnerable to discrimination on the basis of prejudice and unfounded assumptions — precisely the type of injury our Constitution seeks to prevent. This is manifestly unfair. Mr Cohen properly conceded that this was so.

[26] See above paragraph 11(c).

[27] I accept, of course, that the obligations of an employer towards existing employees may be greater than its obligations towards prospective employees.

[**33.**] The High Court found that the commercial operation of SAA, and therefore the public perception about it, would be undermined if the employment practices of SAA did not promote the health and safety of the crew and passengers. In addition, the High Court took into account that the ability of SAA to compete in the airline industry would be undermined 'if it were obliged to appoint HIV-infected individuals as flight-deck crew members'.[28] This was apparently based on the allegation by SAA that other airlines have a similar policy. It is these considerations that led the High Court to conclude that HIV-negative status was, at least for the moment, an inherent requirement for the job of cabin attendant and that therefore the appellant had not been unfairly discriminated against.

[**34.**] Legitimate commercial requirements are, of course, an important consideration in determining whether to employ an individual. However, we must guard against allowing stereotyping and prejudice to creep in under the guise of commercial interests. The greater interests of society require the recognition of the inherent dignity of every human being and the elimination of all forms of discrimination. Our Constitution protects the weak, the marginalised, the socially outcast, and the victims of prejudice and stereotyping. It is only when these groups are protected that we can be secure that our own rights are protected.[29]

[**35.**] The need to promote the health and safety of passengers and crew is important. So is the fact that if SAA is not perceived to be promoting the health and safety of its passengers and crew this may undermine the public perception of it. Yet the devastating effects of HIV infection and the widespread lack of knowledge about it have produced a deep anxiety and considerable hysteria. Fear and ignorance can never justify the denial to all people who are HIV positive of the fundamental right to be judged on their merits. Our treatment of people who are HIV positive must be based on reasoned and medically sound judgments. They must be protected against prejudice and stereotyping. We must combat erroneous, but nevertheless prevalent, perceptions about HIV. The fact that some people who are HIV positive may, under certain circumstances, be unsuitable for employment as cabin attendants does not justify a blanket exclusion from the position of cabin attendant of all people who are HIV positive.

[**36.**] The constitutional right of the appellant not to be unfairly discriminated against cannot be determined by ill-informed public perception of persons with HIV. Nor can it be dictated by the policies of other airlines not subject to our Constitution.

[28] Above n 7, at paragraph 28.
[29] *S v Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at paragraph 88.

[**37.**] Prejudice can never justify unfair discrimination. This country has recently emerged from institutionalised prejudice. Our law reports are replete with cases in which prejudice was taken into consideration in denying the rights that we now take for granted.[30] Our constitutional democracy has ushered in a new era — it is an era characterised by respect for human dignity for all human beings. In this era, prejudice and stereotyping have no place. Indeed, if as a nation we are to achieve the goal of equality that we have fashioned in our Constitution, we must never tolerate prejudice, either directly or indirectly. SAA, as a state organ that has a constitutional duty to uphold the Constitution, may not avoid its constitutional duty by bowing to prejudice and stereotyping.

[30] For example, in *Moller v Keimoes School Committee* 1911 AD 635, a case involving a challenge to segregation in public schools following an objection by a group of white parents to their children having to attend the same school as black children, de Villiers CJ, at 643-4, declined to ignore colour prepossessions, or prejudices in construing a statute. Relying on such prejudice, he found that a white parent would not have been a consenting party to an Act by which European parents could be compelled to send their children to aschool which children of mixed origin can also be compelled to attend. In *Minister of Posts and Telegraphs v Rasool* 1934 AD 167, a case involving a challenge to segregation of counters at a post office following an objection by a group of whites to being served at the same counter as Indians, Stratford ACJ, at 175, held that a division of the community on differences of race or language for the purpose of postal service seems, *prima facie*, to be sensible and make for the convenience and comfort of the public as a whole, since appropriate officials conversant with the customs, requirements and language of each section will conceivably serve the respective sections. In *Williams & Adendorff v Johannesburg Municipality* 1915 TPD 106, a case involving a challenge to segregation in the use of tramcars, while the majority found that segregation was unlawful because it was unauthorised by the empowering statute, Bristowe J held, at 122, that regard might be properly paid to the feelings and the sensitiveness, even to the prejudices and foibles of the general body of reasonable citizens in determining whether segregation was lawful. Bristowe J held further that, having regard to the existing state of public feeling the segregation of natives, even though not coming within bye-law 12, may be essential to an efficient tramway system. Curlewis J, also dissenting, held, at 128, that apart from dress and behaviour it is possible that it may be established that the use, for instance, by natives of the ordinary tramcars would be so distasteful and revolting to the rest of the community that the council as a common carrier would be justified in refusing to carry them as passengers in the same cars as Europeans. *The State v Xhego and Others* 83 Prentice Hall H76 concerned the admissibility of confessions. Some ten African accused challenged confessions made by them on the grounds that they had been induced by threats or force on the part of the police. Rejecting the evidence of the accused, van der Riet AJP observed, at 197, that [h]ad the evidence been given by Europeans, it might well have prevailed against the single evidence of warrant officer de Beer because there were many other policemen who were allegedly involved in the assault but who gave no evidence to contradict the accused. The evidence of the accused was rejected, however, because the native, in giving evidence, is so prone to exaggeration that it is often impossible to distinguish the truth from fiction. The Court also noted that there were other factors which militated strongly against the acceptance of the allegations of the accused, again resulting largely from the inherent foolishness of the Bantu character. In *Incorporated Law Society v Wookey* 1912 AD 623, a case involving an application by a woman to be admitted as an attorney, even though the statute in question did not expressly exclude women from practising as attorneys, relying upon the history of the profession, namely that it is a profession which has always been practised by men, the Court found that the word person should be construed to refer to men only, to the exclusion of women.

[**38.**] People who are living with HIV must be treated with compassion and understanding. We must show *ubuntu* towards them.[31] They must not be condemned to 'economic death' by the denial of equal opportunity in employment. This is particularly true in our country, where the incidence of HIV infection is said to be disturbingly high. The remarks made by Tipnis J in *MX of Bombay Indian Inhabitant v M/s ZY and Another*[32] are apposite in this context:

> In our opinion, the State and public corporations like respondent No 1 cannot take a ruthless and inhuman stand that they will not employ a person unless they are satisfied that the person will serve during the entire span of service from the employment till superannuation. As is evident from the material to which we have made a detailed reference in the earlier part of this judgment, the most important thing in respect of persons infected with HIV is the requirement of community support, economic support and non-discrimination of such person. This is also necessary for prevention and control of this terrible disease. Taking into consideration the widespread and present threat of this disease in the world in general and this country in particular, the State cannot be permitted to condemn the victims of HIV infection, many of whom may be truly unfortunate, to certain economic death. It is not in the general public interest and is impermissible under the Constitution. The interests of the HIV positive persons, the interests of the employer and the interests of the society will have to be balanced in such a case.

[**39.**] As pointed out earlier, on the medical evidence not all people who are living with HIV are unsuitable for employment as cabin attendants.[33] It is only those people whose CD4+ count has dropped below a certain level who may become unsuitable for employment. It follows that the finding of the High Court that HIV-negative status is an inherent requirement 'at least for the moment' for a cabin attendant is not borne out by the medical evidence on record.

[**40.**] Having regard to all these considerations, the denial of employment to the appellant because he was living with HIV impaired his dignity and constituted unfair discrimination. This conclusion makes it unnecessary to consider whether the appellant was discriminated against on a listed ground of disability as set out in section 9(3) of the Constitution, as Mr Trengove contended, or whether people who are living with HIV ought not to be regarded as having a disability, as contended by the amicus.

[**41.**] I conclude, therefore, that the refusal by SAA to employ the appellant as a cabin attendant because he was HIV positive violated his right to equality guaranteed by section 9 of the Constitution. The third enquiry, namely whether this violation was justified, does not arise. We are not

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[31] *Ubuntu* is the recognition of human worth and respect for the dignity of every person. See also the comments of Langa J, Mahomed J and Mokgoro J in *S v Makwanyane*, above n 29, at paras 224, 263 and 308 respectively.
[32] AIR 1997 (Bombay) 406 at 431.
[33] Above paragraph 15.

dealing here with a law of general application.[34] This conclusion makes it unnecessary to consider the other constitutional attacks based on human dignity and fair labour practices. It now remains to consider the remedy to which the appellant is entitled.

Remedy

[**42.**] Section 38 of the Constitution provides that where a right contained in the Bill of Rights has been infringed, 'the Court may grant appropriate relief'. In the context of our Constitution 'appropriate relief' must be construed purposively, and in the light of section 172(1)(b), which empowers the Court, in constitutional matters, to make 'any order that is just and equitable'.[35] Thus construed, appropriate relief must be fair and just in the circumstances of the particular case. Indeed, it can hardly be said that relief that is unfair or unjust is appropriate.[36] As Ackermann J remarked in the context of a comparable provision in the interim Constitution, '[i]t can hardly be argued, in my view, that relief which was unjust to others could, where other available relief meeting the complainant's needs did not suffer from this defect, be classified as appropriate'.[37] Appropriateness, therefore, in the context of our Constitution, imports the elements of justice and fairness.

[**43.**] Fairness requires a consideration of the interests of all those who might be affected by the order. In the context of employment, this will require a consideration not only of the interests of the prospective employee but also the interests of the employer. In other cases, the interests of the community may have to be taken into consideration.[38] In the context of unfair discrimination, the interests of the community lie in the recognition of the inherent dignity of every human being and the elimination of all forms of discrimination. This aspect of the interests of the community can be gathered from the preamble to the Constitution in which the people of this country declared:

[34] See *August and Another v Electoral Commission and Others* 1999 (3) SA 1 (CC); 1999 (4) BCLR 363 (CC) at paragraph 23.

[35] *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 paragraph 65. In terms of section 7(4) of the interim Constitution, where the rights contained in Chapter 3 were infringed, persons referred to in paragraph (b) of section 7(4) were entitled to apply to Court for appropriate relief.

[36] In *Re Kodellas et al and Saskatchewan Human Rights Commission et al; Attorney-General of Saskatchewan, Intervenor* (1989) 60 DLR (4th) 143, 187, Vancise JA said: A just remedy must of necessity be appropriate, but an appropriate remedy may not be fair or equitable in the circumstances. This statement must be understood in the context of section 24(1) of the Canadian Charter, which provides that anyone whose rights, guaranteed in the Charter, have been infringed may apply to court to obtain such remedy as the court considers appropriate and just in the circumstances. The Canadian Constitution, therefore, makes a distinction between appropriateness and justness. Our Constitution does not.

[37] *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC) at paragraph 38.

[38] Id.

> We, the people of South Africa,
> Recognise the injustices of our past;
> . . .
> We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to —
> Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights . . .

[**44.**] This proclamation finds expression in the founding provisions of the Constitution, which include 'human dignity, the achievement of equality and the advancement of human rights and freedoms'.[39]

[**45.**] The determination of appropriate relief, therefore, calls for the balancing of the various interests that might be affected by the remedy. The balancing process must at least be guided by the objective, first, to address the wrong occasioned by the infringement of the constitutional right; second, to deter future violations; third, to make an order that can be complied with; and fourth, of fairness to all those who might be affected by the relief. Invariably, the nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in the particular case. Therefore, in determining appropriate relief, 'we must carefully analyse the nature of [the] constitutional infringement, and strike effectively at its source'.[40]

[**46.**] With these considerations in mind, I now turn to consider the appropriate relief in this case. The infringement involved here consists of the refusal to employ the appellant because he was HIV positive. The relief to which the appellant is entitled depends, in the first place, on whether he would have been employed as a cabin attendant but for his HIV-positive status. It is to that question that I now turn.

(a) Would the appellant have been employed but for the unfair discrimination?

[**47.**] It is common cause that the appellant was refused employment because of his HIV-positive status. This much was conceded both in the written argument of SAA and in the course of oral argument by Mr Cohen. Mr Cohen nevertheless contended that it had not been shown that the appellant would necessarily have been employed but for his HIV-positive status. The contention being advanced here is that it has not been shown that the appellant has been denied employment solely because of his HIV status. This contention rests on the assumption that there were fewer than 12 posts for which the 12 individuals, including the appellant, had been

[39] In *Fose*, above n 37, Ackermann J said, at paragraph 38, that in determining the appropriate relief under section 7(4) of the interim Constitution the interests of both the complainant and society as a whole ought, as far as possible, to be served.
[40] *Fose*, above n 37, at paragraph 96 per Kriegler J.

identified as suitable. It was submitted that there was, therefore, no guarantee that the appellant would have been one of the individuals to fill the available posts.

[**48.**] The fallacy of this contention lies in its premise. It has never been SAA's case that there were fewer than 12 vacant posts at the time the 12 individuals were selected for employment, nor was there any suggestion that the individuals who were selected still had to go through some further selection process to determine who among them were to fill the available posts. Had this been its case, it would have been an easy matter for SAA to have said so. Far from saying so, SAA admitted the allegation that the appellant was selected a's one of 12 flight attendants to be employed out of 173 applicants', and that his selection was subject to a pre-employment medical examination, which included a test for HIV. SAA knew that the case it had to meet in the event that it was unsuccessful on the merits was why the appellant should not be employed. This was the main relief sought by the appellant. The contention must, therefore, fail.

[**49.**] It is common cause that the appellant successfully completed the final screening stage, having been found suitable for employment throughout the selection process. As already mentioned,[41] when the blood test of the appellant indicated that he was infected with the HIV virus, the medical report was altered to indicate that he was unsuitable for employment as a cabin attendant. It follows that what stood between the appellant and employment as a cabin attendant was his HIV-positive status. I am therefore satisfied that the appellant was denied employment as a cabin attendant solely because of his HIV-positive status. It follows that the infringement involved here consists in the refusal to employ the appellant solely because he was HIV positive. It now remains to consider how to redress this wrong. Mr Trengove contended that instatement was the appropriate relief.

(b) Is instatement the appropriate relief?

[**50.**] An order of instatement, which requires an employer to employ an employee, is a basic element of the appropriate relief in the case of a prospective employee who is denied employment for reasons declared impermissible by the Constitution. It strikes effectively at the source of unfair discrimination. It is an expression of the general rule that, where a wrong has been committed, the aggrieved person should, as a general matter and as far as is possible, be placed in the same position the person would have been but for the wrong suffered. In proscribing unfair discrimination, the Constitution not only seeks to prevent unfair discrimination but also to eliminate the effects thereof. In the context of employment, the attainment of that objective rests not only upon the elimination of the discriminatory employment practice but also requires that the person who

[41] Above paragraph 5.

has suffered a wrong as a result of unlawful discrimination be, as far as possible, restored to the position in which he or she would have been but for the unfair discrimination.

[**51.**] The need to eliminate unfair discrimination does not arise only from chapter 2 of our Constitution. It also arises out of international obligation.[42] South Africa has ratified a range of anti-discrimination conventions, including the African Charter on Human and Peoples' Rights.[43] In the preamble to the African Charter, member states undertake, among other things, to dismantle all forms of discrimination. Article 2 prohibits discrimination of any kind. In terms of article 1 member states have an obligation to give effect to the rights and freedoms enshrined in the Charter. In the context of employment, the ILO Convention 111, Discrimination (Employment and Occupation) Convention, 1958, proscribes discrimination that has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation. In terms of article 2 member states have an obligation to pursue national policies that are designed to promote equality of opportunity and treatment in the field of employment with a view to eliminating any discrimination. Apart from these conventions, it is noteworthy that item 4 of the SADC Code of Conduct on HIV/AIDS and Employment,[44] formally adopted by the SADC Council of Ministers in September 1997, lays down that HIV status 'should not be a factor in job status, promotion or transfer'. It also discourages pre-employment testing for HIV and requires that there should be no compulsory workplace testing for HIV.

[**52.**] Where a person has been wrongfully denied employment, the fullest redress obtainable is instatement.[45] Instatement serves an important

[42] In terms of section 231(2) of the Constitution, an international agreement is binding on the Republic of South Africa once it has been ratified.

[43] South Africa has ratified the following Conventions dealing with discrimination: The African Charter on Human and Peoples Rights, 1981; the Convention on the Elimination of All Forms of Discrimination Against Women, 1979; the International Covenant on Civil and Political Rights, 1966; the International Convention on the Elimination of All Forms of Racial Discrimination, 1966; and ILO Convention 111, Discrimination (Employment and Occupation) Convention, 1958. South Africa has signed, but not ratified, the Convention on the Political Rights of Women, 1953 and the International Covenant on Economic, Social and Cultural Rights, 1966.

[44] In terms of the Code of Conduct on HIV/AIDS and Employment in the Southern African Development Community (SADC), 1997.

[45] In the context of an employee who is unfairly dismissed, Nicholas AJA expressed the rule as follows: Where an employee is unfairly dismissed he suffers a wrong. Fairness and justice require that such wrong should be redressed. The [Labour Relations Act, 28 of 1956] provides that the redress may consist of reinstatement, compensation or otherwise. The fullest redress obtainable is provided by the restoration of the *status quo ante*. It follows that it is incumbent on the Court when deciding what remedy is appropriate to consider whether, in the light of all the proved circumstances, there is reason to refuse reinstatement. *National Union of Metalworkers of South Africa and Others v Henred Fruehauf Trailers (Pty) Ltd* 1995 (4) SA 456 (A) at 462I-463A. In terms of section 193(2) of the 1995 Labour Relations Act (Act 66 of 1995), reinstatement is the primary remedy for a dismissal that is substantively unfair.

constitutional objective. It redresses the wrong suffered and thus eliminates the effect of the unfair discrimination. It sends a message that under our Constitution discrimination will not be tolerated and thus ensures future compliance. In the end, it vindicates the Constitution and enhances our faith in it. It restores the human dignity of the person who has been discriminated against, achieves equality of employment opportunities and removes the barriers that have operated in the past in favour of certain groups, and in the process advances human rights and freedoms for all. All these are founding values in our Constitution.

[**53**.] In these circumstances, instatement should be denied only in circumstances where considerations of fairness and justice, for example, dictate otherwise. There may well be other considerations too that make instatement inappropriate, such as where it would not be practical to give effect to it.

[**54**.] Here, there was no suggestion that it would either be unfair or unjust were SAA to be ordered to employ the appellant as a cabin attendant. Nor was it suggested that it would not be practical to do so. On the contrary, Mr Cohen assured us that it would not be impractical to employ the appellant as a cabin attendant. Nor does the medical condition of the appellant render him unsuitable for employment as a cabin attendant.[46] The appellant is currently receiving combination therapy, which should result in the complete suppression of the replication of the virus and lead to a marked improvement in his CD4+ count.[47] On 19 June 2000 he was medically examined and his blood sample was taken. He was found to be asymptomatic and his CD4+ count was 469 cells per microlitre of blood. He describes his prognosis as excellent. He is able to be vaccinated against yellow fever and is not prone to opportunistic infections.[48]

[**55**.] It was contended that an order of instatement would open the floodgates for other people who are living with HIV and who were previously denied employment by SAA. However, what the appropriate relief would be in this case cannot be made to depend on other cases that may or may not be instituted. What constitutes appropriate relief depends on the facts of each case. The relief to be granted in those other cases will have to be determined in the light of their facts.

[**56**.] In the light of the aforegoing, the appropriate order is one of instatement.

[**57**.] Mr Trengove submitted that the order for the employment of the

[46] When the appeal was called, Mr Trengove asked for leave to hand in an affidavit deposed to by the appellant, setting out his present HIV status, medical condition and the treatment he was receiving. Mr Cohen did not object and it was admitted.

[47] See items 10 and 11 of the expert minute at paragraph 13 above.

[48] A person may not be effectively vaccinated against yellow fever when his or her CD4+ count drops below 350 cells per microlitre of blood, and only becomes prone to opportunistic infections when his or her CD4+ count drops to below 300 cells per microlitre of blood. See above paragraph 11.

appellant should be effective from the date of the judgment of the High Court. Whether it is appropriate to make such an order in this case is a matter to which I now turn.

(c) The effective date of the order

[**58.**] As a general matter, the question whether instatement is the appropriate relief must be determined as at the time when the matter came before the High Court. The denial of instatement by the High Court should not be allowed to prejudice the appellant. Indeed, it would be unfair to a litigant to fail to provide him or her with the full relief that the trial court should have given where the trial court has wrongly refused such relief. Albeit in a different context, Goldstone JA expressed the principle as follows:

> Whether or not reinstatement is the appropriate relief, in my opinion, must be judged as at the time the matter came before the industrial court. If at that time it was appropriate, it would be unjust and illogical to allow delays caused by unsuccessful appeals to the Labour Appeal Court and to this Court to render reinstatement inappropriate. Where an order for reinstatement has been granted by the industrial court, an employer who appeals from such an order knowingly runs the risk of any prejudice which may be the consequence of delaying the implementation of the order.[49]

However, the ultimate consideration is whether it would be appropriate to backdate the order of instatement to the date of the judgment of the trial court.

[**59.**] In this case there is, in my view, an insuperable difficulty besetting the appellant's path to that relief. Where, as here, the employee seeks an order backdating the order of instatement to the date of the High Court order it is, in my view, incumbent upon that employee both to warn the employer that he or she intends to request such an order on appeal and to place before the Court such information as may be relevant to the consideration of such relief. This is necessary so as to inform the employer of the case it will be required to meet on appeal in the event that it fails on the merits. Here the appellant did not seek such relief in his notice and grounds of appeal. As a result, SAA came to this Court unprepared to meet a claim for the backdating of the order of instatement to the date of the High Court judgment.

[**60.**] There is a further consideration that militates against granting such relief. The backdating of an order for instatement raises a number of difficult legal questions relating to the form such relief should take. These questions were not argued. It is not possible physically to instate the appellant retrospectively to the date of the judgment of the High Court. Whether retrospectivity of instatement can be expressed by the ordering of back pay and the provision of benefits or some other relief such as

49 *Performing Arts Council of the Transvaal v Paper Printing Wood and Allied Workers Union and Others* 1994 (2) SA 204 (A) at 219H-I.

damages are matters that were not debated in this Court. Although Mr Trengove informed us from the Bar that the appellant has been in employment since the date of the judgment of the High Court, this is not enough. We do not have any information as to what he has earned. Nor do we have any information as to what he would have earned as a cabin attendant. More importantly, SAA has not had the opportunity of investigating these facts. In these circumstances it would be unfair to SAA to make an order backdating the instatement to the date of judgment in the High Court.

[**61**.] I conclude, therefore, that the appropriate relief in the circumstances of this case is an order directing SAA to employ the appellant as a cabin attendant with effect from the date of the order of this Court. It now remains to consider the question of costs.

Costs

[**62.**] The litigation resulting in this appeal was unnecessary, SAA effectively told us on appeal. It is a result, it also told us, of its true policy having been applied incorrectly to the appellant. There was, therefore, nothing for SAA to defend either in the High Court or in this Court. It must, therefore, bear the costs of the appellant in both courts. In the High Court the appellant sought the costs of two counsel and he is entitled to such costs. In this Court, Mr Trengove sought the costs of two counsel, but limited the costs of the out-of-town counsel to reimbursements and actual costs incurred.[50]

[**63.**] The *amicus* also asked for an order that SAA pay its costs. An *amicus curiae* assists the court by furnishing information or argument regarding questions of law or fact. An *amicus* is not a party to litigation, but believes that the court's decision may affect its interest. The *amicus* differs from an intervening party, who has a direct interest in the outcome of the litigation and is therefore permitted to participate as a party to the matter. An *amicus* joins proceedings, as its name suggests, as a friend of the court. It is unlike a party to litigation who is forced into the litigation and thus compelled to incur costs. It joins in the proceedings to assist the court because of its expertise on or interest in the matter before the court. It chooses the side it wishes to join unless requested by the court to urge a particular position. An *amicus*, regardless of the side it joins, is neither a loser nor a winner and is generally not entitled to be awarded costs. Whether there may be circumstances calling for departure from this rule is not necessary to decide in this case. Suffice it to say that in the present case no such departure is warranted.

[50] *Komani NO v Bantu Affairs Administration Board, Peninsula Area* 1980 (4) SA 448 (A) at 473B-C.

Order

[**64.**] In the result, the following order is made:

(a) The appeal is upheld.
(b) The order of the High Court is set aside.
(c) The decision of SAA not to employ Mr Jacques Charl Hoffmann as a cabin attendant is set aside.
(d) SAA is ordered forthwith to offer to employ Mr Jacques Charl Hoffmann as a cabin attendant; provided that, should Mr Hoffmann fail to accept the offer within 30 days of the date of the offer, this order shall lapse.
(e) SAA is ordered to pay the appellant's costs as follows:
    (i) in the High Court, costs consequent upon the employment of two counsel; and
    (ii) in this Court, costs consequent upon the employment of two counsel, the costs of the second counsel to be limited to the out-of-pocket expenses actually incurred.

* * *

Carmichele v Minister of Safety and Security and Others

(2001) AHRLR 208 (SACC 2001)

Alix Jean Carmichele v Minister of Safety and Security, Minister of Justice and Constitutional Development
Constitutional Court, 16 August 2001 CCT (no 48/100)
Judges: Chaskalson, Ackermann, Goldstone, Kriegler, Madala, Mokgoro, Ngcobo, Sachs, Yacoob, Madlanga, Somyalo
Previously reported: 2001 (4) SA 938 (CC); (2002) 2 CHR 179; 2001 (10) BCLR 995 (CC)

Constitutional supremacy (33, 44)
Interpretation (development of common law, 34, 36, 38, 39, 43, 56, 58, 80; international standards, 45, 47-49, 62; interpretation of issues not raised in lower courts, 50, 51-53)
State responsibility (duty to protect citizens, 44, 49, 57, 73, 74, 77)

Ackermann and Goldstone

The background

[**1.**] On the morning of 6 August 1995, Alix Jean Carmichele (the applicant) was viciously attacked and injured by Francois Coetzee (Coetzee).

The attack took place at the home of Julie Gosling (Gosling) at Noetzie, a small secluded village on the sea some 12 kilometres outside Knysna. Coetzee was convicted of attempted murder and housebreaking in the Knysna Regional Court and was sentenced to an effective term of imprisonment of twelve-and-a-half years.

[**2.**] The applicant instituted proceedings in the Cape of Good Hope High Court (the High Court) for damages against the Minister for Safety and Security and the Minister of Justice and Constitutional Development. She claimed that members of the South African Police Service and the public prosecutors at Knysna had negligently failed to comply with a legal duty they owed to her to take steps to prevent Coetzee from causing her harm.

[**3.**] In the High Court, the issue of the liability of the respondents was separated from that of damages. At the close of the applicant's case, Chetty J found that there was no evidence upon which a court could reasonably find that the police or prosecutors had acted wrongfully. He granted an order of absolution from the instance in favour of the respondents with costs. With the leave of the High Court, the applicant appealed to the Supreme Court of Appeal (the SCA). The appeal was dismissed with costs.[1]

[**4.**] The applicant now seeks special leave to appeal to this Court from the order of the SCA. In considering the application, we also heard argument on the merits of the appeal. The jurisdiction of this Court to entertain such an application and the requirements for the grant of special leave were considered in *S v Boesak*[2]. It was pointed out by Langa DP, with reference to section 167(3)(b) of the Constitution, that the issues to be decided must be constitutional matters or issues connected with decisions on constitutional matters.[3] It must in addition be in the interests of justice that the appeal should be heard and in that regard the prospects of success constitute an important factor.[4] The Deputy President stated, *inter alia*, that:

> Under section 167(7), the interpretation, application and upholding of the Constitution are also constitutional matters. So, too, under section 39(2), is the question whether the interpretation of any legislation or the development of the common law promotes the spirit, purport and objects of the Bill of Rights.[5]

In this case we are primarily concerned with the development of the common law delictual duty to act.

[1] The judgment of the SCA is reported as *Carmichele v Minister of Safety and Security and Another* 2001 (1) SA 489 (SCA).
[2] 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at paras 10-15.
[3] *Id* at paragraph 11.
[4] *Id* at paragraph 12.
[5] *Id* at paragraph 14. Section 39(2) of the Constitution provides that: 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. The corresponding provision of the interim Constitution (IC) (Act 200 of 1993), section 35(3), provided: In the interpretation of any law and the application development of the common law or customary law, a court, shall have due regard to the spirit, purport and objects of this Chapter.

The facts

[**5**.] The facts which emerged from the evidence adduced on behalf of the applicant in the High Court appear from the judgment of Chetty J and from that of Vivier JA who delivered the unanimous judgment of the SCA. It will make the discussion in this judgment more comprehensible if the relevant facts are restated.

[**6**.] Coetzee was born in 1973. He had problems of a sexual nature from about the age of ten years and had sexually molested his niece when in his early teens. His mother, Mrs Annie Coetzee, had been sufficiently concerned to seek advice from their doctor but had been advised that her son was too young to be given medication.

[**7**.] Coetzee passed his matriculation examinations. He sang for some time in a choir that devoted its time to entertaining ill people. He also spent many hours at home reading.

[**8**.] On 3 June 1994, when he was 20 years of age, Coetzee committed an indecent act on a 25-year-old acquaintance of his, Beverley Claassen. Late at night, while she was asleep, he climbed through her open bedroom window and lay next to her in her bed. He indecently fondled her until she awoke and gave the alarm. He escaped through the window and ran off. On 6 September 1994, he stood trial on charges of housebreaking and indecent assault arising from that incident. He pleaded guilty and was convicted of both charges. On the housebreaking charge, he was sentenced to 18 months imprisonment conditionally suspended for four years, and on the indecent assault charge he was sentenced to a fine of R600 or six months imprisonment plus twelve months imprisonment conditionally suspended for four years.

[**9**.] Less than six months later, on 4 March 1995, Coetzee attempted to rape and murder Eurona Terblanche (Eurona).[6] Coetzee and Eurona were school friends. She was then 17 years old. After a dance at the Hornlee Hotel, Knysna, Coetzee offered to walk Eurona home. She accepted his offer. Along the way he persuaded her to take a detour along a footpath. At a deserted spot he attempted to kiss her and, when she resisted, he threw her to the ground and repeatedly punched and kicked her. He dragged her into tall grass and ripped off her clothes. He forcibly held her down by sitting on her while he repeatedly punched her in the face, throttled her and bit her. He threatened to kill her. She eventually lost consciousness. At his subsequent trial, Coetzee admitted he had wanted to rape Eurona but denied that he had done so. Whether in fact he did rape Eurona after she lost consciousness was not established. He left her for dead and ran back to the Hornlee Hotel.

[6] Eurona Terblanche is referred to by her first name to avoid confusion with her mother to whom reference is made later in this judgment.

[**10.**] When Coetzee arrived at the Hornlee Hotel, he informed the management that he had just killed a girl and asked them to summon the police. When the police arrived he repeated that he had killed a girl but refused to furnish any further details. He was arrested for being drunk in a public place.

[**11.**] Eurona regained consciousness, gathered her clothes and walked to the house of a neighbour and friend. She arrived there at about 4 am. She reported the attack to her friend and shortly thereafter to her own mother (Mrs Terblanche) who summoned the police. Eurona was taken to hospital where the examining doctor noted the extensive injuries inflicted on her.

[**12.**] During that morning (4 March 1995) Mrs Terblanche and Eurona went to the Knysna charge office where they reported the attack to the duty officer, Sergeant Beaulah Jantjies (Jantjies). She took a detailed statement from Eurona and Mrs Terblanche who informed her that Coetzee had told them he had a previous conviction for rape. For the benefit of the investigating officer, Jantjies noted that information in the investigation diary. Immediately thereafter, the investigating officer, Detective Sergeant David Klein (Klein), took over the matter. He also interviewed Eurona and accompanied her to the scene of the attack where he found a sandal and an item of underwear that Eurona told him belonged to her.

[**13.**] The following morning (5 March 1995), Klein interviewed Coetzee, informing him of the charge. He appeared in court the next day. In his note to the prosecutor, Klein stated that there was no reason to deny Coetzee bail and recommended that he be released on warning. Coetzee appeared before Magistrate Von Bratt (the Magistrate) on a charge of rape. The prosecutor, Mr G Olivier (Olivier), did not place before the magistrate any information concerning Coetzee's previous conviction, nor did he oppose Coetzee's release on his own recognisance. Coetzee was unconditionally released and warned to appear again on 17 March 1995.

[**14.**] After his release, Coetzee returned to Noetzie where he was living with his mother. A day or two later, Mrs Terblanche called on Gosling, who is a friend of the applicant. Mrs Coetzee worked for Gosling both as a domestic worker and as a general assistant in her business in Knysna. The purpose of Mrs Terblanche's visit was to inform Gosling of the attack on Eurona and of Coetzee's previous conviction. In evidence in the High Court, Gosling stated that she was distressed at the news because she thought: 'that he would obviously commit this crime again and I felt very scared to be anywhere where he was.' She added that she felt: 'that he shouldn't maintain a presence in society because my knowledge as a nursing sister and just in life is that a man that has committed two similar crimes is going to do it again.'

[**15.**] Because of her concern, Gosling went to speak to Captain Lawrence Oliver (Oliver), a police officer at the Knysna police station. She told him

she did not think that Coetzee 'should be out on the street' and asked whether he could not be detained pending his trial. Oliver advised her to discuss the matter with the senior prosecutor at Knysna, Ms Dian Louw (Louw). Gosling went to Louw whom she knew well. Her office was in the same building as the Knysna police station. She told Louw that she: 'was afraid that Francois would hurt one of my friends or me and that I really thought he would commit this crime again.' Louw informed her that there was no law to protect them and that the authorities' hands were tied unless Coetzee committed another offence.

[**16.**] On 10 March 1995, Coetzee called at the Terblanche home and told Mrs Terblanche that he wanted to talk. She ordered him off the premises and summoned the police. Coetzee ran away. When the police arrived, she reported the incident. She was upset that he was at large.

[**17.**] On 13 March 1995, Mrs Coetzee's relative, Detective Sergeant Grootboom (Grootboom) gave her a lift home. He was also stationed at the Knysna police station. She informed him that she was concerned about Coetzee, who was withdrawn, and she feared he might attempt suicide or 'get up to something'. She raised these concerns with Grootboom in the hope that he might arrange for her son to be sent to some institution where he could be treated. When they arrived at her home they found that Coetzee had indeed attempted suicide. Grootboom took him to hospital where he was treated. After his discharge, he again returned home to his mother.

[**18.**] On the following day, 14 March 1995, Grootboom took Coetzee to Louw. She interviewed him and took notes of the interview. According to the notes, he told her that he did not know why he committed the offence against Eurona and that at the time he was not aware of what he was doing. He told her that he had a problem because when he saw a girl in a bathing suit he could not control himself. When that happened he would run home and masturbate. He said that this condition had begun when he was about ten years old. Concerning the attack on Eurona, Coetzee told Louw he was walking her home when they came to a dark passage where it 'just happened' ('toe het dit net gebeur'). Afterwards he just saw her lying there. He jumped up and ran to the Hornlee Hotel where he asked the owner to call the police. When the police arrived he handed himself over to them. He said that it was as if a 'superhuman, unnatural force' overcame him and he then committed an act of which he had no knowledge.

[**19.**] As a result of this interview, Louw decided that Coetzee should be referred for psychiatric observation. He was brought before the court on 15 March 1995. At the request of the prosecutor and with his consent, Coetzee was referred in custody to Valkenberg Hospital in Cape Town for 30 days observation in terms of section 77(1) of the Criminal Procedure

Act.[7] The purpose of a referral under that provision is to ascertain whether an accused person is by reason of mental illness or mental defect incapable of understanding trial proceedings so as to make a proper defence. On the same day Louw prepared a report for the hospital authorities in which she included the details of the attack on Eurona, a reference to his previous conviction, a description of the events thereafter and a rendition of her interview with Coetzee.

[**20**.] On 18 April 1995, on his return from Valkenberg Hospital, Coetzee again appeared in the Knysna magistrate's court. The prosecutor was again Olivier and the presiding magistrate a Mr Goosen. According to the report from Valkenberg Hospital, Coetzee was found to be mentally capable of understanding the proceedings and able to make a proper defence, and was also found to have been mentally capable at the time of his attack on Eurona.[8] The criminal charges were put to Coetzee and he pleaded not guilty. He gave as his reason his doubt as to whether he had raped the complainant. The case was postponed to 2 May 1995 pending the Attorney-General's decision whether to proceed in the High Court. There is no reference in the record to the question of bail having been raised. Coetzee was warned to appear on 2 May 1995. On that date the trial was further postponed.

[**21**.] The applicant frequently stayed at Gosling's home in Noetzie. On one such occasion towards the end of June 1995, Gosling left for work in the morning. Shortly after she had left, the applicant noticed Coetzee snooping around the house, looking in at a window and trying to open it. The applicant called to him and asked what he was doing there. He replied that he was looking for Gosling. He then left. The applicant telephoned Gosling and reported the incident. Gosling informed the applicant that Coetzee's excuse was false as he must have seen her driving away in her motor vehicle.

[**22**.] At the request of the applicant, Gosling again went to the Knysna police station and reported the incident to Captain Oliver who again referred her to Louw. According to Gosling's evidence 'I said 'Dian you've got to do something about this guy, there must be some law to protect society, not necessarily me or people at Noetzie' and she said to me that there was nothing she could do.' On 2 August 1995 both the applicant and Gosling again broached the matter with Louw when she visited them at Gosling's business premises. Again, according to Gosling, Louw claimed she was powerless to do anything about Coetzee.

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[7] Act 51 of 1977.

[8] Although the referral was only in terms of section 77(1) of the Criminal Procedure Act, which relates to whether the accused is capable of understanding the proceedings in question so as to make a proper defence, it appears from the record that Valkenberg treated the enquiry as also having been made under section 78(2), which relates to whether the accused is by reason of mental illness or mental defect not criminally responsible for the offence charged.

[**23.**] On Sunday, 6 August 1995, the applicant went to Gosling's home where they had arranged to meet. Gosling had not yet arrived. The applicant went into the house and was confronted by Coetzee who had apparently broken in. He immediately attacked her with a pick handle. His blows were directed at her head and face. When she lifted her arm to protect herself, one of the blows struck and broke her arm. He threatened her and dragged her around the house. He repeatedly ordered her to turn around. She refused to do so. He discarded the pick handle and lunged at her with a knife. He stabbed her left breast and the blade of the knife buckled as it hit her breastbone. He lunged at her again and she kicked him. He lost his balance and she managed to escape through a door. She ran along the beach where someone came to her assistance. Coetzee was charged on a number of counts including one of attempting to murder the applicant.

[**24.**] The prosecution of Coetzee on the charge of raping Eurona came to trial on 11 September 1995. He admitted that he had assaulted her but denied rape. He was convicted of attempted rape and sentenced to seven years imprisonment. On 13 December 1995 he was prosecuted for the attack on the applicant and was convicted of attempted murder and of housebreaking. As mentioned above, he was given an effective sentence of twelve-and-a-half years imprisonment.

The applicant's cause of action

[**25.**] The applicant's claim is founded in delict. The direct cause of the damages she suffered was the assault by Coetzee. However, the applicant wishes to hold the respondents liable because of the alleged wrongful acts or omissions of the police officer (Klein) or the prosecutors (Louw and Olivier) at times when they were acting in the course and scope of their employment with the state. In order to succeed, the applicant would have to establish at the trial that:

> (a) Klein or the prosecutors respectively owed a legal duty to the applicant to protect her;
> (b) Klein or the prosecutors respectively acted in breach of such a duty and did so negligently;
> (c) there was a causal connection between such negligent breach of the duty and the damage suffered by the applicant.

In deciding whether to grant the respondents' application for absolution from the instance the trial court and the SCA dealt with issue (a) only. Having found against the applicant in respect of that issue, it became unnecessary to consider whether there was sufficient evidence on the remaining two issues to place the respondents on their defence.

The test for an order of absolution from the instance

[**26.**] Both the trial judge and SCA applied the appropriate test for the

grant of absolution from the instance at the close of the plaintiff's case, namely whether a court, applying its mind reasonably to the evidence, could or might (not should or ought to) find that the police or prosecutors at Knysna owed a legal duty to the applicant to protect her.[9]

The argument in this court in relation to the duty to act

[**27.**] In her particulars of claim the applicant contended that the relevant members of the South African Police Services and the prosecutors owed her a duty to: '. . . ensure that she enjoyed her constitutional rights of *inter alia* the right to life, the right to respect for and protection of her dignity, the right to freedom and security, the right to personal privacy and the right to freedom of movement.'

[**28.**] Counsel for the applicant submitted that both the High Court and the SCA erred in not applying the relevant provisions of the Constitution in determining whether Klein or the prosecutors owed a legal duty to the applicant to protect her. In particular, counsel relied upon the constitutional obligation on all courts to 'develop the common law' with due regard to the 'spirit, purport and objects' of the Bill of Rights. He submitted that, had the common law been so developed, the High Court and the SCA would have found that there existed a legal duty to act.

[**29.**] It was further contended for the applicant that the common law duty to act should be developed in the light of the provisions of the Bill of Rights in the interim Constitution (IC) which was in operation at all times relevant to the applicant's cause of action. Counsel relied on the following provisions of the IC:

> 8. Equality:
> (1) Every person shall have the right to equality before the law and to equal protection of the law.
> (2) No person shall be unfairly discriminated against, directly or indirectly, and without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.
> (3)(a) This section shall not preclude measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms.
> (b) Every person or community dispossessed of rights in land before the commencement of this Constitution under any law which would have been inconsistent with subsection (2) had that subsection been in operation at the time of the dispossession, shall be entitled to claim restitution of such rights subject to and in accordance with sections 121, 122 and 123.
> (4) *Prima facie* proof of discrimination on any of the grounds specified in subsection (2) shall be presumed to be sufficient proof of unfair discrimination as contemplated in that subsection, until the contrary is established.

[9] *Gordon Lloyd Page & Associates v Rivera and Another* 2001 (1) SA 88 (SCA) at 92E-93A.

> 9. Life — Every person shall have the right to life.
> 10. Human dignity — Every person shall have the right to respect for and protection of his or her dignity.
> 11. Freedom and security of the person:
> (1) Every person shall have the right to freedom and security of the person, which shall include the right not to be detained without trial.
> (2) No person shall be subject to torture of any kind, whether physical, mental or emotional, nor shall any person be subject to cruel, inhuman or degrading treatment or punishment.
> . . .
> 13. Privacy — Every person shall have the right to his or her personal privacy, which shall include the right not to be subject to searches of his or her person, home or property, the seizure of private possessions or the violation of private communications.
> Counsel relied further on the provisions of section 215 of the IC, which read:
> The powers and functions of the Service shall be —
> (a) the prevention of crime;
> (b) the investigation of any offence or alleged offence;
> (c) the maintenance of law and order; and
> (d) the preservation of the internal security of the Republic.

More specifically, so the submission ran, the IC imposed a particular duty on the state to protect women against violent crime in general and sexual abuse in particular. The Court was referred to the following statement of the SCA in *S v Chapman*:[10]

> Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. The rights to dignity, to privacy and the integrity of every person are basic to the ethos of the Constitution [in a footnote there is reference, *inter alia*, to sections 10, 11 and 13 of the IC] and to any defensible civilisation. Women in this country are entitled to the protection of these rights.

[**30**.] It was submitted further that the police and prosecution services are among the primary agencies of the state responsible for the discharge of its constitutional duty to protect the public in general and women in particular against violent crime. It was conceded by counsel for the applicant that it does not follow that any such failure in that duty entitles the victim to damages in delict. It was contended, however, that on the facts of this case, the applicant is entitled to such damages.

[**31**.] Despite the failure by the applicant to rely directly upon the provisions of either section 35(3) of the IC or section 39(2) of the Constitution in the High Court and SCA, counsel for the respondent did not object to this issue being raised in this Court. If covered by the pleadings, and in the absence of unfairness, parties are ordinarily not precluded from raising new legal arguments on appeal.[11] In constitutional matters, however,

[10] 1997 (3) SA 341 (A) at 344J-45B, *per* Mohamed CJ, and Van Heerden and Olivier JJA.
[11] *Cole v Government of the Union of S.A.* 1910 AD 263 at 272-73; *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A) at 23B-24G.

courts have an interest in a constitutional issue being raised timeously. The relevance of this omission in the present case is dealt with later in this judgment.[12]

[**32.**] Neither the trial court nor the SCA had regard to these provisions of the Bill of Rights in the IC or the Constitution. They also did not to have regard to section 39(2) of the Constitution, which requires all our courts to develop the common law with due regard to the 'spirit, purport and objects' of the Bill of Rights.[13]

The obligation to develop the common law

[**33.**] The Constitution is the supreme law. The Bill of Rights, under the IC, applied to all law.[14] Item 2 of schedule 6 to the Constitution provides that 'all law' that was in force when the Constitution took effect, 'continues in force subject to . . . consistency with the Constitution'.[15] Section 173 of the Constitution gives to all higher courts, including this Court, the inherent power to develop the common law, taking into account the interests of justice.[16] In section 7 of the Constitution, the Bill of Rights enshrines the rights of all people in South Africa, and obliges the state to respect, promote and fulfil these rights. Section 8(1) of the Constitution makes the Bill of Rights binding on the judiciary as well as on the legislature and executive. Section 39(2) of the Constitution provides that when developing the common law, every court must promote the spirit, purport and objects of the Bill of Rights.[17] It follows implicitly that where the common law deviates from the spirit, purport and objects of the Bill of Rights the courts have an obligation to develop it by removing that deviation.

[**34.**] Under the IC the circumstances in which the common law could be developed by this Court was a complex issue.[18] However, under the Constitution there can be no question that the obligation to develop the common law with due regard to the spirit, purport and objects of the Bill of Rights is an obligation which falls on all of our courts including this Court.

[12] See paras 41, 50 *et seq* and 78 *et seq*.
[13] Above n 5.
[14] Section 7(2) of the IC provided that: This Chapter shall apply to all law in force during the period of the operation of this Constitution.
[15] Since the Bill of Rights applies to all law, and there is no material difference between section 35(3) of the IC and section 39(2) of the Constitution, it is unnecessary to consider in this case whether the principle of non-retrospectivity applies. See *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC); 1996 (5) BCLR 658 (CC) at paras 15-24.
[16] Section 173 provides: The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.
[17] As emerges from the provisions of section 35(3) of the IC and section 39(2) of the Constitution, the development of the common law will not be different whether we have regard to or promote the spirit, purport and objects of the respective Bills of Rights.
[18] *Du Plessis v De Klerk*, above n 15 at paras 65-66; *Gardener v Whitaker* 1996 (4) SA 337; 1996 (6) BCLR 775 (CC) at paras 16-18.

[**35.**] In this case the High Court and the SCA were requested to develop the common law, not on a constitutional basis, but in the light of the unusual nature of the applicant's cause of action. The common law, especially in the field of delictual liability, has constantly required development.[19] Where a court develops the common law, the provisions of section 39(2) of the Constitution oblige it to have regard to the spirit, purport and objects of the Bill of Rights.

[**36.**] In exercising their powers to develop the common law, judges should be mindful of the fact that the major engine for law reform should be the legislature and not the judiciary. In this regard it is worth repeating the dictum of Iacobucci J in *R v Salituro*,[20] which was cited by Kentridge AJ in *Du Plessis v De Klerk*:[21]

> Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared. Nonetheless there are significant constraints on the power of the judiciary to change the law . . . In a constitutional democracy such as ours it is the legislature and not the courts which has the major responsibility for law reform . . . The judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society.

Under our Constitution the duty cast upon judges is different in degree to that which the Canadian Charter of Rights casts upon Canadian judges. In South Africa, the IC brought into operation, in one fell swoop, a completely new and different set of legal norms.[22] In these circumstances the courts must remain vigilant and should not hesitate to ensure that the common law is developed to reflect the spirit, purport and objects of the Bill of Rights. We would add, too, that this duty upon judges arises in respect both of the civil and criminal law, whether or not the parties in any particular case request the court to develop the common law under section 39(2).

[**37.**] The proceedings in the High Court and the SCA took place after 4 February 1997 when the Constitution became operative. It follows that both the High Court and the SCA were obliged to have regard to the provisions of section 39(2) of the Constitution when developing the common law.[23] However, both courts assumed that the pre-constitutional test for determining the wrongfulness of omissions in delictual actions of this

[19] See *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) at 596G-97H. See also Administrateur, *Natal v Trust Bank van Afrika Bpk* 1979 (3) SA 824 (A) at 828H-29B; *Marais v Richard En n Ander* 1981 (1) SA 1157 (A) at 1166H-67A; *Pakendorf En Andere v De Flamingh* 1982 (3) SA 146 (A) at 157E-58G; and *Schultz v But* 1986 (3) SA 667 (A) at 681D-83I.

[20] (1992) 8 CRR (2d) 173.

[21] Above n 15 at paragraph 61.

[22] See *S v Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at paragraph 262 *per* Mahomed J.

[23] *Amod v Multilateral Motor Vehicle Accidents Fund* 1998 (4) SA 753 (CC); 1998 (10) BCLR 1207 (CC) at paragraph 22.

kind should be applied. In our respectful opinion, they overlooked the demands of section 39(2).

[**38.**] In the High Court and the SCA the applicant relied only on the common law understanding of wrongfulness which has been developed by our courts over many years. Save in one respect referred to in the applicant's heads of argument in the SCA, no reliance was placed on the provisions of the IC or the Constitution as having in any way affected the common law duty to act owed by police officers or prosecutors to members of the public. With regard to the 'interests of the community' imposing a legal liability on the authorities, it was submitted by the applicant's counsel that it would 'encourage the police and prosecuting authorities to act positively to prevent violent attacks on women'. In support of that submission counsel referred to authorities in this Court and the SCA devoted to patterns of discrimination against women.[24] It does not appear to have been suggested that there was any obligation on the High Court or the SCA to develop the common law of delict in terms of section 39(2) of the Constitution.[25]

[**39.**] It needs to be stressed that the obligation of courts to develop the common law, in the context of the section 39(2) objectives, is not purely discretionary. On the contrary, it is implicit in section 39(2) read with section 173 that, where the common law as it stands is deficient in promoting the section 39(2) objectives, the courts are under a general obligation to develop it appropriately. We say a 'general obligation' because we do not mean to suggest that a court must, in each and every case where the common law is involved, embark on an independent exercise as to whether the common law is in need of development and, if so, how it is to be developed under section 39(2). At the same time there might be circumstances where a court is obliged to raise the matter on its own and require full argument from the parties.

[**40.**] It was implicit in the applicant's case that the common law had to be developed beyond existing precedent. In such a situation there are two stages to the inquiry a court is obliged to undertake. They cannot be hermetically separated from one another. The first stage is to consider whether the existing common law, having regard to the section 39(2) objectives, requires development in accordance with these objectives. This inquiry requires a reconsideration of the common law in the light of section 39(2). If this inquiry leads to a positive answer, the second stage concerns itself with how such development is to take place in order to meet the section 39(2) objectives. Possibly because of the way the case was argued before them, neither the High Court nor the SCA embarked on either stage of the above inquiry.

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[24] *Brink v Kitshoff NO* 1996 (4) SA 197 (CC); 1996 (6) BCLR 752 (CC); *S v Baloyi (Minister of Justice and Another Intervening)* 2000 (2) SA 425 (CC); 2000 (1) BCLR 86 (CC); *S v Chapman*, above n 10.

[25] Above n 5.

[**41.**] There is an obligation on litigants to raise constitutional arguments in litigation at the earliest reasonable opportunity in order to ensure that our jurisprudence under the Constitution develops as reliably and harmoniously as possible. In the result this Court has not had the benefit of any assistance from either Court on either stage of the inquiry referred to above. We consider later what this Court should do in these circumstances. But first it is necessary to deal with the reasons of the SCA for dismissing the appeal.

[**42.**] The SCA, as the High Court had done, had regard and referred to wrongfulness as it has been developed in our common law prior to the operation of the IC. Vivier JA stated the following in his judgment:

> The appropriate test for determining the wrongfulness of omissions in delictual actions for damages in our law has been settled in a number of decisions of this Court such as *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) at 597A — C; *Minister of Law and Order v Kadir* 1995 (1) SA 303 (A) at 317C — 318I; *Knop v Johannesburg City Council* 1995 (2) SA 1 (A) at 27G — I and *Government of the Republic of South Africa v Basdeo and Another* 1996 (1) 355 (A) at 367E — H. The existence of the legal duty to avoid or prevent loss is a conclusion of law depending upon a consideration of all the circumstances of each particular case and on the interplay of many factors which have to be considered. The issue, in essence, is one of reasonableness, determined with reference to the legal perceptions of the community as assessed by the Court. In *Minister of Law and Order v Kadir* (*supra*) Hefer JA stated the nature of the enquiry thus at 318E — H:
>
> As the judgments in the cases referred to earlier demonstrate, conclusions as to the existence of a legal duty in cases for which there is no precedent entail policy decisions and value judgments which 'shape and, at times, refashion the common law [and] must reflect the wishes, often unspoken, and the perceptions, often dimly discerned, of the people' (*per* M M Corbett in a lecture reported *sub nom* 'Aspects of the Role of Policy in the Evolution of the Common Law' in (1987) *SALJ* 52 at 67). What is in effect required is that, not merely the interests of the parties *inter se*, but also the conflicting interests of the community, be carefully weighed and that a balance be struck in accordance with what the court conceives to be society's notions of what justice demands.

Hefer JA also stressed the difference between morally reprehensible and legally actionable omissions and warned that a legal duty is not determined by the mere recognition of social attitudes and public and legal policy (at 320A — B). The question must always be whether the defendant ought reasonably and practically to have prevented harm to the plaintiff: in other words, is it reasonable to expect of the defendant to have taken positive measures to prevent the harm (Prof J C van der Walt in Joubert (ed) *The Law of South Africa* Volume 8 1st re-issue part 1 paragraph 56).'[26]

[**43.**] As pointed out in the quotation above, in determining whether there was a legal duty on the police officers to act, Hefer JA in *Minister of Law and Order v Kadir*[27] referred to weighing and the striking of a balance between

[26] Above n 1 at paragraph 7.
[27] 1995 (1) SA 303 (A) at 318E-H.

the interests of parties and the conflicting interests of the community. This is a proportionality exercise with liability depending upon the interplay of various factors. Proportionality is consistent with the Bill of Rights, but that exercise must now be carried out in accordance with the 'spirit, purport and objects of the Bill of Rights' and the relevant factors must be weighed in the context of a constitutional state founded on dignity, equality and freedom and in which government has positive duties to promote and uphold such values.

[**44.**] Under both the IC and the Constitution, the Bill of Rights entrenches the rights to life,[28] human dignity[29] and freedom and security of the person.[30] The Bill of Rights binds the state and all of its organs. Section 7(1) of the IC provided: 'This Chapter shall bind all legislative and executive organs of state at all levels of government.' Section 8(1) of the Constitution provides: 'The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.' It follows that there is a duty imposed on the state and all of its organs not to perform any act that infringes these rights. In some circumstances there would also be a positive component which obliges the state and its organs to provide appropriate protection to everyone through laws and structures designed to afford such protection.

[**45.**] In the United States, a distinction is drawn between 'action' and 'inaction' in relation to the 'due process' clause of their Constitution, (the 14th Amendment). In *DeShaney v Winnebago County Department of Social Services*,[31] the majority declined to hold a government authority liable for a failure to take positive action to prevent harm. As stated in the dissent of Brennan J: 'The Court's baseline is the absence of positive rights in the Constitution and a concomitant suspicion of any claim that seems to depend on such rights.'[32] The provisions of our Constitution, however, point in the opposite direction. So too do the provisions of the European Convention on Human Rights (Convention). Article 2(1) of the Convention provides that: 'Everyone's right to life shall be protected by law.' This corresponds with our Constitution's entrenchment of the right to life. We would adopt the following statement in *Osman v United Kingdom*:[33]

> It is common ground that the state's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person backed up by law enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. It is thus accepted by those appearing before the Court that article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive

[28] Section 9 of the IC; Section 11 of the Constitution.
[29] Section 10 of the IC and the Constitution.
[30] Section 11 of the IC; Section 12 of the Constitution.
[31] 489 US 189 (1989).
[32] *Id* at 204.
[33] 29 EHHR 245 at 305, paragraph 115.

operational measures to protect an individual whose life is at risk from the criminal acts of another individual.

[**46.**] Counsel for the respondents referred us to decisions of the English courts in which public authorities such as the police and local authorities have been granted what amounts to an immunity against claims in delict by members of the public.[34] However, in a recent decision of the House of Lords a more flexible approach to delictual claims against public authorities has emerged. In *Barrett v Enfield London Borough Council*[35] the decision to strike out a claim against a local authority for the negligent failure to safeguard the welfare of a minor was reversed. The reasoning of Lord Browne-Wilkinson is as follows:

> (1) Although the word 'immunity' is sometimes incorrectly used, a holding that it is not fair, just and reasonable to hold liable a particular class of defendants whether generally or in relation to a particular type of activity is not to give immunity from a liability to which the rest of the world is subject. It is a prerequisite to there being any liability in negligence at all that as a matter of policy it is fair, just and reasonable in those circumstances to impose liability in negligence. (2) In a wide range of cases public policy has led to the decision that the imposition of liability would not be fair and reasonable in the circumstances, eg some activities of financial regulators, building inspectors, ship surveyors, social workers dealing with sex abuse cases. In all these cases and many others the view has been taken that the proper performance of the defendant's primary functions for the benefit of society as a whole will be inhibited if they are required to look over their shoulder to avoid liability in negligence. In English law the decision as to whether it is fair, just and reasonable to impose a liability in negligence on a particular class of would-be defendants depends on weighing in the balance the total detriment to the public interest in all cases from holding such class liable in negligence as against the total loss to all would-be plaintiffs if they are not to have a cause of action in respect of the loss they have individually suffered. (3) In English law, questions of public policy and the question whether it is fair and reasonable to impose liability in negligence are decided as questions of law. Once the decision is taken that, say, company auditors though liable to shareholders for negligent auditing are not liable to those proposing to invest in the company (see *Caparo Industries plc v Dickman* [1990] 1 All ER 568, [1990] 2 AC 605), that decision will apply to all future cases of the same kind. The decision does not depend on weighing the balance between the extent of the damage to the plaintiff and the damage to the public in each particular case.[36]

[34] In the case of *Hill v Chief Constable of West Yorkshire* [1989] 1 AC 53 (HL) the House of Lords found it necessary to protect the police from delictual claims on the view that the interests of the community as a whole are best served by a police force that is not diverted and prejudiced by being diverted from its primary duties by the exposure to such liability. The result would be a significant diversion of police manpower and attention from their most important function, that of the suppression of crime. *Per* Lord Keith of Kinkel at 63G. Similar considerations led the House of Lords to deny claims against local authorities for negligence in respect of the discharge of their functions concerning the welfare of children in *X and Others v Bedfordshire County Council* [1995] 2 AC 633 (HL) per Staughton LJ at 674H75G, and per Peter Gibson LJ at 681GH.

[35] [1999] 3 All ER 193.

[36] *Id* at 199d-j.

[**47.**] In two cases the European Court of Human Rights has found against the 'immunity approach' of the English courts. We have already referred to the decision in *Osman*.[37] There it was stated:

> In their alternative submission the applicants asserted that even if it could be said that the immunity pursued a legitimate aim or aims, its operation offended against the principle of proportionality. They reasoned in this respect that the immunity was complete and as such did not distinguish between cases where the merits were strong and those where they were weak. In the instant case, involving the protection of a child and the right to life and where the damage caused was grave, the requirements of public policy could not dictate that the police should be immune from liability. Furthermore, the combined effect of the strict tests of proximity and foreseeability provided limitation enough to prevent untenable cases ever reaching a hearing and to confine liability to those cases where the police have caused serious loss through truly negligent actions.[38]

[**48.**] The second case, *Z and Others v United Kingdom*,[39] was the appeal to the European Court of Human Rights from the decision of the House of Lords in the case of *X and Others v Bedfordshire County Council*.[40] The European Court held that the immunity approach effectively precluded the plaintiffs from having

> . . . available to them an appropriate means of obtaining a determination of their allegations that the local authority failed to protect them from inhuman and degrading treatment and the possibility of obtaining an enforceable award of compensation for the damages suffered thereby.[41]

This was found to contravene the provisions of article 13 of the Convention,[42] and the Court consequently made an award of damages to the appellants.

[**49.**] Fears expressed about the chilling effect such delictual liability might have on the proper exercise of duties by public servants are sufficiently met by the proportionality exercise which must be carried out and also by the requirements of foreseeability and proximity. This exercise in appropriate cases will establish limits to the delictual liability of public officials. A public interest immunity excusing the respondents from liability that they might otherwise have in the circumstances of the present case would be inconsistent with our Constitution and its values. Liability in this case must thus be determined on the basis of the law and its application to the facts of the case, and not because of an immunity against such claims granted to the respondents.

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[37] Above n 33.
[38] *Id* at 314, paragraph 142.
[39] Application no 29392/95, 10 May 2001, as yet unreported.
[40] Above n 34.
[41] *Id* at paragraph 111.
[42] Article 13 provides: Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

The development of the common law under section 39(2)

[**50.**] This Court has consistently, and in various contexts, confirmed the importance of judgments on constitutional issues by the high courts and the Supreme Court of Appeal in cases to be considered by this Court. This is a weighty consideration, for example, when considering whether to grant direct access[43] or to allow an appeal directly to this Court.[44] In *Bequinot's* case[45] the following was said on behalf of a unanimous Court:

> . . . this Court would have . . . to decide the issue without the benefit of the wisdom of the Court below. It has been said before but needs to be restated that this Court is placed at a *grave disadvantage* if it is required to deal with difficult questions of law, constitutional or otherwise, and has to perform the balancing exercise demanded by section 33(1) of the Constitution virtually as a court of first instance.'[46]

(Emphasis supplied.)

[**51.**] There are other public and judicial policy considerations, such as fairness to the losing litigant, which underpin such an approach as was recognised in *Bruce v Fleecytex*[47] where the following was stated by this Court:

> It is, moreover, not ordinarily in the interests of justice for a court to sit as a court of first and last instance, in which matters are decided without there being any possibility of appealing against the decision given. Experience shows that decisions are more likely to be correct if more than one court has been required to consider the issues raised. In such circumstances the losing party has an opportunity of challenging the reasoning on which the first judgment is based, and of reconsidering and refining arguments previously raised in the light of such judgment.[48]

[**52.**] In *Christian Education South Africa v Minister of Education*[49] Langa DP, writing for another unanimous court, dismissed as having 'no merit' an argument that the aforementioned principle was less significant where the issue involved a value judgment and therefore assumed less importance for the interests of justice. He stated that: '. . . the exclusion of the other

43 See, for example, *Transvaal Agricultural Union v Minister of Land Affairs and Another* 1997 (2) SA 621 (CC); 1996 (12) BCLR 1573 (CC) at paragraph 18; *S v Bequinot* 1997 (2) SA 887 (CC); 1996 (12) BCLR 1588 (CC) at paragraph 15; *Bruce and Another v Fleecytex Johannesburg CC and Others* 1998 (2) SA 1143 (CC); 1998 (4) BCLR 415 (CC) at paragraph 8; *Christian Education South Africa v Minister of Education* 1999 (2) SA 83 (CC); 1998 (12) BCLR 1449 (CC) at paras 8 and 12; and *Dormehl v Minister of Justice and Others* 2000 (2) SA 987 (CC); 2000 (5) BCLR 471 (CC) at paragraph 5.

44 See, for example, *Amod v Multilateral Motor Vehicle Accidents Fund*, above n 23 at paragraph 33; *Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party and Others* 1998 (4) SA 1157 (CC); 1998 (7) BCLR 855 (CC) at paras 31-32; and *De Freitas and Another v Society of Advocates of Natal (Natal Law Society Intervening)* 1998 (11) BCLR 1345 (CC) at paras 20-21.

45 Above n 43.

46 *Id* at paragraph 15 citation omitted.

47 Above n 43.

48 *Id* at paragraph 8.

49 Above n 43.

courts from the exercise of a jurisdiction given to them by the Constitution would clearly not be in the general interests of justice and the development of our jurisprudence.'[50]

[**53.**] The above principles become singularly compelling when the issue is whether or how the common law is to be developed under section 39(2) of the Constitution, particularly when this Court has not previously been required to do so. As this Court stated in *Amod's* case:[51]

> When a constitutional matter is one which turns on the direct application of the Constitution and which does not involve the development of the common law, considerations of costs and time may make it desirable that the appeal be brought directly to this Court. But when the constitutional matter involves the development of the common law, the position is different. The Supreme Court of Appeal has jurisdiction to develop the common law in all matters including constitutional matters. Because of the breadth of its jurisdiction and its expertise in the common law, its views as to whether the common law should or should not be developed in a 'constitutional matter' are of particular importance.

This passage was quoted with approval in the *De Freitas* case.[52]

[**54.**] Our Constitution is not merely a formal document regulating public power. It also embodies, like the German Constitution, an objective, normative value system. As was stated by the German Federal Constitutional Court:

> The jurisprudence of the Federal Constitutional Court is consistently to the effect that the basic right norms contain not only defensive subjective rights for the individual but embody at the same time an objective value system which, as a fundamental constitutional value for all areas of the law, acts as a guiding principle and stimulus for the legislature, executive and judiciary.[53]

The same is true of our Constitution.[54] The influence of the fundamental constitutional values on the common law is mandated by section 39(2) of the Constitution. It is within the matrix of this objective normative value system that the common law must be developed.

[**55.**] This requires not only a proper appreciation of the Constitution and its objective, normative value system, but also a proper understanding of the common law. We have previously cautioned against overzealous judicial reform.[55] The proper development of the common law under section 39(2) requires close and sensitive interaction between, on the one hand,

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[50] *Id* at paragraph 9.
[51] Above n 44 at paragraph 33.
[52] Above n 44 at paragraph 21.
[53] BVerfGE 39, 1at 41 and *Du Plessis and Others v De Klerk and Another*, above n 15 at paragraph 94.
[54] Compare also the remarks of Mahomed AJ in *S v Acheson* 1991 (2) SA 805 (NmHC) at 813B.
[55] Above paragraph 36.

the High Courts and the Supreme Court of Appeal[56] which have particular expertise and experience in this area of the law and, on the other hand, this Court. Not only must the common law be developed in a way which meets the section 39(2) objectives, but it must be done in a way most appropriate for the development of the common law within its own paradigm.

[**56.**] There are notionally different ways to develop the common law under section 39(2) of the Constitution, all of which might be consistent with its provisions. Not all would necessarily be equally beneficial for the common law.[57] Before the advent of the IC, the refashioning of the common law in this area entailed 'policy decisions and value judgments'[58] which had to 'reflect the wishes, often unspoken, and the perceptions, often but dimly discerned, of the people'.[59] A balance had to be struck between the interests of the parties and the conflicting interests of the community according to what 'the [c]ourt conceives to be society's notions of what justice demands'.[60] Under section 39(2) of the Constitution concepts such as 'policy decisions and value judgments' reflecting 'the wishes ... and the perceptions ... of the people' and 'society's notions of what justice demands' might well have to be replaced, or supplemented and enriched by the appropriate norms of the objective value system embodied in the Constitution.

[**57.**] Following this route it might be easier to cast the net of unlawfulness wider because constitutional obligations are now placed on the state to respect, protect, promote and fulfil the rights in the Bill of Rights and, in particular, the right of women to have their safety and security protected.

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[56] It is unnecessary for purposes of this case to consider the position of the magistrates and other courts.

[57] The way English law approaches the development of the common law in this context is illustrated by, for example, the decisions in *Home Office v Dorset Yacht Co. Ltd* [1970] AC 1004 (HL); *Hill v Chief Constable of West Yorkshire* above n 34; *Barrett v Enfield London Borough Council* above n 35; and *Lancashire County Council and Another v A (a child)* [2000] AC 147 (HL). By contrast the development of the private law in Germany in the present context is through the indirect horizontal operation of the German Basic Law on private legal relationships. This so-called radiating effect of the Basic Law operates through the general clauses of the German Civil Code, such as clauses which refer to good morals, justified, wrongful, *contra bonos mores*, good faith and so forth; and could even operate in respect of private law rules which are unclear (see *Du Plessis and Others v De Klerk and Another*, above n 15 at paras 39-40; 93-94; 103-05 and the authorities referred to therein).

[58] *Minister of Law and Order v Kadi*r, above n 27 at 318E.

[59] Id at 318F, quoting with approval from Corbett Aspects of the Role of Policy in the Evolution of our Common Law (1987) 104 *SALJ* 52 at 67.

[60] *Minister of Law and Order v Kadir*, above n 27 at 318G. The phrases quoted in the paragraph of text following this footnote are all from the longer quotation cited at n 27 above.

However, it is by no means clear how these constitutional obligations on the state translate into private law duties towards individuals. A consequence of such an approach might be:

> (a) to accentuate the objective nature of unlawfulness as one of the elements of delictual liability, particularly in the context of a bail hearing where the roles and general duties of investigating officers and prosecutors are more clearly defined than would normally be the case;
>
> (b) to define it more broadly; and
>
> (c) to allow the elements of fault and remoteness of damage to play the greater role in limiting liability.

[**58.**] As against this there must be other ways of applying section 39(2) in shaping the common law generally and in determining specifically the wrongfulness element of delictual liability for an omission. Our common law of delict spans many centuries and the debate regarding delictual liability, its elements and their relationship to one another, remains lively. Without the benefit of a fully considered judgment from either the SCA or the High Court as to whether, from the perspective of the common law, one solution would be better than any other, this Court is at a 'grave disadvantage' in the sense indicated in *Bequinot's* case.[61]

[**59.**] The litigants are also disadvantaged because they have not had the opportunity of reconsidering or refining their respective arguments in the light of a prior judgment of the SCA.[62] This in itself impacts negatively on the Court's ability to make wise and prudent choices. Moreover, the issue in this case can hardly be described as an insignificant one, lying at an exotic periphery of the law of delict. On the contrary, the case raises issues of considerable importance to the development of the common law consistently with values of our Constitution.

[**60.**] In our view the High Court, possibly because of the way the case was argued before it, misdirected itself in relation to the constitutional requirements of section 39(2). In the ordinary course a court on appeal would, where the trial court has so misdirected itself, make the order which that Court ought to have made. In the present case, for the reasons that follow, this can be done without pre-empting decisions of the High Court or the SCA as to whether the circumstances of the present case are such to call for the law of delict to be developed, and if so, how this should be done. To that end we proceed to consider the issues relevant to legal liability in the context of the evidence given at the trial and the provisions of the Constitution.

[61] In the passage quoted therefrom in paragraph 50 of this judgment.
[62] See *Bruce v Fleecytex*, above n 44 at paragraph 8.

Should absolution from the instance have been granted in the circumstances of the present case?

[**61**.] Section 215 of the IC provides that:

> The powers and functions of the Service shall be —
> (a) the prevention of crime;
> (b) the investigation of any offence or alleged offence;
> (c) the maintenance of law and order; and
> (d) the preservation of the internal security of the Republic.[63]

The detailed duties of the South African Police Service at the time relevant to this matter were to be found in the Police Act.[64] Section 5 read as follows:

> The functions of the South African Police shall be, *inter alia* —
> (a) the preservation of the internal security of the Republic;
> (b) the maintenance of law and order;
> (c) the investigation of any offence or alleged offence; and
> (d) the prevention of crime.

[**62**.] Thus one finds positive obligations on members of the police force both in the IC and the Police Act. In addressing these obligations in relation to dignity and the freedom and security of the person, few things can be more important to women than freedom from the threat of sexual violence. As it was put by counsel on behalf of the *amicus curiae*:[65]

> Sexual violence and the threat of sexual violence [go] to the core of women's subordination in society. It is the single greatest threat to the self-determination of South African women.

She referred in that context to the following statement by the SCA in the *Chapman* case:[66]

> The courts are under a duty to send a clear message to the accused, to other potential rapists and to the community. We are determined to protect the equality, dignity and freedom of all women, and we shall show no mercy to those who seek to invade those rights.

[63] The provisions of the Constitution are more explicit. Section 7(2) provides that: The state must respect, protect, promote and fulfil the rights in the Bill of Rights. Section 41(1)(b) further provides that: All spheres of government and all organs of state within each sphere must: (b) secure the well-being of the people of the Republic; Chapter 11 makes provision for Security Services. Section 198(a) provides that: National security must reflect the resolve of South Africans, as individuals and as a nation, to be free from fear, and section 205(3) reads as follows: The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.

[64] Act 7 of 1958 which was replaced by the South African Police Service Act 68 of 1995 which commenced on 15 October 1995.

[65] The Centre for Applied Legal Studies (CALS), an organisation based at the University of the Witwatersrand, which conducts research and engages in advocacy, litigation and training for the promotion and protection of human rights in South Africa. CALS has a Gender Research Project which focuses specifically on questions of womens human rights and sex and gender equality, with particular reference to the promotion of equality for disadvantaged groups of women.

[66] Above n 10 at 345C-D.

South Africa also has a duty under international law to prohibit all gender-based discrimination that has the effect or purpose of impairing the enjoyment by women of fundamental rights and freedoms and to take reasonable and appropriate measures to prevent the violation of those rights.[67] The police is one of the primary agencies of the state responsible for the protection of the public in general and women and children in particular against the invasion of their fundamental rights by perpetrators of violent crime.

[**63.**] In the present case the complaint against Klein (the investigating officer in Eurona's case) is not that he was guilty of a mere omission. Coetzee was in custody and Klein had a clear duty to bring to the attention of the prosecutor any factors known to him relevant to the exercise by the magistrate of his discretion to admit Coetzee to bail. He made a positive recommendation that Coetzee should be released on warning in the clear knowledge that the prosecutor would act on such recommendation.

[**64.**] When Klein informed the prosecutor that Coetzee should be released on warning he had interviewed both Eurona and Coetzee. He was aware of the allegation (exaggerated as it may have been) that Coetzee had a previous conviction for rape. On the day after the attack on Eurona, Klein took a statement from Coetzee. It is not clear from the record of the proceedings in the High Court what information was given to him by Coetzee. It was submitted on behalf of the applicant that there was a probability that Coetzee would have given Klein the information he later gave to Louw. For the purpose of an application for absolution from the instance we consider that a reasonable court might be prepared to make that assumption in favour of the applicant.

[**65.**] There appears to be no question that at all times after the attack on Eurona, Coetzee admitted that he was the perpetrator of a violent sexual attack on her. That, too, was a relevant consideration. Coetzee already had a suspended sentence hanging over him for a sexual assault. In the circumstances, and in the light of his admission, less weight than is normally given would have been attached to the presumption of innocence and to the right to freedom and security of the person in determining where the interests of justice lay as far as bail was concerned.

[67] The Convention on the Elimination of All Forms of Discrimination Against Women, commonly known by its acronym CEDAW, was adopted in General Assembly Resolution 34/180 on 18 December 1979. See articles 1, 2, 3, 6, 11, 12 and 16. The Convention was signed by South Africa on 29 January 1993 and ratified on 15 December 1995. The United Nations Committee on the Elimination of Discrimination Against Women, which was established under the Convention, recommended in 1992 that: States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation. See General Recommendation 19, UN GAOR, Committee on the Elimination of Discrimination Against Women, 11th session (1992). See generally a helpful article by Heléne Combrinck, Positive State Duties to Protect Women from Violence: Recent South African Developments (1998) 20 *Human Rights Quarterly* 666-690. And see *S v Baloyi*, above n 24 at paragraph 13.

[**66.**] Klein was aware that, if released, Coetzee would return to his mother's home in the secluded setting of Noetzie. If there was a risk of a repeat attack on a woman, those living in the vicinity of the Coetzee home would be most vulnerable if Coetzee was released. According to Gosling and the applicant they certainly perceived themselves to be in such a position. It was also known to Klein that the previous attacks by Coetzee had been committed against women who knew him. The issue here is whether, given these facts and the constitutional protection to which the applicant was entitled, Klein's advice to the prosecutor that Coetzee be released on his own recognisance's was unlawful.

[**67.**] The SCA did not consider the conduct of Klein on 5 March 1995 and dealt with the case on the basis only of the failure by the prosecutor to oppose bail on 18 April 1995 after Coetzee's return from Valkenberg. But once Coetzee was released on warning in March, the pattern was set. When he returned from Valkenberg, that release order was likely to remain in place unless there were grounds on which he could be denied bail at that stage.

[**68.**] When Coetzee was returned in custody from Valkenberg and appeared before the magistrate on 18 April 1995, Louw (the senior prosecutor) was aware of the material facts relating to Coetzee's history of criminal conduct. She had indeed noted them at the time of the referral of Coetzee to Valkenberg. Those facts disclosed that Coetzee had on two occasions perpetrated crimes of a sexual nature on women who were known to him. The second one was accompanied by brutal violence. Furthermore, Coetzee acknowledged that he had great difficulty in controlling his sexual impulses. This is borne out by the fact that his victims were known to him and his apprehension was inevitable. Louw was also aware that there were very few women living in the seclusion of Noetzie and that they were concerned for their safety and had strong feelings that Coetzee should not have been allowed back into their community.

[**69.**] With his consent, Coetzee was committed to Valkenberg on 15 March 1995 and for that purpose was taken into custody. A committal order was made under the provisions of section 77 of the Criminal Procedure Act.[68] It was necessary, therefore, at the end of the period of observation at Valkenberg, for Coetzee again to appear in the magistrate's court. Olivier, the prosecutor on that occasion, apparently did not apply for him to be kept in custody and he was again released on his own recognisance.

[**70.**] The SCA dealt with the matter on the basis that the magistrate had the power to withdraw the earlier order releasing Coetzee on his own recognisance and reconsider the question of bail. Vivier JA said the following:

> In view of the fact that Coetzee was taken into custody after his first release on 6 March 1995 and that he was then again released on 18 April 1995 the court

[68] Above n 7.

proceedings on 6 March 1995 are irrelevant and need not be considered. The essential enquiry is, first, whether the alleged legal duty was owed by the police and prosecutors with regard to Coetzee's release on 18 April 1995 and, secondly, whether the prosecutors owed the appellant a legal duty to secure his re-arrest following the complaints on 20 June 1995 and 2 August 1995. With regard to Coetzee's release on 18 April 1995 it was obviously the magistrate's decision whether to release him or not, so that the legal duty contended for must be confined to a duty, on the part of the police, to provide the prosecutor with full information and a duty, on the part of the prosecutor, to oppose bail and to give the court full information relevant to Coetzee being remanded in custody or released.[69]

[**71.**] This conclusion that the magistrate could at that hearing have withdrawn the previous order releasing Coetzee on warning was not challenged in this Court and for the purposes of this judgment we consider it prudent to deal with the matter on the basis that the SCA did.[70]

The case against the prosecutors

[**72.**] The IC did not contain any provisions dealing with prosecutors. Section 108(1) provided only that the authority to institute criminal prosecutions on behalf of the state vested in Attorneys-General. Under section 108(2) the powers, duties and functions of Attorneys-General were to be prescribed by law.[71] However, prosecutors have always owed a duty to carry out their public functions independently and in the interests of the public.[72] Although the consideration of bail is pre-eminently a matter for the presiding judicial officer,[73] the information available to the judicial officer can but come from the prosecutor. He or she has a duty to place

[69] Above n 1 at paras 14-15.

[70] Whether, as the Criminal Procedure Act then read, it was open to the magistrate in the circumstances of the present case to review or reconsider the release of Coetzee is a matter on which we do not express an opinion.

[71] 71 Under the Constitution section 179 deals more explicitly with the prosecuting authority. It is provided, *inter alia*, in section 179(4) that national legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice. The national legislation is to be found in the National Prosecuting Authority Act 32 of 1998. Section 32(1) of the Act reads as follows: (a) A member of the *prosecuting authority* shall serve impartially and exercise, carry out or perform his or her powers, duties and functions in good faith and without fear, favour or prejudice and subject only to the *Constitution* and the law. (b) Subject to the *Constitution* and *this Act*, no organ of state and no member or employee of an organ of state nor any other person shall improperly interfere with, hinder or obstruct the *prosecuting authority* or any member thereof in the exercise, carrying out or performance of its, his or her powers, duties and functions.

[72] See *R v Riekert* 1954 (4) SA 254 (SWA) at 261D-E; *S v Jija and Others* 1991 (2) SA 52 (E) at 67J-68A, and *S v Van Huyssteen* [2000] 3 All SA 439 (C) at paragraph 11. Australia: *Lawless v R* (1979) 26 ALR 161 at 176-77; *R v Hall* (1979) 28 ALR 107 at 112. Canada: *Boucher v The Queen*, (1954) 110 CCC 263 at 270;*Bain v The Queen* (1992) 87 DLR (4th) 449 at 463-65. England: *R v Brown* [1997] 3 All ER 769 (HL) at 778. India: *S.B. Shahane v State of Maharashtra* AIR 1995 SC 1628 at 1629-31. United States: *Imbler v Pachtman, District Attorney* 424 US 409, 423 (1976).

[73] *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat* 1999 (4) SA 623 (CC); 1999 (7) BCLR 771 (CC) at paras 41-43; *Ellish en Andere v Prokureur-Generaal, Witwatersrandse Plaaslike Afdeling* 1994 (4) SA 835 (W) at 849E-F.

before the court any information relevant to the exercise of the discretion with regard to the grant or refusal of bail and, if granted, any appropriate conditions attaching thereto.

[**73**.] In considering the legal duty owed by a prosecutor either to the public generally or to a particular member thereof, a court should take into account the pressures under which prosecutors work, especially in the magistrates' courts. Care should be taken not to use hindsight as a basis for unfair criticism. To err in this regard might well have a chilling effect on the exercise by prosecutors of their judgment in favour of the liberty of the individual. There are far too many persons awaiting trial in our prisons either because bail has been refused or because bail has been set in an amount which cannot be paid. We can do no better in this regard than refer to the following passage which appears in the *United Nations Guidelines on the Role of Prosecutors*:[74]

> In the performance of their duties, prosecutors shall:
> (a) . . .
> (b) Protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect; . . .

[**74**.] That said, each case must ultimately depend on its own facts. There seems to be no reason in principle why a prosecutor who has reliable information, for example, that an accused person is violent, has a grudge against the complainant and has threatened to do violence to her if released on bail should not be held liable for the consequences of a negligent failure to bring such information to the attention of the court. If such negligence results in the release of the accused on bail, who then proceeds to implement the threat made, a strong case could be made out for holding the prosecutor liable for the damages suffered by the complainant.

Causation

[**75**.] Counsel for the respondents submitted that at the relevant time in 1995, magistrates interpreted the provisions of the IC as requiring them to grant bail unless the state could establish that the interests of justice required the accused to be kept in custody.[75] He relied on the evidence of the magistrate, Mr KJ von Bratt, in support of the submission that even if

[74] Adopted by the 8th United Nations Congress on the Prevention of Crime and the Treatment of Offenders held in Havana, Cuba, from 17 August7 September 1990. These guidelines have been incorporated by reference in our law by section 22(4)(f) of the National Prosecuting Authority Act 32 of 1998, which requires the National Director to bring them to the attention of Directors and prosecutors and promote their respect for and compliance with those principles.

[75] See Du Toit *et al Commentary on the Criminal Procedure Act* (Juta, Cape Town 1987, revision service update 24, 2000) at 9-7; and *Ellish en Andere v Prokureur-Generaal, Witwatersrandse Plaaslike Afdeling*, above n 73 at 846H-J.

Klein's information had been placed before him, he would in any event have released Coetzee. Mr von Bratt was called as a witness by the applicant. He stated that had he been informed of Coetzee's previous conviction in the light of the charge involving Eurona, he would have held an inquiry into the question of bail. He was not asked to take that any further. Under cross-examination he stated that at that time in 1995: '... there was very much a renewed emphasis on personal freedom at that stage, which did play a role ...'. He added that in consequence people were allowed out on their own recognisances more readily than prior to the coming into operation of the IC and that this also related to persons accused of serious offences such as murder and rape and that the state would have had to have produced substantial grounds for keeping an accused in prison. In re-examination he said that bail would have been refused if he had been of the view that Coetzee's previous conviction had been a serious one and that there was a risk of his committing a further offence.

[**76.**] It may well be that in deciding whether a magistrate could or might have refused to release Coetzee on bail an objective test must be applied, and that the evidence of the magistrate who happened to have been seized with the matter is neither relevant nor admissible. On this approach the court would have regard to the law as it should have been applied by a reasonable magistrate on the facts given to him by the prosecutor. The question of causation, in the event of the conduct of either the police or the prosecutors being unlawful, was not considered by the High Court or the SCA. This too is a complex issue that may ultimately depend on the facts as they emerge at the end of the case.

[**77.**] Not having the benefit of the views of the High Court or the SCA, or argument from counsel in this Court on the admissibility of Von Bratt's evidence, it is not desirable that this Court should express a firm view as to either the proper test to be applied in determining this issue or on the application of the correct test to the facts established on the applicant's evidence. Nor, in the light of the decision to which we have come, is it necessary for us to do so. The evidence is in our view sufficient to justify a conclusion that if bail had been opposed and if all relevant information pertaining to Coetzee's background and sexual problems had been placed before the magistrate, bail might have been refused. That is sufficient to put the respondents on their defence in relation to this issue.

What should this court do in these circumstances?

[**78.**] The issue confronting this Court is whether, in the special circumstances of this case, it should itself decide if the law of delict should be developed to afford the applicant a right to claim damages if the police or the prosecutor were negligent, or whether this should be left to the High Court or the SCA to determine.

[**79**.] An order for absolution from the instance is an appropriate order to make at the end of the plaintiff's case where a court, applying its mind reasonably to the evidence, could not or might not find for the plaintiff.[76] The underlying reason is that it is ordinarily in the interests of justice to bring the litigation to an end in such circumstances.[77] A determination of what is in the interests of justice necessarily involves the exercise of a discretion.[78]

[**80**.] In *Minister of Law and Order v Kadir*,[79] Hefer JA made the following comment, with which we are in respectful agreement, concerning the approach to be adopted by courts when they are asked to develop the common law:

> Decisions like these can seldom be taken on a mere handful of allegations in a pleading which only reflects the facts on which one of the contending parties relies. In the passage cited earlier, Fleming rightly stressed the interplay of many factors which have to be considered. It is impossible to arrive at a conclusion except upon a consideration of *all* the circumstances of the case and every other relevant factor. This would seem to indicate that the present matter should rather go to trial and not be disposed of on exception. On the other hand, it must be assumed — since the plaintiff will be debarred from presenting a stronger case to the trial court than the one pleaded — that the facts alleged in support of the alleged legal duty represent a high-water mark of the factual basis on which the Court will be required to decide the question. Therefore, if those facts do not *prima facie* support the legal duty contended for, there is no reason why the exception should not succeed.[80]

This is relevant to applications for absolution from the instance in trials where the court is asked to develop the common law in terms of section 39(2) of the Constitution. There may be cases where there is clearly no merit in the submission that the common law should be developed to provide relief to the plaintiff. In such circumstances absolution should be granted. But where the factual situation is complex and the legal position uncertain, the interests of justice will often better be served by the exercise of the discretion that the trial judge has to refuse absolution. If this is done, the facts on which the decision has to be made can be determined after hearing all the evidence, and the decision can be given in the light of all the circumstances of the case, with due regard to all relevant factors. This has the merit of avoiding the determination of issues on the basis of what might prove to be hypothetical facts. It also ensures that there is a full and complete record on which the dispute can be determined with finality not only by the trial court, but by an Appeal Court required to deal with the matter. This may curtail rather than prolong litigation.

[76] Above paragraph 26.

[77] *Mazibuko v Santam Insurance Co Ld and Another* 1982 (3) SA 125 (A) at 134E-35A; *Putter v Provincial Insurance Co Ltd. and Another* 1963 (4) SA 771 (W) at 772F-G; *Ardecor (Pty) Ltd v Quality Caterers (Pty) Ltd and Others* 1978 (3) SA 1073 (N) at 1076G-77C.

[78] *Ardecor*, id at 1077C-F. Compare *Young v Rank and Others* [1950] 2 KB 510 at 511-13.

[79] Above n 27.

[80] Id at 318G-J.

[**81**.] We are satisfied that the case for the appellant has sufficient merit to require careful consideration to be given to the complex legal issues that it raises. If this Court were to decide these issues it would have to do so in circumstances where for all practical purposes it would be acting as a court of first instance in relation to issues of fundamental importance concerning the development of the common law of delict. For the reasons that have already been given that is not desirable. Moreover, even if the applicant were to be successful that would not put an end to the litigation. The facts would still have to be determined and they might prove to be materially different from those evaluated at the absolution stage. It is not desirable that a case as complex as this should be dealt with on the basis of what the facts might be rather than what they are.

[**82**.] This matter has already passed through three courts and it is desirable that it be brought to a head without further unnecessary delay. The High Court will deal with the matter on the basis of the facts as determined by it.

[**83**.] The appropriate order is to uphold the appeal, to set aside the orders of the High Court and the SCA and to refer the matter back to the High Court for it to continue with the trial. That is likely to lead to a final determination of the issues with the least delay. The application for leave to appeal must consequently be granted and the appeal must succeed.

The order

[84.] The following order is made:

1. The application for special leave to appeal is granted with costs.
2. The appeal is upheld with costs.
3. The order of the Supreme Court of Appeal is set aside and the following order is substituted for that of the High Court: 'The application for absolution from the instance is dismissed with costs.'
4. The matter is referred back to the High Court so that the trial may continue.
5. The costs orders referred to in 1 and 2 above are to include those of two counsel.

TANZANIA

Ephraim v Pastory

(2001) AHRLR 236 (TzHC 1990)

Ephraim v Pastory
High Court of Tanzania at Mwanza, 22 February 1990 (Civil Appeal no 70 of 1989)
Mwalusanya J
Previously reported: (1990) LRC (Const) 757

Constitutional supremacy (17, 38)
Interpretation (interpretative powers of courts, 11-14, 16, 35; customary law, conflict with the Bill of Rights, recognition clause, 19, 29, 32; statutory interpretation, purpose of the legislation, 20-22, 24-28, 34)
Equality, non-discrimination (discrimination on the grounds of sex, inheritance, 7, 8, 10, 42)

Mwalusanya J

[**1.**] This appeal is about women's rights under our Bill of Rights. Women's liberation is high on the agenda in this appeal. Women do not want to be discriminated against on account of their sex. What happened is that a woman, one Holaria d/o Pastory, who is the first respondent in this appeal, inherited some clan land from her father by a valid will. Finding that she was getting old and senile and had no one to take care of her, she sold the clan land on 24 August 1988 to the second respondent Gervazi s/o Kaizilege for Shs 300 000. This second respondent is a stranger and not a clan member. Then on 25 August 1988, the present appellant Bernardo s/o Ephrahim filed a suit at Kashasha Primary Court in Muleba District, Kagera Region, praying for a declaration that the sale of the clan land by his aunt, the first respondent to the second respondent was void as females under Haya Customary Law have no power to sell clan land. The Primary Court agreed with the appellant and the sale was declared void and the first respondent was ordered to refund the Shs 300 000 to the purchaser.

[**2.**] Indeed the Haya customary law is clear on the point. It is contained in the Laws of Inheritance of the Declaration of Customary Law, 1963, which in paragraph 20 provides:

> Women can inherit, except for clan land, which they may receive in usufruct but may not sell. However, if there is no male of that clan, women may inherit such land in full ownership.

[**3.**] In short that means that females can inherit clan land which they can use in usufruct ie for their lifetime. But they have no power to sell it, otherwise the sale is null and void. As for male members of the clan the position is different. Cory and Hartnoll in their book on *Customary Law of the Haya Tribe* tell us, in paragraph 561 and 562, that a male member of the clan can sell land but if he sells it without consent of the clan members, other clan members can redeem that clan land. The land returns to the clan and becomes the property of the man who repays the purchase price. It will be seen that the law discriminates against women as Hamlyn J was heard to say in the case of *Bi Verdiana Kyabuje and Others v Gregory s/o Kyabuje* (1968) HCD no 459 that:

> Now however much this court may sympathise with these very natural sentiments it is cases of this nature bound by the Customary law applicable to these matters. It has frequently been said that it is not for courts to overrule customary law. Any variations in such law as takes place must be variations initiated by the altering customs of the community where they originate. Thus, if a customary law draws a distinction in a matter of this nature between males and females, it does not fall to this court to decide that such law is inappropriate to modern development and conditions. That must be done elsewhere than in the courts of law.

[**4.**] The Tanzania Court of Appeal some 13 years later nodded in agreement with the above observations in the case of *Deocres Lutabana v Deus Kashaga* (1981) TLR 122 as *per* Mwakasendo JA. The rule that females in the Bahaya community do not have the rights to sell clan land was affirmed by the Tanzania Court of Appeal in *Rukuba Nteme v Bi Jalia Hassani and Another (supra)* as *per* Nyalali CJ and later in *Haji Athumani Isaa v Rweutama Mituta* (Court of Appeal of Tanzania, Civil Appeal no 9 of 1988, unreported) as *per* Kisanga JA. It appeared then that the fate of women as far as the sale of clan land was concerned was sealed. The position was as an English novelist Sir Thomas Browne (1605-1682) had pointed out in his book *Religio Medici* where he said:

> The whole world was made for man; but the twelfth part of man for woman. Man is the whole world, and the breath of God, woman the rib and crooked piece of man. I could be content that we might procreate like trees, without conjunction or that there were any way to perpetuate the world without this trivial and vulgar way of union.

[**5.**] However the Senior District Magistrate of Muleba, Mr LS Ngonyani, did not think the courts were helpless or impotent to help women. He took a different stand in favour of women. He *inter alia*, said in his judgment:

> What I can say here is that the respondents' claim is to bar female clan members on clan holdings in respect of inheritance and sale. That female clan members are only to benefit or enjoy the fruits from the clan holdings. I may say that this was the old proposition. With the Bill of Rights of [1984] female clan members have the same rights as male clan members.

[**6.**] And so he held that the first respondent had the rights under the Constitution to sell clan land and that the appellant was at liberty to

redeem that clan land on payment of the purchase price of shs 300 000. That has spurred the appellant to appeal to this court, arguing that the decision of the District Court was contrary to the law.

[**7.**] Since this country adopted the doctrine of *Ujamaa* and self-reliance, discrimination against women was rejected as a crime. In his booklet *Socialism and Rural Development*, Mwalimu Julius K Nyerere states:

> Although every individual was joined to his fellow by human respect, there was in most parts of Tanzania, an acceptance of one human inequality. Although we try to hide the fact and despite the exaggeration which our critics have frequently indulged in, it is true that the women in traditional society were regarded as having a place in the community which was not only different, but was also to some extent inferior. This is certainly inconsistent with our socialist conception of the equality of all human beings and the right of all to live in such security and freedom as is consistent with equal security and freedom from all other. If we want our country to make full and quick progress now, it is essential that our women live in terms of full equality with their fellow citizens who are men.

[**8.**] And as long ago as in 1968 Mr Justice Saidi (as he then was) pointed out the inherent wrong in this discriminatory customary law. It was in the case of *Ndewawiosia d/o Mbeamtzo v Imanuel s/o Malasi (supra*). He *inter alia*, said:

> Now it is abundantly clear that this custom, which bars daughters from inheriting clan land and sometimes their own father's estate, has left a loophole for undeserving clansmen to flourish within the tribe. Lazy clan members anxiously await the death of their prosperous clansman who happens to have no male issue and as soon as death occurs they immediately grab the estate and mercilessly mess up things in the dead man's household, putting the widow and daughters into terrible confusion, fear, and misery. It is quite clear that this traditional custom has outlived its usefulness. The age of discrimination based on sex is long gone and the world is now in the stage of full equality of all human beings irrespective of their sex, creed, race or colour.

[**9.**] But the customary law in question has not been changed up to this day. The women are still suffering at the hands of selfish clan members.

[**10.**] What is more is that since the Bill of Rights was incorporated in our 1977 Constitution, see Act no 15 of 1984, by article 13(4) discrimination against women has been prohibited. But some people say that that is a dead letter. And the Universal Declaration of Human Rights, 1948, which is part of our Constitution by virtue of article 9(1)(f) prohibits discrimination based on sex as per article 7. Moreover Tanzania has ratified the Convention on the Elimination of All Forms of Discrimination Against Women, 1979. That is not all. Tanzania has also ratified the African Charter on Human and Peoples' Rights, 1981, which in article 18(3) prohibits discrimination on account of sex. And finally Tanzania has ratified the International Covenant on Civil and Political Rights, 1966, which in article 26 prohibits discrimination based on sex. The principles enunciated in the above-named documents are a standard below which any civilised nation

will be ashamed to fall. It is clear from what I have discussed that the customary law under discussion flies in the face of our Bill of Rights as well as the international conventions to which we are signatories.

[**11.**] Courts are not impotent to invalidate laws which are discriminatory and unconstitutional. The Tanzania Court of Appeal both in the case of *Rukuba Nteme (supra)* and *Haji Athumani Issa (supra)* agreed that the discriminatory laws can be declared void for being unconstitutional by filing a petition in the High Court under article 30(3) of the Constitution.

[**12.**] In the case of *Haji Athymani Issa (supra),* Kisanga JA pointed out that the constitutionality of a statue or any law could not be challenged in the course of an appeal by an appellate court. He said that the proper procedure was for the aggrieved party to file a petition in the High Court under article 30(3) of our Constitution. Equally here, as there is no petition under article 30(3) of the Constitution and so the question of deciding any constitutionality of a statute or any law does not arise. When the issue of basic rights under the Constitution is raised or becomes apparent only after the commencement of proceedings in a subordinate court, it seems that the proper thing to do is for the subordinate court concerned to adjourn the proceedings and advise the party concerned to file petition in the High Court under article 30(3) of the Constitution for the vindication of his or her right.

[**13.**] One more observation before I leave this topic. In the *Haji Athumani Issa* Case (*supra*) Kisanga JA seems to suggest that 'rules of the court' must first be enacted under article 30(4) of the Constitution before a citizen can file a petition under article 30(3) of the Constitution. However, that was just and *obiter dicta* as the decision of the case did not turn on the point. I wish to make certain observations on the point. It will be recalled that article 30(4) states that the authority 'may' make rules of the court and does not say it 'must' make them. That appears to envisage a situation whereby petitions may be filed without rules of the court made for the purpose. That is not a new phenomenon. Under section 18 (1) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Ordinance, 1955, as amended by Law Reform (Fatal Accidents and Miscellaneous Provisions) Ordinance (Amendment) Act, 1968 it is provided that:

> The Chief Justice may make rules of the court prescribing the procedure and the fees payable or documents filed or issued in cases where an order of mandamus, prohibition or certiorari is sought.

[**14.**] It is now 22 years since that provision was made and yet the successive Chief Justices have yet to make rules of the court for the purpose. But that has not prevented nor deterred litigants from filing the necessary applications under the law. By parity of reasoning, when article 30(4) of the Constitution states that the authority may make rules of the court for filing petitions, in the absence of those rules of the courts it does not mean the courts are impotent to act. The High Court will invoke its inherent powers and use the available rules of the court. After all, the Rules of

Procedure are the handmaidens of justice and should not be used to defeat substantive justice — see Biron J in *General Marketing Co Ltd v AA Shariff* [1980] TLR 61 at page 65. Therefore, failure to invoke the correct rules of the court cannot defeat the course of justice, particularly when human rights are at stake. In other words, wrong rules of the court may only render the proceedings a nullity when they result in a miscarriage of justice.

[**15.**] That was a conclusion reached by the Supreme Court of Mauritius in *Noordally v Attorney-General and Another* [1987] LRC (Const) 599 (Mauritius, SC) which was a petition under the Constitution. What happened in that case is that the applicant did not apply in person as required by the Constitution, and the proper respondent was not cited and the application was not made according to the correct procedure as prescribed. Delivering the judgment of the court, Moollan CJ held that, notwithstanding all those procedural irregularities, the court would disregard the errors since the case raised matters of great public interest and no useful purpose would be served by insistence on form other than to delay a decision on the merits. The court cited the decision of their earlier case where they had said:

> It is the Court's duty to determine the validity of any statute which is alleged to be unconstitutional, because no law that contravenes the Constitution can be suffered to survive, and the authority to determine whether the legislature has acted within the powers conferred upon it by the Constitution is vested in the Court. The Court's primary concern, therefore, in any case where a contravention of the Constitution is invoked is to ensure that it be redressed as conveniently and speedily as possible.

[**16.**] That approach was also made by the Privy Council in the case of *Mariapper v Wijesinha* [1967] 3 WLR 1460. It is a commendable approach which I hope will be adopted by the High Court of Tanzania as well as the Tanzania Court of Appeal. The primary concern of the court should not be as to whether the correct rules of the court have been invoked, but rather to redress the wrong as speedily as possible.

[**17.**] If the Tanzania Court of Appeal is to regard the decision in *Haji Athuman Issa* case *(supra)* as the last word on the matter, then it is only hoped that their conscience will be tempered by what the former Chief Justice of Botswana, Aguda CJ had said in the article 'The role of the Judge with special Reference to Civil Liberties' (Vol 10, no 2 *East African Journal*, 1974, page 158):

> If the Constitution entrenches fundamental rights, these must be regarded as the basic norm of the whole legal system. Therefore all laws and statutes which are applicable to the state must be subjected, as the occasion arises, to rigorous tests and meticulous scrutiny to make sure that they are in consonance with the declared basic norm of the Constitution. It is clear from this that there is no room here for a rigid application of the common law doctrine of *stare decisis*. It is submitted therefore that a court can refuse to follow the judgment of a higher court which was given before the enactment of a Constitution if such a judg-

> ment is in conflict with a provision of the Constitution. Also the final court of the land must regard itself absolutely bound only by the Constitution and not by any pervious decision of the same court.

[**18.**] If the *Haji Athumani Issa* case (*supra*) is to be regarded as binding authority and not just an *obiter dicta* then the hopes of the masses of Tanzania that they would be saved by the Bill of Rights have been dashed. This is because the rules of the court may not be enacted for years on end.

[**19.**] It has been provided by section 5(1) of the Constitution (Consequential, Transitional and Temporary Provisions) Act, 1984 (Act no 16 of 1984) that with effect from March 1988 the courts will construe the existing law, including customary law 'with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with the provisions of the Fifth Constitutional Amendment Act, 1984, ie the Bill of Rights'.

[**20.**] All courts in Tanzania have been enjoined to interpret that section in the course of their duties. And I think it is the section which the Senior District Magistrates of Muleba had invoked in hearing this appeal. In the book *Law and Its Administration in One Party State* by RW James and FM Kassam, the former Chief Justice of Tanzania, Mr Georges, says:

> Apart from judicial review, the Courts can usually be depended upon to be astute in finding interpretations for enactments which will promote rather than destroy the rights of the individual and this is quite apart from declaring bad or good.

[**21.**] The shape in which a statute is imposed on the community as a guide for conduct is that statute as interpreted by the courts. The courts put life into the dead words of the statute. By statutory interpretation courts make judge-made law affecting the fundamental rights of a citizen.

[**22.**] Prof BA Rwezaura of the Faculty of Law of University of Dar es Salaam in his article 'Reflections on the Relationship between State Law and Customary Law in Contemporary Tanzania: Need for Legislative Action?' (Vol 2 no 1 *Tanzania Law Reform Bulletin*, July, 1988, page 19) holds the view that courts in Tanzania can modify discriminatory customary law in the course of statutory interpretation. He says:

> It is also anticipated by section 5 (1) of the Constitution (Consequential, Transitional and Temporary Provisions), 1984, with effect from March 1988, courts will construe existing law, including customary law, with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with the provisions of the Constitution.

[**23.**] Now how should section 5 (1) of Act 16 of 1984 be interpreted by the courts? That is the big question.

[**24.**] Lord Denning MR (as he then was) in the case of *Seaford Court Estate Ltd v Asher* [1949] 2 KB 481 (CA) tells us what a judge should do whenever a statute comes up for construction. He says:

He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it, and of the mischief which it was passed to remedy and then must supplement the written word so as to give 'force and life' to the intention of the legislature. That was clearly laid down by the resolution of the judges in *Heydon's Case* (1584) 3 Col. Rep. 7a and it is the safest guide today. Good practical advice on the subject was given about the same time by Plowden.

[**25.**] In two more cases Lord Denning MR (as he then was) had to repeat his warnings as regards the use for the courts to invoke a purposive approach of interpretation which is sometimes referred to as the schematic and teleological method of interpretation. The two cases are *Buchanan & Co Ltd v Babco Ltd* [1977] QB 208; [1977] All ER 518 and the case of *Nothman v Barnet London Borough Council* [1978] 1 WLR 220 (CA). In the latter case he emphasised that the days of strict literal and grammatical construction of the words of a statute were gone. He continued:

> The method is now completely out of date. It has been replaced by the approach which Lord Diplock described as the purposive approach (in *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1971] AC 850 at p 881). In all cases now in the interpretation of statutes we adopt such a construction as will promote the general legislative purpose underlying the provision.

[**26.**] The Tanzania Court of Appeal has adopted the above purposive approach as shown in the case of *Bi Hawa Mohamed v Ally Sefu (supra*) as *per* Nyalali CJ. In there the High Court took a narrow view of a statutory provision with the result that the meaning attributed to the relevant part of the statute excluded the wife's domestic services in computing her contribution in building her husband's house. By applying the purposive approach the Court of Appeal of Tanzania arrived at a different conclusion. And *ex cathedra* in a paper delivered to the first Commonwealth Africa Judicial Conference in The Gambia on 6 May 1986 entitled 'The Challenges of Development to Law in Developing Countries Viewed from the Perspective of Human Rights', Chief Justice Nyalali cited with approval the purposive approach of interpretation enunciated by Lord Denning MR (as he then was) in *Buchanan and Co v Babco Ltd (supra*) and stated:

> By failing to give due weight to the reasons and objectives of a statute, this methodology (the literal construction), commonly used in common law countries, misdirects the courts into a position where they end up applying the intention of the Parliamentary legal draftsman instead of the presumed intention of the Parliament concerned.

[**27.**] Now what was the intention of the Parliament of Tanzania to pass section 5 (1) of Act 16 of 1984 and what was the mischief that it intended to remedy?

[**28.**] There can be no doubt that Parliament wanted to do away with all oppressive and unjust laws of the past. It wanted all existing laws (as they

existed in 1984) which were inconsistent with the Bill of Rights to be inapplicable in the new era or be treated as modified so that they would be in line with the Bill of Rights. It wanted the courts to modify by construction those existing laws which were inconsistent with the Bill of Rights such that they were in line with the new era. We have had a new *Grundnorm* since 1984, and so Parliament wanted the country to start with a clean slate. That is clear from the express words of section 5 (1) of Act 16 of 1984. The mischief it intended to remedy is all the unjust existing laws, such as the discriminatory customary law now under discussion. I think the message the Parliament wanted to impart to the courts under section 5(1) of Act 16 of 1984 is loud and clear and needs no interpolations.

[**29.**] If Parliament meant otherwise it could have said so in clear words. Many countries in the Commonwealth which had to incorporate a Bill of Rights in their Constitutions have expressly indicated what they wanted to be the position of the existing law after the introduction of the Bill of Rights in their Constitutions. For example in Sri Lanka article 18(3) of their 1972 Constitution clearly states that 'all existing law shall operate notwithstanding any inconsistency with the provisions of the Bill of Rights'. See the case of *Gunaratne v People's Bank* [1987] LRC (Const) 383 at page 398 (SL, SC).

[**30.**] In Trinidad and Tobago their 1976 Constitution in article 6 (1) clearly states: 'Nothing in the Bill of Rights shall invalidate the existing law' — and so in *Attorney-General v Morgan* [1985] LRC (Const) 770 at pages 783-984 Melsick CJ held that the Rent Restriction Act was protected from challenge by the above section. Other cases from Trinidad and Tobago on the same point are *De Freitos v Benny and Others*; [1976] AC 239 (PC) and *Maharaj v Attorney-General* [1979] AC 385 (PC).

[**31.**] The Constitution of Jamaica states: 'Nothing contained in any law in force immediately before the commencement of the Constitution shall be held inconsistent with the human rights provisions in the said Constitution.' And so the then existing law, even if it was oppressive, was saved as indicated in the two cases from Jamaica: *Director of Public Prosecutors v Patrick Nasralla* [1967] 2 AC 238 (PC) and the case of *Riley and Others v Attorney-General of Jamaica and Another* [1982] 3 All ER 469 (PC). And from the Cook Islands in the case of *Clarke v Karika* [1985] LRC (Const) 732 (Cook Is, CA), Speight CJ of the Court of Appeal held that the human rights provisions in their Constitution only declared rights already afforded by the existing statutory and common law, and so all the existing law had been saved intact.

[**32.**] But we in Tanzania did not want to adopt the above provisions which 'saved' the existing law operating prior to the introduction of the Bill of Rights. We wanted to start with a *clean slate*, a new *Grundnorm*. That was nice for the people. The people of Zimbabwe did the same when their Constitution came into effect on 18 April 1980. And they had a similar provision like our section 5(1) of Act 16 of 1984 and theirs is section 4(1)

of the Zimbabwe Constitution (Transitional, Supplementary and Consequential Provision) Order, 1980 and provides: 'That existing laws must be so construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution.'

[**33**.] In Zimbabwe in 1987 a certain provision in the Criminal Procedure and Evidence Act, chapter 59, restricting the right to bail came into question as to whether it should not be construed as modified for being inconsistent with the right to liberty in the Bill of Rights. The case is *Bull v Minister of Home Affairs* [1987] LRC (Const) 547. In the High Court, Sansole J agreed with the applicant that if indeed the provision in the Criminal Procedure Act restricting bail was inconsistent with the right to liberty prescribed in the Bill of Rights, then it would be taken to be modified such that it did not exist but was void. But the learned judge found it as a fact that the section in question was inconsistent with any provision in the Bill of Rights as article 13 of the Constitution allowed pre-trial detention without bail subject to the limitation that the period of detention was reasonable. And so the question of construing the section in the Criminal Procedure Act as modified did not arise. The Supreme Court of Zimbabwe (as *per* Beck JA) agreed with that reasoning.

[**34**.] The above case from Zimbabwe is persuasive authority for the proposition of law that any existing law that is inconsistent with the Bill of Rights should be regarded as modified such that the offending part of that statute or law is void.

[**35**.] The reception clause of section 5(1) of Act 16 of 1984 has its parallel in the reception clause of the English common law introduced by the Tanganyika Order in Council of 1920. Both clauses give the mandate to the courts to construe the received law with some modifications and qualifications. The reception of the English common law said:

> The received law was subject to the qualification that it be applied so far as the circumstances of the territory and its inhabitants permit and subject to such qualifications as local circumstances may render necessary.

[**36**.] Mfalila J (as he then was) very correctly lamented in his paper 'The Challenges of Dispensing Justice in Africa According to Common Law' of the second Commonwealth Africa Judicial Conference in Arusha, Tanzania, 8 — 12 August, 1988, where he said:

> If these colonial judges had wished they could have developed over the years a version of the common law relevant to Africa as the reception statutes themselves stated. They could have done this by construing the reception statutes strictly, for instance in East Africa where only 'the substance' of the common law and equity was received the colonial judges had even greater scope of creativity. They could have proceeded to create a body of laws responsible to the emergent demands of each territory. As one writer put it, 'the colonial judges never approached the problem as one calling essentially for the exercise of a policy making legislative power'. This was a pity because in West Africa they had the

> power to determine whether the limits of the local jurisdiction and local circumstances permitted the application of the received rules and to what extent. In East Africa they had the further power to decide whether a specific rule of English law was part of the 'substance' of the common law and in all the territories they had the power to determine whether the statutes were of general application.

[**37.**] It is for this reason that the colonial judges in criminal trials held that a customary law spouse was not regarded as a wife or husband for the purposes of evidence rules and as a result she or he could be compelled to testify against her or his spouse whereas the common law counterpart could not be so compelled. That was so in the case of *Rex v Amkeyo* [1917] 7 EALR 14 (by Hamilton CJ) and the case of *Abdulrahman Bin Mohamed and Another v R* [1963] EA 596 (Uganda) by Sir Ronald Sinclair P.

[**38.**] But even under the reception clause of the English common law there were judges who liberally construed the provision under discussion. For example Sir Udo Udoma, then Chief Justice of Uganda, in *Alai v Uganda* [1967] EA 596 interpreted the phrase 'any married woman' from the reception clause to include a wife of common law marriage as well as a wife of a customary law marriage, contrary to the stand of the previous judges discussed above. But the hero of the construction of the reception clause of the English common law is Lord Denning MR (as he then was) who in *Nyali Ltd v Attorney-General* [1955] 1 All ER 646 (CA) (see also [1957] AC 253 (HL) said:

> This wise provision should, I think, be liberally construed. It is a recognition that the common law cannot be applied in a foreign land without considerable qualification. It has many principles of manifest justice and good sense which can be applied with advantages to people of every race and colour all the world over. But it also has many refinements, subtleties and technicalities which are not suited to other folk. These offshoots must be cut away. In these far off lands the people must have a law which they understand and which they will respect. The common law cannot fulfil this role except with considerable qualifications. The task of making these qualifications is entrusted to the judges of these lands. It is a great task. I trust that they will not fail them.

[**39.**] The issue in the above case was that by the English common law applicable to Kenya, the Kenya government should be exempt from payment of a bridge toll at Mombasa. Lord Denning MR rejected that argument, holding that the common law rule that the Crown had a prerogative not to pay tax was not applicable to Kenya as local circumstances did not permit.

[**40.**] I am inclined to think that if Lord Denning MR was confronted with the present problem now at hand he would have unhesitatingly said:

> This wide provision should, I think be liberally construed. It is a recognition that the law existing before the introduction of the Bill of Rights cannot be applied in the new era without considerable qualification. It has many principles of manifest justice and good sense which are not suited to a country with a Bill of

> Rights. Theses offshoots must be cut away. The people must have a law which they understand and which they will respect. The law existing prior to the introduction of the Bill of Rights cannot fulfil this role except with considerable qualifications. The task of making these qualifications is entrusted to the judges of Tanzania. It is a great task. I trust that they will not fail therein.

[**41**.] Therefore Lord Denning MR (as he then was) will wriggle in his chair to hear that some judges interpret the reception clause in section 5 (1) of Act 16 of 1984 as not to affect the content and the quality of the law existing prior to the enactment of the Bill of Rights. However, it should be noted that the reception clause in section 5 (1) of Act 16 of 1984 affects only statutes and customary law existing prior to 1984, but does not affect any later law. And the position is understandable because for three years, from March 1985 to March 1988, the government was given a period of grace to put its house in order ie to amend all laws that were inconsistent with the Bill of Rights. And so the statutory interpretation that we have adopted here need not raise any eyebrows.

[**42**.] I have found as a fact that section 20 of the Rules of Inheritance of the Declaration of Customary Law, 1963, is discriminatory of females in that, unlike their male counterparts, they are barred from selling clan land. That is inconsistent with article 13 (4) of the Bill of Rights of our Constitution which bars discrimination on account of sex. Therefore under section 5(1) of Act 16 of 1984 I take section 20 of the Rules of Inheritance to be now modified and qualified such that males and females now have equal rights to inherit and sell clan land. Likewise the Rules Governing the Inheritance of Holdings by Female Heirs (1944) made by the Bukoba Native Authority, which in rules 4 and 8 entitle a female who inherits self-acquired land of her father to have usufructuary rights only (rights to use for her lifetime only) with no power to sell that land, is equally void and of no effect.

[**43**.] Females just like males can now and onwards inherit clan land or self-acquired land of their fathers and dispose of the same when and as they like. The disposal of the clan land to strangers without the consent of the clansmen is subject to the fact that any other clan member can redeem that clan land on payment of the purchase price to the purchaser. That now applies to both males and females. Therefore the District Court of Muleba was right to take judicial notice of the provisions of section 5(1) of Act 16 of 1984 and to have acted on them in the way it did.

[**44**.] From now on, females all over Tanzania can at least hold their heads high and claim to be equal to men as far as inheritances of clan land and self-acquired land of their fathers is concerned. It is part of the long road to women's liberation. But there is no cause for euphoria as there is much more to do in the other spheres. One thing which surprises me is that it has taken a simple, old rural woman to champion the cause of women in this field and not the elite women in town who chant *jejune* slogans for years on end on women's liberation, but without delivering the goods. To

the male chauvinists they should remember what that English novelist John Gay (1685-1732) had said in *The Beggar's Opera*:

> Fill every glass, for wine inspires us. And fires us, with courage, love and joy, women and wine should life employ. Is there aught else on earth desirous? If the heart of a man is depressed with cares, The mist is dispelled when a woman appears.

[**45.**] It is hoped that, from the time the woman has been elevated to the same plane as the man, at least in respect of inheritance of clan land, then the mist will be dispelled.

[**46.**] At the hearing of this appeal, Mr Jacob Lazaro Mbasa who held the special power of attorney of the appellant, argued that the District Court was wrong to hold that the purchase price was shs 300 000 and not shs 30 000. However, upon perusal of the evidence on record, I find that the District Court was right. The record of the Primary Court shows that, besides the vendor and purchaser, there were two independent witnesses who witnessed the sale and these were Mr Abeli s/o Byalwasha (DW 4) and Mr Eliyeus s/o Balongo (DW 5). Both these witnesses testified that the purchaser paid out shs 300 000. The evidence of the only other witness who witnessed the sale, that of Mr Francis s/o Joseph (DW 3), was very suspect. He conceded at the trial that he belonged to the clan of the appellant and that he was not happy with the sale of their clan land by the first respondent. When pressed to state what amount was paid by the purchaser, he said it was shs 30 000. You will note that Francis s/o Joseph (DW 3) as a clan member had an axe to grind as he was not happy with the sale of their clan land. Therefore his evidence concerning the amount of purchase price paid was suspect and was rightly ignored by the District Court. Like the District Court I hold that the clan land in question was sold for shs 300 000.

[**47.**] Like the District Court I hold that the sale was valid. The appellant can redeem that clan land on payment of shs 300 000. I give the appellant six months from today to redeem the clan land, otherwise, if he fails, the land becomes the property of the purchaser — the second respondent. The appeal is dismissed with costs. Order accordingly.

ZIMBABWE

Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General and Others

(2001) AHRLR 248 (ZwSC 1993)

Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General & Ors
Supreme Court, 20, 21 May and 24 June 1993
Judges: Gubbay, McNally, Korsah, Ebrahim and Muchechetere
Previously reported: 1993 (1) ZLR 242 (S); (1993) 2 LRC 279

Locus standi (15-18)
Cruel, inhuman or degrading treatment (death penalty, death row phenomenon, 4, 20, 23, 120-122)
Derogation (not possible, 21)
Evidence (burden of proof to demonstrate that a right is violated on complainant, 24-27)

Gubbay CJ

Introduction

[**1.**] On 13 March 1993, it was reported in *The Herald* newspaper, which circulates throughout Zimbabwe, that the Minister of Justice, Legal and Parliamentary Affairs had announced that four men, Martin Bechani Bakaka, Luke Kingsize Chiliko, Timothy Mhlanga and John Chakara Zacharia Marichi, convicted of the crime of murder and under sentence of death, were to be hanged within the next few days. Reacting to this information, the Catholic Commission for Justice and Peace in Zimbabwe lost no time in lodging with this Court an urgent chamber application in respect of the four condemned prisoners. It sought, and obtained, a provisional order interdicting the three respondents, who are the Attorney-General, the Sheriff of Zimbabwe and the Director of Prisons, from carrying out the sentences, pending the decision of this Court whether to:

> (i) declare that the delay in carrying out the sentence of death constitutes a contravention of section 15(1) of the Constitution of Zimbabwe (the Constitution); and
> (ii) order that such sentences be permanently stayed.

[**2.**] Notice of opposition was duly filed by the respondents and after the reception of several sets of affidavits the matter was set down, with the consent of the parties, and heard on 20 and 21 May 1993. The court has

had the benefit of the industrious research undertaken by both counsel into the authorities, for which it expresses its appreciation.

[**3.**] As foreshadowed in the provincial order, the important question that falls to be determined is whether this Court is obliged to intervene and prevent the respondents from carrying out the sentences of death passed upon the four condemned prisoners. It is claimed that by March 1993 the executions had been rendered unconstitutional due to the dehumanising factor of prolonged delay, viewed in conjunction with the harsh and degrading conditions under which prisoners are confined in the condemned section at Harare Central Prison.

[**4.**] It was not sought, nor could it reasonably be, to overturn the death sentences on the grounds that they were unlawfully imposed. The judgments of this Court dismissing the appeals of the condemned prisoners cannot be disturbed. They are final. And the constitutionality of the death penalty *per se*, as well as the mode of its execution by hanging, are also not susceptible of attack. The sole contention is whether, even though the death sentences were the only fitting and proper punishments to have imposed, supervening events establish that their execution on the appointed dates would have constituted inhuman or degrading treatment in violation of section 15(1) of the Constitution. The challenge is not, therefore, to the judicial sentences, but to their execution, after what are asserted to be inordinate delays. I would emphasise that it must not be thought that the fact that it is permissible to impose the death penalty in appropriate cases implies that it must be carried out in every instance where it has been upheld on appeal, regardless of the events which have occurred since the imposition or confirmation of that sentence.

The offences

[**5.**] On 28 November 1988 Bakaka and Chiliko were jointly convicted of murder with actual intent to kill and of rape. They were sentenced to death on the first count and to nine years imprisonment with labour on the second. It was proved that on the night of 14 March 1987 they had broken into the house of a 70-year-old woman who lived alone. They assaulted her severely, raped her, tied her up and left her to die while they proceeded to steal her property. The victim sustained a sub-dural haemorrhage resulting from a blow to the head. Her body was discovered, stripped of clothing, covered in blood and extremely bruised. Their appeals were dismissed on 15 July 1991.

[**6.**] On 17 November 1988 Mhlanga, a member of the Zimbabwe National Army, was sentenced to death for the murder of a 72-year-old male villager. He was also sentenced to ten years imprisonment with labour for the rape of a 13-year-old girl. The evidence disclosed that, while proceeding at night along a footpath through the bush, the deceased heard a cry for help. It came from a child who was being raped by Mhlanga. The deceased stopped to enquire who was crying. Without receiving a re-

sponse, he was shot twice in the abdomen by Mhlanga. He died instantly. Mhlanga's appeal was dismissed on 22 January 1990.

[**7.**] Marichi broke into the residence of the deceased under cover of darkness. His entry did not go unnoticed by the deceased who armed himself with a pistol. He confronted Marichi in the passage of the house and fired at least once at him, but missed. Marichi then tackled the deceased, whom he succeeded in disarming. He fired at the deceased striking the left collar bone. He then shot the deceased in the head. He was held by the trial court to have fired deliberately with intent to kill and was sentenced to death on 26 February 1987. His appeal was dismissed on 13 November 1988.

The events subsequent to the passing of the death sentences

(a) The physical conditions endured daily by the four condemned prisoners

[**8.**] Since the passing of sentence of death upon them, the four prisoners have been incarcerated in the condemned section of Harare Central Prison. Pursuant to section 110 of the Prisons Act (Cap 21) a condemned prisoner is confined in a cell, separately, under constant supervision both by day and night. The cell is approximately three-and-a-half metres long by two metres wide. By holding his arms outstretched a person is able to touch the opposite walls. There is a single window very high up from which only the sky is visible. The door of the cell has a small aperture through which prison officers are able to view the inmate. An electric light burns in each cell and is never extinguished. It supplies the sole source of illumination. There is no inbuilt toilet, the prisoner being obliged to utilise a chamber pot. A thin mattress is provided as well as two sets of clothing — the one to be worn inside the cell, the other when outside — in order to facilitate routine security checks and searches.

[**9.**] The cell is opened every morning at 0600 hours. The condemned prisoner is allowed out in a group for washing of the chamber pot and bathing. He is returned for breakfast. Lunch is served in the cell at 1100 hours and supper at 1400 hours. The food is of poor quality. Ten cigarettes a day are provided.

[**10.**] The condemned prisoner is allowed two periods of exercise time of 30 minutes each in one of two exercise yards, between 0900 and 1100 hours and 1300 and 1500 hours, in a group of about ten other condemned prisoners. No apparatus to exercise is supplied and the playing of games is forbidden. Communication with other condemned prisoners is permitted but not with any other grade of prisoner. In all he is confined in a cell for a minimum period of 21 hours and 40 minutes per day during which he has no contact at all with any other prisoner. He is given a Bible and other religious books, but no other reading material.

[**11.**] At 1500 hours the condemned prisoner is required to leave all cloth-

ing outside his cell. Thereupon he is incarcerated, naked, until the following morning. The cell is very cold in the winter months. Visitations from family members of about ten minutes duration, in the presence of prison officers, are permitted periodically.

(b) The mental anguish of the four condemned prisoners

[**12.**] It was proposed to execute Marichi on 16 March 1993 and the others on 19 March 1993. Save for this Court's intervention on 15 March 1993, Marichi would have been incarcerated in the condemned section for six years and 21 days; Mhlanga for four years, four months and two days; and Bakaka and Chiliko, for four years, three months and 24 days. Each alleged in his affidavit that throughout the period he has lived in daily fear of being put to death. Execution by hanging is constantly in mind. Chiliko deposed when informed that his appeal had been dismissed he seriously contemplated committing suicide. He thought that it would be less painful to smash his head against the wall of his cell than to be hanged. Eventually he decided against it. Marichi, also, at some stage of his incarceration, considered suicide to be a preferable option.

[**13.**] The affidavits also revealed not infrequent taunting by prison officers of the impending hanging, the mental deterioration suffered by other condemned prisoners, the acute fear experienced when it becomes known that one of their number is about to be hanged and the terrible ordeal of hearing the sounds of the executions being carried out.

[**14.**] All this is graphically described in the affidavit of Admire Mthombeni. He was sentenced to death on 14 August 1987 for dissident-related murders but was released on 3 September 1990 by virtue of a free pardon granted him under Clemency Order no 1 of 1990, made to mark Zimbabwe's Tenth Anniversary of Independence. His averments, which were not disputed by the respondents, read in part as follows:

> Because you spend so much time in your cell alone, you endlessly brood over your fate and it becomes very difficult, and for some people impossible, to cope with it all.
>
> The treatment meted out to you by the warders is very harsh. They are continuously hassling you and chasing you up.
> If you make any complaint about anything to do with the conditions, you run the risk of receiving a beating. One of the warders blows a whistle. Other warders come running and without further ado they start beating you with their baton sticks.
>
> The warders are also continuously reminding you of the hanging which awaits you. They continually taunt and torment you about it. For instance, they would ask you why you are bothering to read when you are going to hang. They would also say that you are not fat enough to hang.
>
> The gallows themselves are situated within the condemned section itself. Whilst I was there, people hanged in 1987 and 1988. Although apparently five people can be hanged at the same time, the hangings used to take place in stages. This means that for the rest of us the agony [is] prolonged.
>
> In 1987 a total of eleven people were hanged. However, the process went on

for about two weeks. Two people hanged one day. The next day nobody was hanged. The following day another two people were hanged and so it went on.

During this period, the warders rattled our doors at 4.00 am which is the time they remove people from their cells for hanging. The effect was, of course, that I woke up suddenly terrified that I was about to be hanged. This was just another way in which they tormented us.

When a person was to be taken out for hanging the warders came into his cell in a group. They leg-ironed him and handcuffed him.

Often, the person to be hanged resisted and the warders then used electric prodders to subdue him. I saw this through the peep-hole in my cell. The warders also told us that they did this.

We heard the sounds of wailing and screaming of those about to be hanged from the time they are removed from their cells at 4.00 am up to the time they were hanged at about 9.00 am.

We also heard the sound of the gallows themselves . . .

The warders often told us detailed and lurid stories about the hangings themselves which they had witnessed. The aim of this was to torture us.

For instance, after one lot of hangings, they told us that the machine did not work properly. As a result, one of those to be hanged called Chirongo did not die. Instead, he somehow managed to get hold of the hangman and would not let go. We were told that the warders eventually had to get a hammer and they hammered him to death.

On another occasion one of the warders showed one condemned man called Vundla a newspaper showing that he was about to be executed. We were not allowed access to any newspapers. The warder therefore deliberately showed this condemned person the newspaper to torture him.

As a result, Vundla managed to climb up to the window at the top of his small cell and from there he dived onto the floor and killed himself.

Many people could not cope with this and become mentally disturbed. The warders treated these kinds of people even worse than us. For instance, if a mentally disturbed prisoner soiled his cell, the warders refused for days to have it cleaned up.

The *locus standi* of the applicant

[**15.**] Although the *locus standi* of the applicant to bring this application was initially objected to in an affidavit filed on behalf of the respondents, the contention was not pressed at the hearing, and correctly so.

[**16.**] The applicant is a human rights organisation whose avowed objects are to uphold basic human rights, including the most fundamental right of all, the right to life. It is intimately concerned with the protection and preservation of the rights and freedoms granted to persons in Zimbabwe by the Constitution. Its non-frivolous submission is that, in the circumstances which presently obtain, the carrying out of the death sentences would amount to an abuse of the protection guaranteed the condemned prisoners under section 15(1).

[**17.**] It would be wrong, therefore, for this Court to fetter itself by pedantically circumscribing the class of persons who may approach it for relief to the condemned prisoners themselves; especially as they are not only indigent but, by reason of their confinement, would have experienced

practical difficulty in timeously obtaining interim relief from this court. See *Deary NO v Acting President & Others* 1979 RLR 200 (G) at 203A-D.

[**18.**] In any event, since the grant of the provisional order, the four condemned prisoners have effectively joined in the application. They have, of course, a direct and immediate interest in its determination.

The relevant constitutional provisions

[**19.**] Section 24(1) of the Constitution, which is the provision pursuant to which the application was brought, vests in the Supreme Court the power to deal with constitutional issues as a court of first instance. It enjoins the Supreme Court to examine challenged legislation, or a particular practice or action authorised by a state organ, in order to determine whether or not it infringes on the entrenched fundamental rights and freedoms of the individual. The Supreme Court is empowered to measure the effect of the enactment or action against the particular guarantee it is claimed it offends. Clearly it has jurisdiction in every type of situation which involves an alleged breach or threatened breach of one of the provisions of the Declaration of Rights and, particularly, where there is no other judicial procedure available by which the breach can be prevented: compare *Martin v Attorney-General & Another* 1993 (1) ZLR 153 (S).

[**20.**] The protection embodied in section 15(1) of the Constitution reads: 'No person shall be subjected to torture or to inhuman or degrading punishment or other such treatment.'

[**21.**] Save for the derogations recently introduced by the Constitution of Zimbabwe Amendment (No 11) Act 1990, which are not presently relevant, no further derogation from the rights entrenched is permitted. The prohibitions are absolute. Justification cannot arise: see *S v A Juvenile* 1989 (2) ZLR 61 (S) at 91G; 1990 (4) SA 151 (ZS) at 169F.

The availability of the constitutional protection to the condemned prisoners

[**22.**] It cannot be doubted that prison walls do not keep out fundamental rights and protections. Prisoners are not, by mere reason of a conviction, denuded of all the rights they otherwise possess. They retain all basic rights, save those inevitably removed from them by law, expressly or by implication. Thus, a prisoner who has been sentenced to death does not forfeit the protection afforded by section 15(1) of the Constitution in respect of his treatment while under confinement: see *Conjwayo v Minister of Justice, Legal & Parliamentary Affairs & Another* 1991 (1) ZLR 105 (S) at 109G-111G; 1992 (2) SA 56 (ZS) at 61B-62E and the cases there cited.

The construction of section 15(1) of the Constitution

[**23.**] In *S v Ncube & Others* 1987 (2) ZLR 246 (S) at 267B-C; 1988 (2) SA 702(ZS) at 717B-D, I expressed the view that section 15(1) is nothing less

than the dignity of man. It is a provision that embodies broad and idealistic notions of dignity, humanity and decency. It guarantees that punishment of treatment of the individual be exercised within the ambit of civilised standards. Any punishment or treatment incompatible with the evolving standards of decency that mark the progress of a maturing society, or which involve the infliction of unnecessary suffering, is repulsive. What might not have been regarded as inhuman decades ago may be revolting to the new sensitivities which emerge as civilisation advances. I went on to say that an application of this approach to whether a form of torture, punishment or treatment, is inhuman or degrading is dependent upon the exercise of a value judgment (see at 268C and 717I). One that must not only take account of the emerging consensus of values in the civilised international community (of which this country is a part), as evidenced in the decisions of other courts and the writings of leading academics, but of contemporary norms operative in Zimbabwe and the sensitivities of its people.

The onus

[**24.**] It was contended on behalf of the applicant that the burden of proof rested upon the respondents to satisfy this Court that to carry out the sentences at this time would not constitute inhuman treatment of the condemned prisoners. Reliance was placed on the judgment of the Supreme Court of India in *Deena alias Deen Dayal & Others v Union of India & Others* [1984] 1 SCR 1, where Chandrachud CJ at 32E-F stated that notwithstanding that in normal constitutional applications the onus lies on the applicant, where it appears that a person is being deprived of his life, or has been deprived of his personal liberty, the burden rests on the state to establish the constitutional validity of the impugned law.

[**25.**] This view is contrary to that expressed by Lord Scarman and Lord Brightman in their joint minority opinion in *Riley & Others v Attorney-General of Jamaica & Another* [1982] 3 All ER 469 (PC) at 480C, wherein it was said that it was for the applicant for constitutional protection to show that:

> the delay was inordinate, arose from no act of his, and was likely to cause such acute suffering that the infliction of the death penalty would be in the circumstances which had arisen inhuman or degrading.

[**26.**] With respect to Chandrachud CJ, I prefer the opposing view. I consider that the burden of proof that a fundamental right, of whatever nature, has been breached is on he who asserts it. In relation to section 15(1) of the Constitution, the issue of whether an individual has been subjected to torture or to inhuman or degrading punishment or treatment is essentially a matter of fact and, ordinarily, some evidence would have to be adduced to support the contention. The respondent is not obliged to do anything until a case is made out which requires to be met.

[**27.**] It is also noted that the view of Chandrachud CJ is persuasively criticised in Seervai's *Constitutional Law of India,* 3rd edition, supp, at

413-415. It is there pointed out that, as section 354(5) of the Code of Criminal Procedure (which provided that sentence of death was to be carried out by hanging) bore no stamp of cruelty on the face of it, and as sentence of death had been held a constitutionally valid punishment (see *Bachan Singh v State of Punjah* [1983] 1 SCR 145), it was necessary for the petitioner who alleged that death by hanging was a cruel and barbarous punishment to lead evidence in support thereof; and that is what he did. Furthermore, a presumption of constitutionality in respect of section 354(5) operated in favour of the Union of India.

Judicial and academic acceptance of the death row phenomenon

[**28.**] Much has been said and written by jurists, penologists and psychiatrists about the mental suffering endured by prisoners who have been sentenced to death.

[**29.**] Over 100 years ago Justice Miller in *Ex p Medley* 134 US 160 (1890) at 172 opined that:

> When a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it . . . as to the precise time when his execution shall take place.

[**30.**] In *Furman v Georgia* 408 US 238 (1972) at 288 Justice Brennan gave as one reason for his conclusion that capital punishment is *per se* unconstitutional the fact that:

> Mental pain is an inseparable part of our practice of punishing criminals by death, for the prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death.

[**31.**] More recently, in *District Attorney for the Suffolk District v Watson & Others* (1980) 411 NE 2d 1274 (Mass) at 1283, Hennessey CJ said of the death penalty: 'The mental agony is, simply and beyond question, a horror.'

[**32.**] And in *Re Kemmler* 136 US 436 (1890) at 447 the United States Supreme Court accepted that: 'Punishments are cruel when they involve . . . a lingering death . . . something more than the mere extinguishment of life.'

[**33.**] It may validly be argued, so it seems to me, that death is as lingering if a person spends several years in a death cell awaiting execution, as if the mode of execution takes an unacceptably long time to kill him. The pain of mental lingering can be as intense as the agony of physical lingering.

[**34.**] Indian judges have also made the same observations. In *Ediga Anamma v State of Andhra Pradesh* [1974] 3 SCR 329 at 335, Krishna Iyer J spoke of '. . . the brooding horror of 'hanging' which has been haunting the prisoner in her condemned cell for over two years.'

[**35.**] Later, in *Rajendra Prasad v State of Uttar Pradesh* [1979] 3 SCR 78 at 130, the same learned Supreme Court judge remarked that:

> . . . The excruciation of long pendancy of the death sentence, with the prisoner languishing in near solitary confinement suffering all the time may make the death sentence unconstitutionally cruel and agonising.

[**36.**] And in *Sher Singh & Others v State of Punjab* [1983] 2 SCR 583 at 591 Chandrachud CJ, in language borrowed closely from the minority opinion in *Riley v Attorney-General of Jamaica, supra,* said:

> The prolonged anguish of alternating hope and despair, the agony of uncertainty, the consequences of such suffering on the mental, emotional, and physical integrity and health of the individual can render the decision to execute the sentence of death an inhuman and degrading punishment in circumstances of a given case.

[**37.**] In a sociological study entitled *Condemned to Die: Life under Sentence of Death*, the renowned criminologist, Professor Robert Johnson, wrote (at 4):

> Death row is barren and uninviting. The death row inmate must contend with a segregated environment marked by immobility, reduced stimulation, and the prospect of harassment by staff. There is also the risk that visits from loved ones will become increasingly rare, for the man who is 'civilly dead' is often abandoned by the living. The condemned prisoner's ordeal is usually a lonely one and must be met largely through his own resources. The uncertainties of his case — pending appeals, unanswered bids for commutation, possible changes in the law — may aggravate adjustment problems. A continuing and pressing concern is whether one will join the substantial minority who obtain a reprieve or will be counted among the to-be-dead. Uncertainty may make the dilemma of the death row inmate more complicated than simply choosing between maintaining hope or surrendering to despair. The condemned can afford neither alternative, but must nurture both a desire to live and an acceptance of imminent death. As revealed in the suffering of terminally ill patients, this is an extremely difficult task, one in which resources afforded by family or those within the institutional context may prove critical to the person's adjustment. The death row inmate must achieve equilibrium with few coping supports. In the process, he must somehow maintain his dignity and integrity.

[**38.**] And (at 47):

> Death row is a prison within a prison, physically and socially isolated from the prison community and the outside world. Condemned prisoners live twenty-three and one half hours alone in their cells . . .

[**39.**] The author proceeded (at 110):

> Some death row inmates, attuned to the bitter irony of their predicament, characterize their existence as a living death and themselves as the living dead. They are speaking symbolically, of course, but their imagery is an appropriate description of the human experience in a world where life is so obviously ruled by death. It takes into account the condemned prisoners' massive deprivation of personal autonomy and command over resources critical to psychological survival; tomblike setting, marked by indifference to basic human needs

> and desires; and their enforced isolation from the living, with the resulting emotional emptiness and death.

[**40.**] See also, Johnson's 'Under Sentence of Death: The Psychology of Death Row Confinement' (1979) 5 *Law and Psychology Review* at 141, and *Death Work*, Chapter 4 : Living and Working on Death Row at 48; the unauthored note, 'Mental Suffering Under Sentence of Death: A Cruel and Unusual Punishment' (1972) 57 *Iowa Law Review* 814 at 829-830; Kaplan 'Administering Capital Punishment' (1984) 36 *University of Florida Law Review* 177 at 181-185; Bluestone and McGahee 'Reaction to Extreme Stress: Impending Death by Execution' 1962 *American Journal of Psychiatry* at 393. All these studies describe confinement under sentence of death as exquisite psychological torture, wherein many inmates suffer obvious deterioration and severe personality distortions, including denial of reality.

[**41.**] The respondents recognise and acknowledge the actuality of the death row phenomenon. They do not criticise as impartial or in any way exaggerate the psychological traumas and behavioural changes detailed in the literature above cited. Their answer is simply that such 'unabating stress' is inherent in the penalty of death. It is an unavoidable consequence. Where the anguish attains an unacceptable level due to delay in carrying out the sentence, it is always open to the condemned prisoner to move the court for relief. The court will ensure that the suffering ceases, but only in so far as the original punishment, which cannot itself become tainted with the inhumanity or degradation of the treatment, remains unaffected.

The attitude of the courts to delay in executing a sentence of death

(a) The position in Zimbabwe up to the present time

[**42.**] There is a very relevant judgment of the Appellate Division of the High Court of Rhodesia. It is in *Dhlamini & Others v Carter NO & Another*, (1) 1968 (1) RLR 136(A). The facts were that the three appellants had been sentenced to death prior to the declaration of Unilateral Independence on 11 November 1965. Their appeals were duly dismissed. The government, under the 1965 Constitution, considered the question of the exercise of the prerogative of mercy and advised the Officer Administrating the Government to decline clemency. In accordance with that advice he confirmed the sentences on 27 August 1967. In seeking to interdict the first respondent, the Sheriff, from carrying out the sentences the appellants relied, *inter alia*, upon the submission that the delay between their imposition and the decision to confirm them was so inordinate as to constitute inhuman or degrading punishment in violation of section 60(1) of the lawful 1961 Constitution. Two of the appellants had been held on death row for two years and nine months and the third for one month short of two years. In rejecting the argument Beadle CJ at 154-155A said:

> If during the course of his punishment, a prisoner is subjected to inhuman 'treatment' he can move the court for relief and the court will see that the

'treatment' is stopped, but that does not affect the original 'punishment' which cannot, itself, become tainted with the inhumanity of the 'treatment'.

[**43.**] He continued at 155F-H:

> The inhuman treatment complained of in the instant case is the delay in carrying out the sentence. If, as I have already found, 'treatment' is distinct from 'punishment', and if the inhumanity of the treatment cannot taint the lawfulness of an otherwise lawful punishment, then the only remedy an accused, who has been sentenced to death, has under s 60(1) is to ask for an order that the delay should stop, something which no person sentenced to death is ever likely to do. Even if, therefore, in certain circumstances, delay may be considered as inhuman treatment, the remedy given an accused who is under sentence of death under s 60(1) is not one which is likely to be of much value to him, as it gives him no more that the right to ask for the delay to cease.

[**44.**] In conclusion, the learned Chief Justice remarked at 157A-C:

> This court, under its ordinary jurisdiction, is given no power to hear an appeal from the decision of the Executive Council refusing to exercise clemency. On the contrary, as I have pointed out, it has no power to question the manner in which the Executive Council exercised its power. If the court had any power to interfere with the discretion of the Executive Council, it could, therefore, only have it under s 60(1), but, as I have pointed out, it is given no power under this section to interfere with a lawful punishment. Its powers are limited to stopping inhuman treatment or punishment, but it cannot, in dealing with inhuman treatment, interfere with a lawful punishment.

[**45.**] With all deference to one of this country's most illustrious Chief Justices, I consider the approach he adopted to be flawed. Section 60(1) alone (which was cast in similar terms to the present section 15(1)) was examined on the critical issue of whether the court had jurisdiction to deal with the complaint. What appears to have been completely overlooked was that under section 71(4) of the 1961 Constitution (the equivalent to the present section 24(4)) the court was vested with special power to make whatever order was necessary to prevent a contravention of any of the fundamental rights and freedoms, including that specified in section 60(1). It was sitting as a Constitutional Court, not as the Appellate Division, and so was not restricted, as it believed itself to be, to those powers properly exercisable by an appellate body. In the event, whereas a right was acknowledged a remedy was denied.

[**46.**] Moreover, and contrary to what was suggested by Beadle CJ, it is irrelevant to the condemned prisoner's assertion that the alternative to delay may be expeditious execution. It is not his wish for a speedy death that causes due process of law, in so far as it prohibits inhuman or degrading punishment or treatment, to proscribe delay. Rather, as pointed out by Pannick in his book *Judicial Review of the Death Penalty* at 85:

> . . . The proscription results from the fact that it is unacceptable for the state to inflict mental torture on a defendant, irrespective of that defendant's preference for torture rather than execution. Furthermore, the claim of the appellant is not that further delay would be unconstitutionally cruel and that, therefore, the

> execution should be carried out immediately. The claim is, rather, that by reason of the delay already suffered, the execution if carried out would constitute cruel, inhuman or degrading punishment. The delay experienced should be added to the pain and suffering normally pursuant to execution in order to determine whether the carrying out of the death sentence would breach the appellant's fundamental rights under the relevant constitutional provision. Whether or not the death penalty is constitutional *per se*, the pain and suffering it causes may exceed constitutional limits when the agony caused by delay is added to the balance.

[**47.**] Lastly, the judgment, having been given 25 years ago, is out of step with more enlightened thinking, as exemplified in the decisions of the Supreme Court of India, the minority opinion in *Riley's* case *supra*. It preceded the adumbration by Lord Wilburforce in *Minister of Home Affairs & Another v Fisher & Another* [1979] 3 All ER 21 (PC) at 26a-e of the liberal interpretative technique applicable to constitutional provisions relating to the protection of the individual — an approach that has more than once received the commendation of this Court. See for instance, *Bull v Minister of Home Affairs* 1986 (1) ZLR 202 (S) at 210H-211A; 1986 (3) SA 870 (ZS) at 881C. Also, *United States v Cotroni* (1989) 42 CRR 101 at 109 (Supreme Court of Canada).

[**48.**] I have no difficulty, therefore, in holding that *Dhlamini's* case *supra* was wrongly decided. This Court is free to depart from it. See Supreme Court Practice Direction no 2 of 1981, 1981 ZLR 417 (S).

(b) The position in India

[**49.**] Although there is no provision in the Indian Constitution, framed in 1948-1950, which expressly proscribes torture or inhuman or degrading punishment or treatment, the Supreme Court of India has filled the void and brought the Bill of Rights in the Constitution into conformity with international norms, as set out in article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and article 7 of the International Covenant on Civil and Political Rights. It held in *Francis Coralie Mullin v Administrator, Union Territory of Delhi AIR 1983 SC 746* that the right to live with basic human dignity implicit in the right guaranteed under article 21, included the right not to be subjected to torture or to cruel, inhuman or degrading punishment or treatment. This all-important right was, therefore, read by the Supreme Court into the right to life and made part of domestic jurisprudence.

[**50.**] Taking the right of protection as the base, the Supreme Court has proceeded to consider the question of delay in the carrying out of sentence of death, such delay being a notorious feature of the India legal system. In *Vatheeswaran v State of Tamil Nadu AIR 1983 SC 361* the Supreme Court, sitting on appeal, considered the claim of the appellants, who had been justly sentenced to death, that to take away their lives after they had been left for eight years in illegal solitary confinement was a gross violation of the fundamental right guaranteed by article 21 of the Con-

stitution. Chimnappa Reddy J (in whose judgment Misra J concurred) at 362 posed the question whether:

> . . . in a case where after the sentence of death is given, the accused person is made to undergo inhuman and degrading punishment or where the execution of the sentence is endlessly delayed and the accused is made to suffer the most excruciating agony and anguish, it is not open to a court of appeal or a court exercising writ jurisdiction, in an appropriate proceeding, to take note of the circumstance when it is brought to its notice and give relief where necessary.

[**51.**] And, quoting from the minority opinion in *Riley & Others v Attorney-General of Jamaica & Another supra* at 479e-f, gave the answer at 363:

> It is, of course, true that a period of anguish and suffering is an inevitable consequence of sentence of death. But a prolongation of it beyond the time necessary for appeal and consideration of reprieve is not. And it is no answer to say that the man will struggle to stay alive. In truth, it is this ineradicable human desire which makes prolongation inhuman and degrading. The anguish of alternating hope and despair, the agony of uncertainty, the consequences of such suffering on the mental, emotional and physical integrity and health of the individual are vividly described in the evidence of the effect of the delay in the circumstances of these five cases.

[**52.**] The learned judge suggested, unnecessarily, however, that a delay of more than two years should be sufficient to invoke the application of article 21 (see at 367). The appeal was allowed. The sentences of death were set aside and substituted by life imprisonment.

[**53.**] It was the *obiter dictum*, and not the remainder of the judgment that was promptly repudiated by the three Supreme Court judges, including the Chief Justice, in *Sher Singh & Others v State of Punjab supra*. The court was faced with a writ petition for two condemned prisoners who had unsuccessfully exhausted their rights of appeal against the death sentence. Chandrachud CJ at 590B-D pointed out that the narrow view that jurisdiction to interfere with a death sentence could be exercised only in an appeal against the judgment of conviction and sentence was unacceptable. The inquiry was whether it was harsh and unjust to execute it by reason of supervening events. The learned Chief Justice continued at 593B-F:

> A prisoner who has experienced living death for years on end is therefore entitled to invoke the jurisdiction of this court for examining the question whether, after all the agony and torment he has been subjected to, it is just and fair to allow the sentence of death to be executed. That is the true implication of article 21 of the Constitution. . . . It is a logical extension of the self-same principle that the death sentence, even if justifiably imposed, cannot be executed if supervening events make its execution harsh, unjust or unfair.

[**54.**] Finally, it was stated that it was normal for appeals to take over two years and that it would be ridiculous if a convicted person could, by bringing frivolous proceedings, ultimately delay execution so long that it had to be commuted under such a rule (see at 596A-B). In the result, the petition was adjourned in order for the Governor of Punjab to explain why the

petitioners had not been executed for more than 18 months since the ultimate dismissal of their appeals.

[**55.**] In *Javed Ahmed v State of Maharashtra AIR 1985 SC 231* the petitioner, aged 22 years, had been convicted of murder and sentenced to death. His appeal against the sentence had been dismissed and a petition for clemency later rejected by the President of India. He had behaved satisfactorily in prison, appeared genuinely repentant and anxious to atone for the grave wrongs he had done. Sentence of death had been awaited for two years and nine months. Chinnappa Reddy and Venkataramiah JJ entertained the petition and substituted imprisonment for life for the death penalty.

[**56.**] On 7 February 1989 the aspect of delay came before five judges of the Supreme Court in *Triveniben & Others v State of Gujarat & Others (1989) 1 SCJ 383*. Oza J, giving the lead judgment, laid down at 393 that the only delay which could be considered in a writ petition was from the date the judgment of the apex court was pronounced, ie when the judicial process had come to an end. He made it clear that no fixed period could be held to make sentence of death inexecutable and to that extent overruled the decision in the *Vatheeswaran* case *supra*. Shetty J, in a separate concurring judgment, said at 410 paragraphs 74 and 75:

> It has been universally recognised that a condemned person has to suffer a degree of mental torture even though there is no physical mistreatment and no primitive torture. . . . As between funeral fire and mental worry, it is the latter which is more devastating, for funeral fire burns only the dead body while the mental worry burns the living one. This mental torment may become acute when the judicial verdict is finally set against the accused. Earlier to it, there was every reason for him to hope for acquittal. That hope is extinguished after the final verdict. If, therefore, there is inordinate delay in execution, the condemned prisoner is entitled to come to the court requesting to examine whether it is just and fair to allow the sentence of death to be executed.

[**57.**] In *F Madhu Mehta v Union of India* [1989] 3 SCR 775, which followed six weeks later, a writ petition brought on behalf of one Gyasi Ram was allowed and the death sentence altered to imprisonment for life. The condemned prisoner had been waiting a decision on his mercy petition by the President of India for over eight years. It was held that he had suffered mental agony of living under the shadow of death for far too long.

(c) The position in the United States of America

[**58.**] The Supreme Court of the United States has never directly addressed the issue of delay in carrying out sentence of death. But it is of some significance, if only historical, that in the course of its decision in *Ex p Medley supra* the Supreme Court referred to a few weeks in solitary confinement awaiting execution, with limitations on visitation and uncertainty

as to the exact date the execution would take place, as 'an additional punishment of the most important and painful character' (at 171).

[**59.**] The modern starting point is the *cause célèbre* involving Caryl Chessman. There are two decisions which dealt with his protest that the mental suffering caused by the years spent on death row was 'cruel and unusual punishment'. In the first, *People v Chessman* 52 Cal 2d 469 (1959), although the court recognised that mental suffering had occurred, it focused only on the submission that the unusual length of the confinement on death row, 11 years, was due to unconstitutional delays on the part of the California judiciary. It held that the California courts had proceeded without unreasonable delay and that the State of California had not, therefore, been guilty of cruel and unusual punishment. This rationale implies that no matter the extent of Chessman's mental agony because of his confinement, and irrespective of the length thereof, his suffering would not have been a factor in determining whether cruel and unusual punishment had occurred, as long as there was a legitimate reason for him to be confined.

[**60.**] In the subsequent case of *Chessman v Dickson* 275 F 2d 604 (1960), the Court of Appeals for the North Circuit denied a stay of execution. The complaint that the delay, now close on 12 years, constituted cruel and unusual punishment and would render the execution a denial of Chessman's fundamental rights, received short shrift from Chambers CJ. He said at 607-608:

> It may show a basic weakness in our government system that a case like this takes so long, but I do not see how we can offer life (under a death sentence) as a prize for one who can stall the processes for a given number of years, especially when in the end it appears the prisoner never really had any good points. If we did offer such a prize, what year would we use as a cut-off date? I would think that the number of years would have to be objective and arbitrary. But counsel for petitioner suggest that we take a subjective approach on this man's case. We are told of his agonies on death row. True, it would be hell for most people. But here is no ordinary man. In his appearances in court one sees an arrogant, truculent man, . . . spewing vitriol on one person after other. We see an exhibitionist who never before had such opportunities for exhibition. (All this I get from the record.) And, I think he has heckled his keepers long enough.

[**61.**] Conspicuously absent from this so-called reasoning was why Chessman's personality, as assessed by the court, would reduce the level of his mental suffering below that required for the application of the constitutional standard. See the criticism by an anonymous writer in *Minnesota Law Review* volume 44 at 994.

[**62.**] In *United States ex rel Townsend v Twomey* 322F Supp 158 (1971) the United States District Court accepted that the petitioner had been confined on death row for 15 years and nine months, the delay in carrying out the sentence being due principally to the skilful and persistent efforts of counsel to secure his release. It acknowledged that the length of his confinement under sentence of death seemingly was unconstitutionally cruel,

but deemed itself barred from so ruling by the Supreme Court's decision in re *Kemmler supra* that electrocution was not a cruel and unusual punishment, and by that Court's decision in *Trop v Dulles* 356 US 86 (1958) that the death sentence *per se* was constitutional. However, it granted the petitioner a new trial on the grounds of the admission of an illegally obtained confession. The Federal Appellate Court reversed this decision. It held the conviction to be valid, but that the death sentence could not be carried out because of serious flaws in the selection of members of the jury. It remanded the case for sentencing or, in the alternative, a new trial. See 452 F 2d 350 (7th Cir 1972).

[**63.**] More recently, in *Potts v State of Georgia* 376 SE 2d 851 (Ga 1989) the Supreme Court of Georgia rejected the plea that a period of over 13 years on death row justified the setting aside of the death penalty. Smith J quoted extensively from an article by Professor Little in 1984 in *Florida University Law Review*, Volume 36 at 201-202, to the effect that the suffering on death row was no worse than that endured by an innocent patient who was to serve out a 'death sentence' imposed by disease — a condition, which, though cruel, was far from unusual and out of the run of human experience. No further attempt was made by the learned judge to analyse the growing body of judicial and academic discussion on the issue of delay as a basis for setting aside a death sentence.

[**64.**] Much the same narrow reasoning was expressed in *Richmond v Lewis* 948 F 2d 1473 (1991). One of the grounds advanced on behalf of the appellant was that the carrying out of the death sentence after 16 years on death row would constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. In rejecting it O' Scannlain CJ stated at 1491:

> We know of no decision by either the United States Supreme Court or this circuit that has held that the accumulation of time a defendant spends on death row during the prosecution of his appeals can accrue into an independent constitutional violation, and Richmond has cited no such decision.

[**65.**] He went on to cite with approval a dictum in the case of *Andrews v Shulsen* 600 F 408 (1984) at 431 (where the petitioner had been on death row for ten years) that to accept the argument would be 'a mockery of justice', given that the delay was attributable more to the petitioner's actions than to the state's. (The decision was, however, reversed on other grounds, *sub nom Lewis v Richmond* 113 S Ct 528 (1992).)

[**66.**] A far more progressive and compassionate approach is evident in *People v Anderson* 493 P 2d 880 (1972). The Supreme Court of California was there concerned with whether the death sentence violated article 6 of the state's constitutional prohibition against cruel or unusual punishment. In holding that it did, Wright CJ stressed the torturousness of delay involved in the carrying out of the death penalty. He said at 892:

> It merits emphasis that in assessing the cruelty of capital punishment under

> article 1, s 6, we are not concerned only with the 'mere extinguishment of life', . . . but with the total impact of capital punishment, from the pronouncement of the judgment of death through the execution itself, both on the individual and on the society which sanctions its use. Our concern is that the execution which ultimately follows pronouncement of the death sentence has in fact become the 'lingering death' which the Kemmler court conceded would be cruel in the constitutional sense.

And continued at 894-895:

> The cruelty of capital punishment lies not only in the execution itself and the pain incident thereto, but also in the dehumanising effects of the lengthy imprisonment prior to execution during which the judicial and administrative procedures essential to due process of law are carried out. Penologists and medical experts agree that the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture. Respondent concedes the fact of lengthy delays between the pronouncement of the judgment of death and the actual execution, but suggests that these delays are acceptable because they often occur at the instance of the condemned prisoner. We reject this suggestion. An appellant's insistence on receiving the benefits of appellate review of the judgment condemning him to death does not render the lengthy period of impending execution any less torturous or exempt such cruelty from constitutional proscription.

[**67.**] The California State Constitution was later amended in a manner which overruled the decision, by exempting the death penalty from the prohibition against cruel or unusual punishment. Nonetheless, the observations of Wright CJ remain entirely apposite.

[**68.**] The decision of the Supreme Judicial Court of Massachusetts, in *District Attorney for Suffolk District v Watson supra* portrays the same advanced perception. It held the death penalty to be violative of the state's Constitution which prohibited cruel punishment. The delay and pain of waiting for execution was an important part of the rationale, as especially expressed in the opinions of Hennessey CJ and Liacos J.The former said at 1283:

> The mental agony is, simply and beyond question, a horror. . . . [W]e know that mental pain is an inseparable part of our practice of punishing criminals by death, for the prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and actual infliction of death' *Furman v Georgia supra* at 287-288 (Brennan J concurring). '[T]he process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture' *People v Anderson* 6 Cal 3d 628, 649 and '[T]he onset of insanity while awaiting execution of a death sentence is not a rare phenomenon' *Solesbee v Balkcom* 339 US 9, 14 (1950) (Frankfurter J dissenting).
>
> The fact that the delay may be due to the defendant's insistence on exercising his appellate rights does not mitigate the severity of the impact on the condemned individual, and the right to pursue due process of law must not be set off against the right to be free from inhuman treatment. Moreover, it is often the very reluctance of society to impose the irrevocable sanction of death which mandates, 'even against the wishes of the criminal, that all legal avenues be explored before the execution is finally carried out' *Furman v Georgia supra* 408 US at 289 n 37 (Brennan J concurring).

In equally strong vein Liacos J remarked at 1290-1291:

> The ordeals of the condemned are inherent and inevitable in any system that informs the condemned person of his sentence and provides for a gap between sentence and execution. Whatever one believes about the cruelty of the death penalty itself, this violence done the prisoner's mind must afflict the conscience of enlightened government and give the civilized heart no rest.

He continued in graphic terms at 1292:

> The condemned must confront this primal terror directly, and in the most demeaning circumstances. A condemned man knows, subject to the possibility of successful appeal or commutation, the time and manner of his death. His thoughts about death must necessarily be focused more precisely than other people's. He must wait for a specific death, not merely expect death in the abstract. Apart from cases of suicide or terminal illness, this certainty is unique to those who are sentenced to death. The state puts the question of death to the condemned person, and he must grapple with it without the consolation that he will die naturally or with his humanity intact. A condemned person experiences an extreme form of debasement.

[**69.**] See also the similar observations in the lead opinion of Tauro CJ in *Commonwealth v O'Neal* (1975) 339 NE 2d 676 (Mass) at 680-681. It is, I think, apparent from this survey that both the Supreme Judicial Court of Massachusetts and the Supreme Court of California have indicated an appreciation of the relevance of delay *per se* as a ground of constitutional attack upon the death penalty. The other decisions either failed to view the delay in a constitutional setting, or held that it was not an accountable factor since caused by the condemned prisoner's pursuit, to the full, of his judicial remedies — an approach which 'both ignores the drive for self-preservation and penalises the exercise of a legal right': *per* the anonymous writer in 1972 *Iowa Law Review* at 831.

(d) The position in the West Indies

[**70.**] There are two decisions of the Judicial Committee of the Privy Council that bear on the matter. In *Abbott v Attorney-General of Trinidad and Tobago & Others* [1979] 1 WLR 1342 (PC), the appellant had been convicted of murder and sentenced to death at Port-of-Spain Criminal Assizes, on 16 July 1973. His appeal was dismissed on 9 July 1974, and a further appeal to the Privy Council was, in turn, dismissed on 20 July 1976. Six days later he petitioned the Governor General for the exercise of the prerogative of mercy. This was declined on 23 February 1977, it being directed that the appellant was to be executed on 22 March 1977. On 15 March 1977 the appellant filed a motion claiming that his pending execution would contravene his fundamental human rights under section 14 of the Constitution because of the delay, from 26 July 1976 to 12 March 1977, in dealing with his petition for reprieve. The motion was rejected and the order was later affirmed by the Court of Appeal. The appellant then exercised his right, in a constitutional matter, to appeal to the Privy Council.

[**71.**] It was held, as in *de Freitas & Malik v Benny* [1976] AC 239 (PC), that the appellant could complain neither about the delay totalling three years preceding his petition for clemency, caused by his own action in appealing against his conviction, nor of that of two years subsequent to the denial of his petition. Nonetheless it was remarked that the first period of delay was 'greatly to be deplored' (at 1345E). The appellant's case depended solely on the period of somewhat less than eight months which was allowed by the state to elapse between the lodging of the petition for pardon and its rejection. The contention that such a delay was so inordinate as to invoke a contravention of his constitutional right was castigated as 'quite untenable'. The opinion delivered on behalf of the Judicial Committee by Lord Diplock concluded at 1348B-D:

> Their Lordships accept that it is possible to imagine cases in which the time allowed by the authorities to elapse between the pronouncement of a death sentence and notification to the condemned man that it was to be carried out was so prolonged as to arouse in him a reasonable belief that his death sentence must have been commuted to a sentence of life imprisonment. In such a case, which is without precedent and, in their Lordships' view, would involve delay measured in years, rather than in months, it might be argued that the taking of the condemned man's life was not 'by due process of law'; but since nothing like this arises in this instant case, this question is one which their Lordships prefer to leave open.

[**72.**] The learned author, Pannick *op cit*, disapproves strongly of the pronouncement that the first period of delay of three years was to be disregarded as due to a utilisation of the appellate procedure. He comments at 85:

> . . . it ignores the degree of mental torture suffered; it deters the defendant from claiming his rights to review by appellate courts of the penalty of death; and it penalises the claiming of the right to appeal by providing that the exercise of that right prevents the defendant from claiming that his treatment has breached his right not to suffer cruel or inhuman punishment. The defendant's reluctance to suffer a long delay before execution, his knowledge that if he appeals against sentence or conviction any delay resulting therefrom will not render his execution unconstitutionally cruel, and his failure accurately to assess his chances of winning an appeal against conviction or sentence, may deter the defendant from appealing, and thereby overturning, a sentence of death unlawfully imposed.

[**73.**] This criticism is impressive in its logic and I adopt it. It is supported by the quoted passage in the opinion of Hennessy CJ in the *Watson* case *supra*. There are dicta to the same effect in *Vatheeswaran v State of Tamil Nadu supra* at 364 and *Sher Singh & Others v State of Punjab supra* at 595F-H.

[**74.**] In *Riley & Others v Attorney-General of Jamaica & Another supra* the five appellants had been convicted of murder between March 1975 and October 1976 and sentenced to death. In each case an appeal had been dismissed. From April 1976 political factors in Jamaica led to a suspension of all sentences of death, but on 30 January 1979 the House of Represen-

tatives resolved to retain capital punishment. Thereupon, the executions were set on dates between 29 May and 12 June 1979. The appellants then applied to court for a declaration that the executions would be contrary to section 17(1) of the Constitution of Jamaica, contending that the prolonged delay, due substantially to circumstances outside their control, had caused them sustained mental anguish, thereby rendering the punishment inhuman and degrading. Their application failed both at first instance and on appeal. A further appeal to the Privy Council followed.

[**75.**] The majority opinion of Lord Bridge (concurred in by Lord Hailsham and Lord Diplock) was based specifically on section 17(2) of the Constitution. His lordship reasoned that since at the time immediately before the Constitution came into effect, execution of a death sentence would have been a punishment of a description which was lawful, notwithstanding any delay between its passing and the issue of the death warrant, execution of the death penalty would be 'to the extent' that the law authorised within the meaning of section 17(2) and, therefore, would not contravene section 17(1). (See at 473 b-d). In the course of the opinion it was again reiterated that any delay necessarily occasioned by the appellate procedures pursued was to be excluded (see at G 471e and j).

[**76.**] In a joint dissenting opinion, Lord Scarman and Lord Brightman held the appellants to have established a breach of section 17(1) of the Constitution. They said at 476b-c that:

> The 'treatment' which is *prima facie* 'inhuman' under subsection (1) is the execution of the sentence of death as the culmination of a prolonged period of respite. That species of 'treatment' falls outside the legalising effect of subsection (2). Subsection (2) is concerned only to legalise certain descriptions of punishment, not to legalise a 'treatment', otherwise inhuman, of which the lawful punishment forms only one ingredient. Subsection (1) deals with 'punishment' and 'other treatment'. In the instant case the punishment is the execution of the death sentence. Subsection (2) is directed both to 'punishment' and to 'other treatment'. The 'other treatment', if inhuman, is not validated by subsection (2), in our opinion, merely because lawful punishment is an ingredient of the inhuman treatment.

And continued at 479d:

> It is no exaggeration, therefore, to say that the jurisprudence of the civilised world, much of which is derived from common law principles and the prohibition against cruel and unusual punishments in the English Bill of Rights, has recognised and acknowledged that prolonged delay in executing a sentence of death can make the punishment when it comes inhuman and degrading. As the Supreme Court of California commented in *People v Anderson* it is cruel and has dehumanising effects. Sentence of death is one thing: sentence of death followed by lengthy imprisonment prior to execution is another.

In conclusion, it was stated at 480a-c:

> The cruel and dehumanising experience suffered by these appellants does meet the test. But we doubt whether actual effect should be the test. It would be quite unacceptable to differentiate in the application of s 17 between victims of

> strong character and those of weaker character. The test must be, in our view, that of the likely effect of the experience to which they have been subjected. Evidence, of course, of actual effect will be very relevant and, indeed, necessary in order to reach a conclusion as to likely effect.
>
> We answer, therefore, the question as to the meaning and effect of s 17(1) as follows. Prolonged delay when it arises from factors outside the control of the condemned man can render a decision to carry out the sentence of death an inhuman and degrading punishment . . . Such a case has been established, in our view, by these appellants.

[**77.**] In my respectful view the minority opinion is to be preferred to that of the majority. It applied the liberal interpretation of fundamental rights recommended in *Minister of Home Affairs v Fisher supra* and accords with the evolving standards in any civilised country. It was referred to with approval by the *Supreme Court of India in Vatheeswaran v State of Tamil Nadu supra* and in *Sher Singh & Others v State of Punjab supra*. In an editorial comment in 1983 *West India Law Journal*, Aubrey Fraser, a former Trinidadian Judge of Appeal, wrote at 12:

> If it were possible to look into the future it might be within the justifiable expectation of the present generation of lawyers in Jamaica, and other countries of the Commonwealth Caribbean, that the enlightenment offered in this dissenting judgment, which should soon join that rare collection of law making dissents, might within this decade, reach beyond the realm of hope, to rescue some of the condemned who, since the middle of the 1970s and onwards, have been awaiting with anguish the execution of their lawful sentences.

[**78.**] In *Re Applications by Thomas & Paul* [1986] LRC (Const) 285, the High Court of Trinidad and Tobago held that the delays that had occurred since the pronouncement of sentence of death were a result of the invocation by the appellants of all the appeal procedures followed by the bringing of the present motion. And no delay could be attributed to the state which was so protracted as to amount to unreasonable incarceration.

[**79.**] Although the court took the passing of the sentences as the starting point of the delay, its reasoning was based on what was, with respect, an unacceptable premise — that the applicants were responsible for the delays and therefore it did not lie in their mouths to complain about them.

(e) The extradition judgments

[**80.**] In *Soering v United Kingdom* (1989) 11 EHRR 439 the European Court of Human Rights decided for the first time that extradition could amount to a breach of article 3 (the prohibition against torture or inhuman or degrading treatment or punishment) of the Convention for the Protection of Human Rights and Fundamental Freedoms.

[**81.**] Soering, a German national, was wanted for murder in Bedford County, Virginia, United States of America. He fled to Europe but was arrested in England on a charge of cheque fraud. Six weeks later he was indicted for two brutal murders in Bedford County and, in consequence, the United States requested his extradition under its 1972 Extradition

Treaty with Great Britain. The then Federal Republic of Germany, which had abolished the death penalty, also requested his extradition. Being his country of origin, it too had jurisdiction to try him for the alleged murders. The United Kingdom government asked the US Department of State for an assurance that if Soering were surrendered he would not be executed, but was only provided with an affidavit from the District Attorney for Bedford County stating that he would inform the sentencing judge that 'it is the wish of the United Kingdom that the death penalty should not be imposed or carried out'. Shortly thereafter a hearing was held in England, upon the request of the United States, for Soering's extradition and the court found him extraditable. Appeals against the decision failed and ultimately Soering was ordered to be surrendered to the United States. In the meantime, however, he filed a complaint with the European Commission of Human Rights, which body advised the United Kingdom not to extradite until it had the opportunity to investigate the claim. The United Kingdom complied.

[**82.**] Before the Commission Soering alleged, *inter alia*, that his extradition to the United States would involve the United Kingdom in a violation of article 3, in that the condition of incarceration of prisoners under death sentence at Virginia's Mecklenburg Correctional Centre was inhuman and degrading. By a majority of six to five the issue was decided against him, but the Commission referred the case to the court, accepting that it required its attention.

[**83.**] The European Court unanimously found that there was a real risk that a Virginia court would sentence Soering to death and that if he was surrendered for trial, article 3 would be violated. This determination was based on its assessment of death row conditions at Mecklenburg Correctional Centre. The following passages in the judgment reflect the position of the Court.

> 56. The average time between trial and execution in Virginia, calculated on the basis of the seven executions which have taken place since 1977, is six to eight years. The delays are primarily due to a strategy by convicted prisoners to prolong the appeal proceedings as much as possible. The United States Supreme Court has not as yet considered or ruled on the 'death row phenomenon' and in particular whether it falls foul of the prohibition of 'cruel and unusual punishment' under the Eighth Amendment to the Constitution of the United States.
>
> 106. The period that a condemned prisoner can expect to spend on death row in Virginia before being executed is on average six to eight years (see paragraph 56 above). This length of time awaiting death is, as the Commission and the United Kingdom Government noted, in a sense largely of the prisoner's own making in that he takes advantage of all avenues of appeal which are offered to him by Virginia law. The automatic appeal to the Supreme Court of Virginia normally takes no more than six months (see paragraph 52 above). The remaining time is accounted for by collateral attacks mounted by the prisoner himself in *habeas corpus* proceedings before both the State and Federal courts and in applications to the Supreme Court of the United States for *certior-*

ari review, the prisoner at each stage being able to seek a stay of execution (see paragraphs 53-54 above). The remedies available under Virginia law serve the purpose of ensuring that the ultimate sanction of death is not unlawfully or arbitrarily imposed.

Nevertheless, just as some lapse of time between sentence and execution is inevitable if appeal safeguards are to be provided to the condemned person, so it is equally part of human nature that the person will cling to life by exploiting those safeguards to the full. However well-intentioned and even potentially beneficial is the provision of the complex of post-sentence procedures in Virginia, the consequence is that the condemned prisoner has to endure for many years the conditions on death row and the anguish and mounting tension of living in the ever-present shadow of death.

111. For any prisoner condemned to death, some element of delay between imposition and execution of the sentence and the experience of severe stress in conditions necessary for strict incarceration are inevitable. The democratic character of the Virginia legal system in general and the positive features of Virginia trial, sentencing and appeal procedures in particular are beyond doubt. The court agrees with the Commission that the machinery of justice to which the applicant would be subject in the United States is in itself neither arbitrary nor unreasonable, but, rather, respects the rule of law and affords not inconsiderable procedure safeguards to the defendant in a capital trial. Facilities are available on death row for the assistance of inmates, notably through provision of psychological and psychiatric services (see paragraph 65 above).

However, in the court's view, having regard to the very long period of time spent on death row in such extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty, and to the personal circumstances of the applicant, especially his age and mental state at the time of the offence, the applicant's extradition to the United States would expose him to a real risk of treatment going beyond the threshold set by article 3. A further consideration of relevance is that in the particular instance the legitimate purpose of extradition could be achieved by another means which would not involve suffering of such exceptional intensity or duration (ie, by extradition to the Federal Republic of Germany).

Accordingly, the Secretary of State's decision to extradite the applicant to the United States would, if implemented, give rise to a breach of article 3.

[**84.**] One important feature that distinguishes this from most human rights cases is that the violation alleged was potential or theoretical, rather than actual. Another is that, although the Court acknowledged that most of the period of six to eight years on death row at Mecklenburg is attributable to collateral attacks on the conviction through *habeas corpus* proceedings in the federal courts and are, therefore, largely of the condemned prisoner's own making, it noted that it is 'part of human nature that the person will cling to life by exploiting those safeguards to the full.'

[**85.**] In his note on the case in 1991 *American Journal of International Law* Volume 85 at 145, Professor Richard Lillich suggested that but for the unusual factors of Soering's age, alleged mental disorder and the request by the Federal Republic of Germany for his extradition, the European Court would not have invalidated the extradition and, therefore, the Court meant to limit its ruling on the death row phenomenon to the most

egregious of cases. But as convincingly answered by Michael Shea in 1992 *Yale Journal of International Law* Volume 17 at 110, such a narrow interpretation ignores the Court's rejection of the argument that the appeal process was designed to protect the death row inmate who could always choose to accelerate the process by waiving his appeal rights (see paragraph 106 of the judgment). In short, neither Soering's youth nor his country of origin was either crucial to or determinative of the result.

[**86.**] In *Re Kindler & Minister of Justice* (1991) 67 CCC 3d 1 the Supreme Court of Canada, by a majority of four to three, on facts very close to those in the *Soering* case, refused to block the extradition of the fugitive appellant to the United States. It is unnecessary to deal in any detail with the lengthy separate judgments save to indicate, that for the majority, La Forrest J, at 15 took the view that:

> While the psychological stress inherent in the death-row phenomenon cannot be dismissed lightly, it ultimately pales in comparison to the death penalty. Besides, the fact remains that a defendant is never forced to undergo the full appeal procedure, but the vast majority choose to do so. It would be ironic if delay caused by the appellant's taking advantage of the full and generous avenue of the appeals available to him should be viewed as a violation of fundamental justice.

[**87.**] On the other hand Cory J, for the minority, summarised his conclusions at 44-45, thus:

> Capital punishment for murder is prohibited in Canada. Section 12 of the Charter provides that no one is to be subjected to cruel and unusual punishment. The death penalty is *per se* a cruel and unusual punishment. It is the ultimate denial of human dignity. No individual can be subjected to it in Canada. The decision of the Minister to surrender a fugitive who may be subject to execution without obtaining an assurance pursuant to article 6 is one which can be reviewed under s 12 of the Charter. It follows that the Minister must not surrender Kindler without obtaining the undertaking described in article 6 of the Treaty. To do so would render s 25 of the Extradition Act inconsistent with the Charter in its application to fugitives who would be subject to the death penalty.

(f) Decisions of the United Nations Human Rights Committee

[**88.**] In recent years the Human Rights Committee, under article 5(4) of the Optional Protocol to the International Covenant on Civil and Political Rights, ('the Covenant'), has handed down decisions on whether the length of detention on death row amounted to a violation of the prohibition against 'torture or cruel inhuman degrading treatment or punishment' under article 7 of the Covenant. In each, the alleged victim, the 'author', was a Jamaican national. They are Earl Pratt and Ivan Morgan, communication nos 210/1985 and 225/1987, (24 March 1988), Carlton Reid, communication no 250/1987, (20 July 1990) and Randolph Barrett and Clyde Sutcliffe, communication nos 270/271/1988, (30 March 1992). Although the periods were taken from the imposition of the sentences, and ranged from two years to ten years, the Committee found that the

claims had not been substantiated. In the last mentioned it was stated at 8 paragraph 8.4:

> In states whose judicial system provides for a review of criminal convictions and sentences, an element of delay between the lawful imposition of a sentence of death and the exhaustion of available remedies is inherent in the review of the sentence; thus, even prolonged periods of detention under a severe custodial regime on death row cannot generally be considered to constitute cruel, inhuman or degrading treatment if the convicted person is merely availing himself of appellate remedies. A delay of ten years between the judgment of the Court of Appeal and that of the Judicial Committee of the Privy Council is disturbingly long. However, the evidence before the Committee indicates that the Court of Appeal rapidly produced its written judgment and that the ensuing delay in petitioning the Judicial Committee is largely attributable to the authors.

[**89**.] This observation called forth a dissent from one of the members, who said at 10:

> The conduct of the person concerned with regard to the exercise of remedies ought to be measured against the states involved. Without being at all cynical, I consider that the author cannot be expected to hurry up in making appeal so that he can be executed more rapidly . . . in this type of case, the elements involved in determining the time factor cannot be assessed in the same way if they are attributable to the state party as if they can [be] ascribed to the condemned person. A very long period on death row, even if partially due to the failure of the condemned prisoner to exercise a remedy, cannot exonerate the state party from its obligations under article 7 of the Covenant . . .

[**90**.] It is this latter approach that I find the more compelling.

The condemned prisoner's entitlement to rely on the factor of delay

[**91**.] Such cases as *Chessman v Dickson* 275 F 2d 604 (1969), *Richmond v Lewis* 948 F 2d 1473 (1991) and *Re Kindler and Minister of Justice* (1991) 67 CCC (3d) 1 propound the narrow and somewhat intolerant view that as the condemned prisoner is never compelled to undergo the full appellate and *habeas corpus* procedures, the period of his confinement on death row resulting therefrom cannot be considered a violation of his fundamental rights, no matter the agony that he is suffering. It is true that the prosecution has no incentive or benefit in consciously delaying execution of a person who has been sentenced to death. Nevertheless in some countries, such as the United States, delay is a necessary incident to the operation of the due process protections in the criminal justice system.

[**92**.] The contrary approach, and one more in accord with a humane understanding of the desire to 'cling to life' as long as possible, is persuasively expressed in such cases as *Vatheeswaran v State of Tamul Nadu* AIR 1983 SC 361 at 364, where it was said:

> We think that the cause of the delay is immaterial when the sentence is death. Be the cause for the delay, the time necessary for appeal and consideration of reprieve or some other cause for which the accused himself may be responsible, it would not alter the dehumanising character of the delay.

[**93.**] See also *People v Anderson* 493 P 2d 880 (1972) at 895; *Soering v United Kingdom* (1989) 11 EHRR 439 at paragraph106.

[**94.**] It seems to me highly artificial and unrealistic to discount the mental agony and torment experienced on death row on the basis that by not making the maximum use of the judicial process available, the condemned prisoner would have shortened and not lengthened his suffering. The situation could be otherwise if he had resorted to a series of untenable and vexatious proceedings which, in consequence, had the effect of delaying the ends of justice.

[**95.**] I hasten to add that, in any event, the position in Zimbabwe, where there is only one appeal stage, is much different from that prevailing in the United States. A person sentenced to death in this country has an automatic right of appeal to the Supreme Court in terms of section 44(2) of the High Court of Zimbabwe Act 1981. If he is indigent and so unable to afford legal representation (as is the case with over 90% of condemned prisoners) legal aid counsel is appointed at the expense of the state.

[**96.**] Section 114 of the Prison Regulations 1956, as amended, requires the officer in charge of the prison to which the condemned prisoner is first admitted, to forthwith advise him of his right to appeal. More often than not he is assisted with the drafting of a notice of appeal by a prison officer. But even where no notice of appeal is lodged, the trial proceedings are still transcribed, *pro deo* counsel appointed to argue the matter and the propriety of the conviction and sentence reviewed by the Supreme Court. I know of no instance where the Cabinet has proceeded to debate the prerogative of mercy without being aware that the death sentence has been upheld on appeal. There is a commendable insistence that the appeal process be exhausted. The condemned prisoner has in reality no option — an appeal must go forward.

[**97.**] Obviously, the system is such as to completely disable the condemned prisoner from postponing his execution by embarking upon a series of appeal procedures. And unless he is one of the fortunate few who continues to be legally represented subsequent to sentence, he has no control over the expedition with which his appeal will be heard. The timescale lies solely in the hands of the state. It is only after the appeal record has been prepared that legal aid counsel is again briefed to represent the condemned prisoner.

[**98.**] It necessarily follows, to my mind, that any inordinate delay between the imposition of the death penalty and the date of its confirmation by the Supreme Court falls outside the responsibility of the condemned prisoner.

The commencement of the period of delay

[**99.**] This issue is closely related to the one preceding.

[**100.**] In *Triveniben v State of Gujarat* [1989] 1 SCJ 383 a full bench of the Supreme Court of India ruled at 393, that the delay:

> Which could be considered while considering the question of commutation of sentence of death into one of life imprisonment could only be from the date the judgment by the apex court is pronounced ie, when the judicial process has come to an end.

[**101.**] As explained in the judgment of Oza J at 391 paragraph 13 and Shetty J at 409 paragraph 71, an appeal court when dealing with a death sentence may take account of the delay and the cause thereof, along with other circumstances. It must weigh up every factor for and against the appellant. But were it to find the disposal of the case not to be sufficiently mitigatory as to warrant the quashing of the sentence and the substitution of a lesser punishment, it would be inappropriate in a subsequent writ application to fall back on the same delay to impeach the execution. In other words, the stage at which significant delay between the imposition of the sentence and the hearing of the appeal is to be considered is by the apex court. It is by that forum that the mental agony of the condemned prisoner brought about by protracted delay must be taken into account as a mitigatory circumstance. This is because the passing of sentence of death upon a conviction of murder is not mandatory. It is only to be imposed in the rarest of cases. As explained in *Machhi Singh v State of Punjab* [1983] 3 SCC 470:

> A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigatory circumstances have to be accorded full advantage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.

[**102.**] In this country the criminal procedure in respect of the crime of murder is different. Where an accused has been convicted, sentence of death is mandatory, except where he is able to establish, on a balance of probability, the existence of extenuating circumstances (see the proviso to s 314A(a) of the Criminal Procedure and Evidence Act (Cap 59)). Extenuating circumstances are all the factors which, in the minds of reasonable men, may serve to reduce the moral, albeit not the legal, blameworthiness of the accused in the commission of the murder. See, for instance *State v Chaluwa* [1985] (2) ZLR 121 (S) at 130B. Any delay from the imposition of the sentence to the hearing of the appeal cannot be taken into account by the Supreme Court in its determination of whether the opinion of the trial court as to the absence of extenuating circumstances was one which no reasonable court would have reached, for the incidence of delay does not qualify as a circumstance capable of reducing an appellant's moral guilt in perpetrating the murder. It is entirely irrelevant to the commission of that offence.

[**103.**] This procedural distinction clearly renders the ruling in *Triveniben's* case *supra* which was applied in *Madhu Mehta v Union of India* [1989] 3 SCR 775 at 782G-H, factually inappropriate to the local jurisprudential context.

[**104.**] In *Abbott v Attorney-General of Trinidad and Tobago* [1979] 1 WLR

1342 it was conceded on behalf of the appellant, and so held by the Judicial Committee, that the delay of three years between sentence and the rejection of the appeal was to be disregarded as due to an unsuccessful attempt by the appellant to have his conviction set aside. I have already indicated my respectful disagreement with this view. I would only add that in the *Soering* case, *supra*, the European Court of Human Rights took as the delay Soering would have to endure if extradited to Virginia, found guilty of murder and sentenced to death, the six to eight years it would take him, from that date, to pursue all the judicial processes available.

[**105.**] Most importantly, in Zimbabwe, as I have mentioned, an appeal against sentence of death is automatic. It is based as much upon the desire of the state to ensure as best it can that the conviction and sentence are justified, as that of the condemned prisoner to have the conviction set aside or the sentence reduced. Moreover, as the responsibility to prepare the record of the trial proceedings for the Appeal Court rests with the state, and since the vast majority of condemned prisoners are without legal representation immediately subsequent to the conclusion of the trial and until, at earliest, the completion of the record, this interim period of delay is one over which they have no control whatsoever.

[**106.**] Accordingly, I am entirely satisfied that in the determination of whether there has been a breach of section 15(1) of the Constitution, the period the prisoner has spent in the condemned cell must be taken to start with the imposition of sentence of death. After all, it is from that date that he begins to suffer what is termed the 'death row phenomenon'.

The value judgment

[**107.**] The Minister of Justice, Legal and Parliamentary Affairs, explained in his affidavit that the appeals of the condemned prisoners were dismissed by the Supreme Court during a time when abolition of the death penalty was under discussion by government. The Cabinet, accordingly, deferred consideration of the prerogative of mercy in respect of all death sentence prisoners; execution would have denied them the benefit of a commutation should the debate have culminated in a decision to abolish.

[**108.**] The Criminal Laws Amendment Act 1992, which retains sentence of death only for murder, treason and certain military offences, was promulgated on 8 May 1992. At that date 45 prisoners were awaiting confirmation or commutation of sentence of death. After the Bill has been passed by Parliament, which preceded the Act by two months, the compilation of the requisite papers for submission to the Cabinet began. Confidential reports had to be prepared by the Social Welfare Department. This involved interviews with both the condemned prisoners and their relatives. Reports also had to be obtained from the trial judges and a memorandum from the Minister. Many copies of various documents, including the judgments of the High Court and the Supreme Court, had to be made.

[**109.**] It was as late as 21 January 1993 that the papers pertaining to the four condemned prisoners were considered by the Cabinet and the necessary decisions taken. And it was on 9 March 1993 that the President confirmed the decisions not to commute the sentences.

[**110.**] Although it must be accepted that it was both reasonable and fair, while the debate ranged, for the Cabinet to have opted for a moratorium on execution, it is doubtful, to my mind, that the subsequent delay of one year between the passing of the Bill and 9 March 1993 can be justified. However that may be, the criterion is the effect of the *entire* extent of the delay on the four condemned prisoners and not the cause thereof. The cause is irrelevant for it fails to lessen the degree of suffering of the condemned prisoners. See *Vatheeswaran v State of Tamil Nadu supra* at 364.

[**111.**] It has been stressed with frequency that sentence of death should be carried out as expeditiously as possible. See the remarks of Lord Diplock in *Abbott v Attorney General of Trinidad and Tobago & Others supra* at 1345E and of Beadle CJ in *Dhlamini & Others v Carter NO & Another supra* at 156E-F. The reason is self-evident. It is to minimise the period of terrible anguish. Certainly, section 116(1) of the Prison Regulations recognises the undoubted psychological stress that a condemned prisoner has to endure, for it is there provided that a prison officer who notices anything in the demeanour or behaviour of such a prisoner indicating that he has become mentally disordered must immediately report in writing to the officer-in-charge. And the repealed section 118 required regular searches of condemned prisoners because of the risk of suicide.

[**112.**] From the moment he enters the condemned cell, the prisoner is enmeshed in a dehumanising environment of near hopelessness. He is in a place where the sole object is to preserve his life so that he may be executed. The condemned prisoner is 'the living dead': see Vogelman 'The Living Dead' 5 (1989) *South African Journal of Human Rights* 183-195; Mihalik 'The Death Penalty in Bophuthatswana: A New Deal for Condemned Prisoners?' (1990) 107 *South African Law Journal* 465 at 471-472; Johnson and Carroll *Litigating Death Row Conditions: The Case for Reform* (1985) [in Ribbins (ed) *Prisoners and the Law*] at 8-5 and 6. He is kept only with other death sentence prisoners — with those whose appeals have been dismissed and who await death or reprieve, or those whose appeals are still to be heard or are pending judgment. While the right to an appeal may raise the prospect of being allowed to live, the intensity of the trauma is much increased by knowledge of its dismissal. The hope of a reprieve is all that is left. Throughout all this time the condemned prisoner constantly broods over his fate. The horrifying spectre of being hanged by the neck and the apprehension of being made to suffer a painful and lingering death, is, if at all, never far from mind. Grim accounts exist of hangings not properly performed: see *State v Frampton* Wash 627 P 2d 922 (1981) at 935-936, Gardiner 'Executions and Indignities' (1978) 39 *Ohio State Law Journal* at 191-192.

[**113.**] The four condemned prisoners have spoken of the agony and tor-

ment they suffer. They maintain that the harsh prison conditions to which they are subjected daily add substantially to the measure of their misery. They are left virtually in solitary confinement in cramped and unhygienic conditions; there is an absence of any meaningful contact with the outside world; they are permitted no reading material save that of a religious nature; there is a total lack of facilities with which to pass the day; they are deprived of all clothing from mid-afternoon to early morning; they are taunted by prison officers with impending death by hanging; they are affected by the mental deterioration of some fellow inmates and by suicides and attempts thereat; they are able to hear the sounds of executions being carried out.

[**114.**] Of course, in an enquiry into a breach of section 15(1) of the Constitution, it would be wrong to differentiate between strong and weak personalities. That is why what is to be assessed is the likely and not the actual effect of the length of the delay upon the ordinary individual. See *Riley & Others v Attorney-General of Jamaica & Another supra* at 479g-h and 480b.

[**115.**] Accepting that fear, despair and mental torment are the inevitable concomitant of sentence of death, the question is whether the delays of 52 months and 72 months, with which this Court is concerned, go beyond what is constitutionally permissible.

[**116.**] In making of a value judgment regard is to be had, *inter alia*, to how the periods of delay from sentence to the proposed dates of execution compare with the average delays over those years from 1978 when executions were carried out in this country.

[**117.**] The following information with which this Court has been provided reflects the following:

Year of execution	Number of executions	Average delay in months from date of sentence
1978	19	4.3
1979	22	4.7
1980	Nil	-
1981	Nil	-
1982	2	13.5
1983	13	18.5
1984	2	22
1985	10	33.2
1986	5	22.8
1987	10	39.6
1988	5	35.6
Overall	88	17.2

[**118.**] The difference between the average period of delay for each individual year as well as that over the nine years, when compared with the present figures of 52 months and 72 months, regrettably indicates a significant upward trend. Viewed against the average of 17.2 months in respect of 88 executions, there is an additional delay of 34.10 months in respect of Bakaka, Chiliko and Mhlanga, and 54.10 months in respect of Marichi. Even relative to the year 1987, when the delay peaked to an undesirable average of 39.6 months, the additional delays to which the four condemned prisoners have been subjected are 12.6 months and 32.6 months respectively.

[**119.**] Making all reasonable allowance for the time necessary for appeal and the consideration of reprieve, these delays are inordinate. As such they create a serious obstacle in the dispensation and administration of justice. They shake the confidence of the people in the very system. It is my earnest belief that the sensitivities of fair-minded Zimbabweans would be much disturbed, if not shocked, by the unduly long lapse of time during which these four condemned prisoners have suffered the agony and torment of the inexorably approaching fore-ordained death while in demeaning conditions of confinement.

[**120.**] Having regard to the impressive judicial and academic consensus concerning the death row phenomenon, the prolonged delays and the harsh conditions of incarceration, I am convinced that a sufficient degree of seriousness has been attained as to entitle the applicant to invoke on behalf of the condemned prisoners the protections against inhuman treatment afforded them by section 15(1) of the Constitution.

[**121.**] In making this value judgment it has been necessary to remain uninfluenced by the fact that the demand for humane and civilised treatment is made on behalf of those who showed no mercy to their victims but subjected them to extreme cruelty and brutality.

[**122.**] Because retribution has no place in the scheme of civilised jurisprudence, one cannot turn a deaf ear to the plea made for the enforcement of constitutional rights. Humaneness and dignity of the individual are the hallmarks of civilised laws. Justice must be done dispassionately and in accordance with constitutional mandates. The question is not whether this court condones the evils committed by the four condemned prisoners, for certainly it does not. It is whether the acute mental suffering and brooding horror of being hanged which has haunted them in their condemned cells over the long lapse of time since the passing of sentence of death is consistent with the guarantee against inhuman, or degrading punishment or treatment. For like article 21 of the Constitution of India, section 15(1) stands as sentinel over human misery, degradation and oppression. Its voice is that of justice and fairness. It can never be silenced on the grounds that the time to heed to its dictates ended with the passing of the death penalty. It echoes through all stages — the trial,

the sentence, the incarceration on death row and finally, the execution: see *Sher Singh & Others v State of Punjab supra* at 593F.

The appropriate remedy

[**123.**] Section 24(4) of the Constitution empowers the Supreme Court to: 'make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or seeking the enforcement of the Declaration of Rights.'

[**124.**] I shall repeat what was said in *re Mlambo* 1991 (2) ZLR 339 (S) at 355C; 1992 (4) SA 144 (ZS) at 155J: 'It is difficult to imagine language which would give this court a wider and less fettered discretion.'

[**125.**] I would add that even the proviso to the subsection, which enacts that the Supreme Court may decline to exercise its powers where other and adequate means of redress are available to the complainant, is not mandatory. The discretion remains.

[**126.**] The argument on this issue turned upon whether this Court, if satisfied that the executions of the four condemned prisoners would be unconstitutional as being contrary to section 15(1), should merely issue a *declaratur* to that affect, as contended for by the respondents; or quash the sentences of death and substitute in their place sentence of life imprisonment, as prayed at the hearing by the applicant.

[**127.**] The power to 'commute' sentence of death is an executive power. Though it exists essentially for the protection of the condemned prisoner, he has no right to be heard in the deliberations of the Cabinet. He may only submit a mercy petition. He has a *de facto* right to expect the lawful exercise of the power but no legal remedy is available to him (see s 31K(2) of the Constitution), save where an infringement of rights can be shown: see *Riley & Others v Attorney-General of Jamaica & Another supra* at 476h. In which event, the Supreme Court is mandated by the Constitution to fulfil its protective role and enforce the particular fundamental right. In so doing the Supreme Court is not to be taken as interfering with the 'pardoning power' of the Cabinet or the President. The judicial power and the executive power over sentences are readily distinguishable: see *United States v Benz* 282 US 304 (1931) at 311.

[**128.**] It is to be noted that in *Javed Ahmed v State of Maharashra* AIR 1985 SC 231 the Supreme Court of India quashed the sentence of death, replacing it with imprisonment for life, notwithstanding that the President of India had refused clemency. And in *Madhu Mehta v Union of India supra* the same distinguished Court issued a similar order even though the mercy petition had not yet been considered by the executive.

[**129.**] It is essential that this Court, in the exercise of its wide discretion, should award a meaningful and effective remedy for the breach of section

15(1). That in my view, may best be achieved by ordering that the sentences of death be vacated.

The order

[**130.**] In the result I would order as follows:

1. The application is allowed with costs.
2. The sentences of death passed upon Martin Bechani Bakaki, Luke Kingsize Chiliko, Timothy Mhlanga and John Chakara Zacharia Marichi is, in each case, set aside and substituted with a sentence of imprisonment for life.

Recommendations

[**131.**] The Minister of Justice, Legal and Parliamentary Affairs, has fairly recognised that, to some extent at least, shortcomings in the system have been revealed. For he stated in his affidavit: 'My Ministry will henceforth examine ways of ensuring speedy processing of petitions for clemency, in cases of prisoners facing the death penalty.'

[**132.**] Such action is, in my mind, imperative. There can be no doubt that to have allowed about ten months to elapse from the date the government resolved to retain the death penalty for murder, to 21 January 1993 when the Cabinet finally considered these four matters, was far too long. It is a delay that simply fails to reflect any sense of urgency. And the period of six weeks to 9 March 1993, when the warrants of execution were issued, was also excessive.

[**133.**] It seems to me that the whole procedure relating to death sentence cases requires to be revised and accelerated.

[**134.**] In the first place, I would suggest that once an accused person has been sentenced to death, the trial judge should direct that the proceedings be transcribed forthwith; that immediately the appeal record has been prepared and lodged with the Registrar of the Supreme Court, the appeal should be set down for hearing as an urgent matter. Once dismissed, no time should be lost in attending to all the procedures necessary for the submission of the matter to the Cabinet.

[**135.**] Secondly, consideration should be given to extending the services of the *pro deo* counsel who appeared at the trial to the drafting of the notice of appeal; and, in the event of the appeal being dismissed, to the preparation of a petition for mercy. In this way the condemned prisoner would be represented by a legal practitioner from the date of sentence to a stage when assistance was no longer required. The latter would be in a position to ensure total expedition with regard to the preparation of the record and the hearing of the appeal.

[**136.**] Thirdly, a self-imposed rule should be applied by the Cabinet that the decision of whether or not to exercise the prerogative of mercy be made within a period of, say, three months from the date the appeal against the death sentence was dismissed.

[**137.**] McNally JA: I agree; Korsah JA: I agree; Ebrahim JA: I agree; Muchechetere JA: I agree.