

Legal Grounds

Reproductive and Sexual Rights in
African Commonwealth Courts



CENTER
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RIGHTS



LEGAL GROUNDS REPRODUCTIVE AND SEXUAL RIGHTS IN AFRICAN COMMONWEALTH COURTS

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TABLE OF CONTENTS

3	ACKNOWLEDGMENTS	32	Ishmael Dintwa v. State
5	TABLE OF CONTENTS	33	b) Kenya
9	TABLE OF CASES BY COUNTRY	33	Mukungu v. Republic
11	FOREWORD	33	c) Namibia
13	CHAPTER I: INTRODUCTION	33	State v. Katamba
17	CHAPTER II: RIGHTS RELATING TO PHYSICAL INTEGRITY, SECURITY, AND AUTONOMY	34	d) Nigeria
17	A. MARRIAGE	34	1) Jos Native Authority Police v. Gani
17	1. Customary Marriage and Related Issues	34	2) Okoyomon v. State
17	a) Nigeria	35	3) State v. Ojo
17	Amadi v. Nwosu	35	4) Upahar v. State
18	b) South Africa	36	e) South Africa
18	1) Mabuza v. Mbatha	36	1) Carmichele v. Ministry of Safety and Security
19	2) Prior v. Battle and Others	38	2) S v. J
20	3) Ryland v. Edros	39	3) Van Eeden v. Minister of Safety and Security
21	4) Van Den Berg v. Van Den Berg	40	3. Prostitution/Sex Work
22	2. Marriage and Child Custody	40	South Africa
22	a) Nigeria	40	S v. Jordan and Others
22	1) Ibe-Lamberts v. Ibe-Lamberts	41	4. Pornography
23	2) Setto v. Motsibbe and Another	42	a) Namibia
24	b) South Africa	42	Fantasy Enterprises CC t/a Hustler the Shop v. Minister of Home Affairs; Nasilowski and Others v. Minister of Justice and Others
24	1) Krugel v. Krugel	43	b) South Africa
25	2) Pinion v. Pinion	43	1) Case and Another v. Minister of Safety and Security and Others; Curtis v. Minister of Safety and Security and Others
26	3) President of the Republic of South Africa and Another v. Hugo	44	2) De Reuck v. Director of Public Prosecution, Witwaters and Local Division, and Others
28	3. Marriage of Same-Sex Couples	45	3) Prinsloo v. RCP Media Ltd (t/a Rapport)
28	South Africa	47	CHAPTER III: RIGHTS RELATING TO REPRODUCTIVE AND SEXUAL HEALTH, INFORMATION AND EDUCATION
28	1) Fourie v. The Minister of Home Affairs	47	A. Abortion
29	2) Satchwell v. President of The Republic of South Africa	47	South Africa
30	B. VIOLENCE AND ILL-TREATMENT	47	a) Christian Lawyers' Association v. National Minister of Health and Others
30	1. Domestic Violence		
30	South Africa		
30	S v. Baloyi		
31	2. Sexual Assault		
32	a) Botswana		

- 48 b) Christian Lawyers' Association of South Africa and Others v Minister of Health and Others
- 49 **B. HIV/AIDS**
- 50 1. Botswana
- 50 Makuto v. State
- 52 2. Kenya
- 52 Nyumbani Children's Home v. The Ministry for Education and The Attorney General
- 52 3. South Africa
- 52 a) Hoffmann v. South African Airways
- 54 b) Irvin and Johnson v. Trawler and Line Fishing Union and Others
- 55 c) PFG Building Glass (Pty) Ltd v. Chemical Engineering Pulp Paper Wood and Allied Workers' Union (CEPPAWU) and Others
- 56 d) Treatment Action Campaign, Dr. Haroon Saloojee, Children's Rights Centre v. Minister of Health and Others
- 57 **C. Reproductive Status and Right to Education**
- 58 1. Botswana
- 58 Student Representative Council of Molepolole College of Education v. Attorney General
- 59 2. Kenya
- 59 3. South Africa
- 59 Mfolo and Others v. Minister of Education, Bophuthatswana
- 60 Zimbabwe
- 60 Lloyd Chaduka and Morgenster College v. Enita Mandizvidza
- 63 **CHAPTER IV: DUE RESPECT FOR DIFFERENCES: DISCRIMINATION BASED ON GENDER AND SEXUAL ORIENTATION**
- 63 **A. Gender Discrimination**
- 63 1. Nigeria
- 63 a) Akande v. Oyewole
- 64 b) Amusan v. Olawumi
- 65 c) Ashipa v. Ashipa
- 65 d) Folami v. Cole
- 66 e) Mojekwu v. Mojekwu
- 67 f) Muojekwo and Others v. Ejikeme and Others
- 68 g) Nzekwu v. Nzekwu
- 69 h) Sharu v. Umma
- 70 2. South Africa
- 70 a) Bhe v. Magistrate, Khayelitsha and Others
- 71 b) Mthembu v. Letsela and Another
- 72 3. Zimbabwe
- 72 Magaya v. Magaya
- 74 **B. Women's Rights to Immigration and Citizenship**
- 74 1. Botswana
- 74 Attorney General of the Republic of Botswana v. Unity Dow
- 75 2. Namibia
- 75 Chairperson of the Immigration Selection Board v. Frank and Others
- 77 3. South Africa
- 77 National Coalition for Gay and Lesbian Equality and Others v. Minister of Home Affairs and Others
- 78 4. Zimbabwe
- 78 Rattigan and Others v. Chief Immigration Officer and Others
- 79 **C. Sexual Orientation**
- 79 1. Immigration
- 79 a) Namibia
- 79 b) South Africa
- 79 c) Zimbabwe
- 79 2. Adoption, Child Custody, and Parental Rights
- 79 South Africa
- 79 1) Du Toit and Another v. Minister of Welfare and Population Development and Others

- 80 2) J and B v. Director General,
Department of Home Affairs and others
- 82 3) V v. V
- 83 3. Law of Sodomy
- 83 a) South Africa
- 83 National Coalition for Gay and
Lesbian Equality v. Minister of Justice
and Others
- 84 b) Zimbabwe
- 84 Banana v. State

86 WEBSITE RESOURCES

88 CASES AVAILABLE IN FULL TEXT

TABLE OF CASES BY COUNTRY

BOTSWANA

- 74 Attorney General of Botswana v. Unity Dow
- 32 Ishmael Dintwa v. State
- 50 Makuto v. State
- 58 Student Representative Council of Molepolole College of Education v. Attorney General

KENYA

- 33 Mukungu v. Republic
- 52 Nyumbani Childrens Home v. The Ministry for Education and The Attorney General

NAMIBIA

- 75 Chairperson of the Immigration Selection Board v. Frank and Another
- 42 Fantasy Enterprises CC t/a Hustler the Shop v. Minister of Home Affairs; Nasilowski and Others v. Minister of Justice and Others
- 33 State v. Katamba

NIGERIA

- 63 Akande v. Oyewole
- 17 Amadi v. Nwosu
- 64 Amusan v. Olawuni
- 65 Ashipa v. Ashipa
- 65 Folami v. Cole
- 22 Ibe-Lamberts v. Ibe-Lamberts
- 34 Jos Native Authority Police v. Gani
- 66 Mojekwu v. Mojekwu
- 67 Muojekwo and Others v. Ejikeme and Others
- 68 Nzekwu v. Nzekwu
- 34 Okoyomon v. State
- 23 Setto v. Motsibbe and Another
- 69 Sharu v. Umma
- 35 State v. Ojo
- 35 Upahar v. State

SOUTH AFRICA

- 70 Bhe v. Magistrate, Khayelitsha and Others
- 36 Carmichele v. Ministry of Safety and Security
- 43 Case and Another v. Minister of Safety and Security and Others; Curtis v. Minister of Safety and Security and Others
- 47 Christian Lawyers' Association v. National Minister of Health and Others
- 48 Christian Lawyers' Association of South Africa and Others v. Minister of Health and Others
- 44 De Reuck v. Director of Public Prosecution, Witwaters and Local Division, and Others
- 79 Du Toit and Another v. Minister of Welfare and Population Development and Others
- 28 Fourie v. The Minister of Home Affairs
- 52 Hoffmann v. South African Airways
- 54 Irvin and Johnson v. Trawler and Line Fishing Union and Others
- 80 J and B v. Director General, Department of Home Affairs and Others
- 24 Krugel v. Krugel
- 18 Mabuza v. Mbatha
- 59 Mfolo and Others v. Minister of Education, Bophuthatswana
- 71 Mthembu v. Letsela and Another
- 83 National Coalition for Gay and Lesbian Equality and Another v. Minister of Justice and Others
- 77 National Coalition for Gay and Lesbian Equality and Others v. Minister of Home Affairs and Others

- 55 PFG Building Glass (Pty) Ltd v.
Chemical Engineering Pulp Paper
Wood and Allied Workers' Union
(CEPPAWU) and Others
- 25 Pinion v. Pinion
- 26 President of the Republic of South
Africa and Another v. Hugo
- 45 Prinsloo v. RCP Media Ltd
(t/a Rapport)
- 19 Prior v. Battle and Others
- 20 Ryland v. Edros
- 30 S v. Baloyi
- 40 S v. Jordan and Others
- 29 Satchwell v. President of
The Republic of South Africa
- 38 S v. J
- 56 Treatment Action Campaign,
Dr. Haroon Saloojee, Children's
Rights Centre v. Minister of Health
and Others
- 21 Van Den Berg v. Van Den Berg
- 39 Van Eeden v. Minister of Safety
and Security
- 83 V v. V

ZIMBABWE

- 85 Banana v. State
- 61 Lloyd Chaduka and Morgenster
College v. Enita Mandizvidza
- 73 Magaya v. Magaya
- 79 Rattigan and Others v. Chief
Immigration Officer and Others

FOREWORD

In the nineties, women's rights activists throughout Africa joined with our sisters from around the world to secure recognition that the "traditional" international human rights framework applies to our unique human condition, including our reproductive and sexual lives. In the Africa region, we can feel great pride that we participated in securing our governments' adoption of a new Protocol on the Rights of Women in Africa just over two years ago, which includes protection for women's reproductive and sexual rights. In 2004, we marked ten years since the International Conference on Population and Development in Cairo, where governments agreed explicitly that reproductive rights are an inalienable part of established international human rights.

In our various roles as African women activists—as government officials, non-governmental organization staff, businesswomen, students, and community and family members—we know that we have achieved a lot in regional and international struggles. We also have made crucial gains in our own countries. Yet, we also know that the words contained in international, regional, and national norms have not translated into concrete changes in women's lives. These empty words in various legal documents do little to comfort women whose lives and health are profoundly impacted by discrimination within their families and communities.

Lack of respect for women's reproductive and sexual rights—for both their autonomy and their health—are among the most obvious causes of the abysmal statistics that continue to characterize the existence of the vast majority of African women. In Nigeria, for example, maternal mortality ratios are among the highest in the world; they range from 704 to 1,500 maternal deaths per 100,000 live births. The HIV/AIDS pandemic along with inadequate access to affordable, quality reproductive health-care services contribute to increased maternal mortality and morbidity ratios in sub-Saharan Africa. It is the responsibility of states to ensure that the benefits of scientific progress reach these women and prevent deaths due to pregnancy, HIV/AIDS, unsafe abortion, etc. Failure to secure women's right to safe motherhood amounts to "torture, inhuman and degrading treatment or punishment." It is, also, an abrogation of women's right to life and their entitlement to special protection by virtue of their reproductive capacity.

Many societal institutions are crucial to the realization of women's reproductive, sexual, and equal rights. One of these institutions is the judiciary. Every day, our courts apply constitutional, statutory, and customary legal provisions to uphold or deny women's rights. Their important role has been too little examined. Oftentimes, the weakness of the standards that are in place best comes into focus when women are compelled to seek or defend their rights in the courts. Judicial decisions can help point out where the law must be reformed to better guarantee women's equality, as well as where judges and other public functionaries are failing to interpret existing standards that uphold women's rights.

This publication provides a crucial starting point for women's rights advocates and jurists who need access to information about courts across the African Commonwealth, which refers to sub-Saharan African countries that were colonized by the British and share a legal system based on English common law. This report should serve as a wake-up call that we must not dismiss the role of the courts and judiciary in furthering women's rights. Women's rights activists should feel comfortable borrowing legal strategies from distant jurisdictions to press courts in their area to

interpret national and international standards for the benefit of women. In turn, courts will become sensitized and increasingly responsive to these rights as more cases are filed.

If we want the law to work for women, then the courts must be part of ensuring that women are able to exercise their human rights, including their reproductive and sexual rights. These rights should come not as an accident of place of birth or socioeconomic status, but be part and parcel of all African women's experience, no matter their country or community of origin.

Joy Ngozi Ezeilo, Executive Director, Women's Aid Collective (WACOL), Nigeria
C.C. Nweze, Judge, Enugu High Court of Nigeria
December, 2004

CHAPTER I

INTRODUCTION

Gender-based discrimination constitutes one of the greatest threats to women's health and lives worldwide. Equality along with reproductive and sexual rights are guaranteed in international and regional human rights treaties, as well as in many domestic laws. However, such guarantees are empty promises if not recognized and enforced by national-level courts, which are important venues through which women's rights are affirmed or denied. Unfortunately, existing human rights resources focus primarily on international norms and their national codification; very few examine the interpretation and application of such norms by national courts. Even fewer resources consider whether and how national jurisprudence addresses women's human rights.

The sub-Saharan Africa region suffers from even greater scarcity of accessible information regarding the jurisprudence of African national courts, particularly on how the courts deal with women's human rights. This compilation is a preliminary step toward enhancing access to and knowledge about some of the gender-relevant jurisprudence of African Commonwealth countries¹, with particular emphasis on reproductive and sexual rights.

Now is the time for African advocates to hold their governments accountable for their regional and international obligations to protect women's human rights. On July 11, 2003, the African Union supplemented the African Charter on Human and People's Rights (the African Charter) with a Protocol on the Rights of Women in Africa (the Women's Rights Protocol, or protocol). The Women's Rights Protocol is the first regional human rights instrument in Africa to specifically address women's rights, including explicit protection for women's sexual and reproductive rights². The protocol will enter into force upon ratification by 15 African states³. A regional, African Court of Human Rights has been proposed to monitor implementation of the African Charter and the protocol. To date, the court has not materialized, nor has the Women's Rights Protocol come into force⁴.

Regardless of when and if the African court has been established, national courts will bear the greatest responsibility for defending the rights embedded in the protocol. Once the protocol enters into force, activists can press national courts to interpret it properly.

However, lack of access to African jurisprudence impedes regional and international understanding of women's rights on the continent. It also makes it more difficult for human rights practitioners to formulate litigation and policy strategies for their own countries and the region. This compilation aims to be a starting point for informing the development of future advocacy strategies by providing advocates with useful resources for the future litigation of women's rights.

Advocates can use the information in this report in either of the following two ways:

To develop litigation strategies:

- Jurisprudence from African Commonwealth courts that shows a trend or that shows a consistent line of reasoning is persuasive, since it demonstrates growing regional acceptance of and support for human rights norms, particularly as they relate to women.

- Jurisprudence implementing international standards can inform and instruct courts that are struggling to interpret and apply international women’s rights norms.
- Jurisprudence from African Commonwealth courts provides human rights practitioners with legal arguments that can be used to support the judicial recognition and protection of women’s rights.

To develop grassroots and other advocacy strategies:

- Legal cases can offer compelling, concrete examples of the need for national-level law reform.
- Jurisprudence from African Commonwealth courts may spur policy reform by exposing the poor implementation of international and national legal standards that protect women’s rights.
- Advocates can use jurisprudence to educate women about the content and scope of their rights.
- Advocates can use the decisions in this report to raise awareness about women’s rights and highlight the importance of the judiciary and the legal system in general.

Structure of this report

Cases in this report are organized by subject matter⁵. Within each section, cases are organized by country and summarized as follows:

- “Court Holding” briefly notes the decision of the case.
- “Summary of Facts” provides the most relevant facts of the case.
- “Issues” details the central question addressed by the court. In most cases, several issues are addressed. These materials, however, selectively focus on issues related to equality and reproductive and sexual rights and do not necessarily reflect all the legal issues that were before the court.
- “Discussion” briefly reviews the court’s reasoning.
- “Conclusion” presents a summary of the outcome.

A brief introduction begins every issue area. These introductions are not comprehensive. They attempt to explain the significance of a particular issue or case to the advancement of women's rights, and may indicate a general trend that is suggested by the available jurisprudence.

At the end of the report, there is a list of Internet resources that offer full texts or summaries of African cases.

In addition, a list of African court cases is available from the Center for Reproductive Rights. The Center is able to act as a resource center in collecting and distributing court decisions. Researchers and other concerned individuals are encouraged to contact the Center to request, or send copies of, relevant cases decided by African courts. Please send your comments and suggestions to the Center for Reproductive Rights at the following e-mail address: Africancourts@reprorights.org

Limitations of This Report

This report is not comprehensive. Many of the cases we have cited were simply the most easily accessible. As a result, there are more cases for some countries and issue areas than others, and we were not able to provide full summaries for all of the cases we do mention. Finally, we have tried to provide the most up-to-date information possible, but some cases may have been appealed, overturned, or superseded after this report went to press.

CHAPTER II

RIGHTS RELATING TO PHYSICAL INTEGRITY, SECURITY, AND AUTONOMY

A. MARRIAGE

A woman's capacity to voluntarily enter into marriage, to dissolve a marriage, and to have equal rights within her marriage are essential to her ability to control her life and make voluntary, informed reproductive choices. Additionally, without equal rights under marriage and family law, a woman's right to property ownership and access to child custody are compromised. The cases below suggest that courts may be willing to grant women property rights in marriage so long as these rights do not conflict with customary or religious law.

The text of the Women's Rights Protocol assumes that marriage is between a man and a woman. The two cases found relating to same-sex couples, both from South Africa, suggest that same-sex unions are not legally recognized as marriage, but that access to benefits equal to those afforded to heterosexual couples may be supported.

1. Customary Marriage And Related Issues

In much of Africa, a woman's rights in marriage depend both on whether the marriage is legally recognized and on the law—statutory or customary—that governs the marriage. The Nigerian Supreme Court held, for example, that in a customary-law marriage, the rights of the parties are governed solely by that customary law. Statutory provisions (like the Nigerian Married Women's Property Act, which granted women ownership rights to property) are inapplicable. Similarly, in South Africa, a court held that where marriage was concluded under religious law (in that case, Islamic law), the rights of the woman were governed by that religious law, even if it did not entitle the woman to an equitable share of her husband's estate.

On the other hand, there is some evidence that courts, at least in South Africa, are willing to submit customary law governing marriage to constitutional scrutiny. Thus, for example, the South African High Court held that a marriage concluded under African customary law was valid, provided that it was consistent with the Constitution of South Africa. In another instance, the High Court declared unconstitutional customary law that excluded a specific class of land from common property of spouses, and gave the husband guardianship over his wife.

Where a marriage is concluded under state law, division of property is usually statutorily governed. In this case, what constitutes common property depends on judicial interpretation of the relevant statute (see, e.g., *Van Den Berg* below).

NIGERIA

Amadi v. Nwosu

(Nigeria, Supreme Court, [1992] 5 NWLR 273)

Court Holding

In a marriage concluded under customary law, where a wife does not have the right to property ownership, she must prove her monetary contribution to family property before she can invoke other laws to claim joint ownership of the property.

Summary of Facts

Mr. Godfrey Amadi, husband of the appellant, sold property to the respondent. The appellant then instituted a suit against the respondent. She challenged the validity of the contract of sale, which was concluded without her consent. First, she argued that the property the respondent purchased from her husband was common property, and thus belonged to both the parents and the children. Second, the appellant contended that had she contributed sand and labor to the building of the property. Mr. Amadi testified that he had lawfully owned the property, and that he had acquired it as partitioned family land. He therefore testified that the transaction was valid and the respondent was the legal owner. After an unsuccessful appeal to the Court of Appeal, the appellant took her case to the Supreme Court.

Issues

- (1) Is the property common property?
- (2) Did the appellant have an ownership right in the property?

Discussion

If a marriage is concluded under customary law, the Married Women's Property Act, 1881, does not apply. All subsequent property transactions that are related to the marriage are resolved through customary law. As a consequence, in the case at hand in which the appellant is bound by customary law, she could not invoke any law that granted her an ownership right over the property. Moreover, the appellant could not prove any actual contribution to the property, including the sand and labor, which she claimed to have supplied.

Conclusion

Given that the marriage was concluded on the basis of customary law, that legal regime also governs the ownership of property. According to customary law, the husband of the appellant could dispose of the property without her consent. Given the appellant's failure to establish any contribution to the family property, she cannot invoke another legal regime to establish ownership. The sale of the property is thus valid and the appeal is dismissed.

SOUTH AFRICA

Mabuza v. Mbatha

(South Africa, High Court, Cape of Good Hope Provincial Division, [2003] (4) SA 218; [2003] (7) BCLR 743 (C))

Court Holding

A marriage concluded under African customary law is valid so long as it is consistent with the South African Constitution.

Summary of Facts

The plaintiff, Ms. Lindiwe Sarah Mabuza, petitioned the court for a decree of divorce, and a declaration ordering the defendant to pay child support and other ancillary relief. The defendant

denied the existence of a valid customary marriage between the parties. The court concentrated upon the issue of whether section 7(1) of the Recognition of Customary Marriages Act 120 of 1998 contravened section 9 of the South African Constitution. This constitutional provision guarantees equality before the law. Section 7(1) of the act establishes that customary law governs any issue arising from a customary marriage concluded before the entry into force of the act.

Issue

Is section 7(1) of the act unconstitutional?

Discussion

The proclamation of the Black Administration Act 38 of 1927 legally recognized African customary law. However, this act recognizes African customary law only in so far as the customary law does not conflict with “the principles of public policy or natural justice.” Section 15(3)(a) of the South African Constitution also specifically recognizes marriages constituted in accordance with traditional rules or with religious or customary law. The enactment of the Recognition of Customary Marriages Act 120 of 1998 specifically recognized the legality of marriages constituted under African customary law. Given these developments, the court decided that it was unnecessary to determine whether such marriages were repugnant to public policy or natural justice. Rather, the marriage should stand as legally valid so long as it is not unconstitutional.

Conclusion

The parties are validly married. The court therefore granted the decree of divorce.

Prior v. Battle and Others

(South Africa, High Court, Transkei Division, [1999] (2) SA 850, Case No. 0405/98)

Court Holding

It is unconstitutional for customary marriage law to exclude a specific class of land from the common property of spouses and to give the husband guardianship over the wife.

Summary of Facts

The applicant and the first respondent constituted their marriage under the Transkei Marriage Act 21 of 1978. Under section 37(a) (civil marriage) and section 37(b) (customary marriage), the husband is deemed the guardian of his wife during their marriage. Section 39(2) of the act recognizes property as common only in so far as the husband has declared the property as such prior to the solemnization of the marriage. The provision also excludes all “land held in individual tenure under quitrent conditions” from common property. The applicant applied to the High Court for a declaration that sections 37 and 39(2) are unconstitutional

Issue

Are the provisions of the act that exclude specific land from the spouses' common property and give the husband guardianship over the wife unconstitutional?

Discussion

Regardless of the fact that the act's provisions govern a purely private relationship, the court is still obligated to scrutinize the constitutionality of the provisions. The grant of guardianship to a husband over his wife violates the applicant's constitutional rights to human dignity (section 10); life (section 11[1]); freedom of trade, occupation, and profession (section 22); and housing (section 26). The court therefore held that such guardianship was "outmoded and anachronistic." Moreover, this marital power had been abolished under section 11 of the Matrimonial Property Act 88 of 1984. According to section 12, spouses enjoy equal power over their common property.

Conclusion

Sections 37(a) and 39(2) of the Transkei Marriage Act 21 of 1978, which grant the husband guardianship over the wife and exclude a specific class of land from common property, are contrary to the constitution.

Ryland v. Edros

(South Africa, High Court, Cape Provincial Division, [1997] (2) SA 690, Case No. 16993/92)

Court Holding

The court is obligated to enforce the terms of a marriage contract concluded under religious (Islamic) law. A woman is not entitled to an equitable share of her husband's estate.

Summary of Facts

The plaintiff terminated his marriage in accordance with Islamic law. He thereafter sought to evict his wife, the defendant, from their home. The defendant argued that she had not received reasonable notice of the marriage's termination. She also filed claims for arrears in maintenance during a period of the marriage, and for her direct and indirect contribution to the enrichment of the family estate.

Prior to deciding these particular issues, the court considered whether it was appropriate to decide issues concerning matters of religious law. In *Ismail v. Ismail* ([1983] (1) SA 1006 [A]), the court held that terms of a contractual marriage agreement were contrary to public policy and therefore unenforceable. In the present case, the court considered whether it should follow the *Ismail* precedent.

Issues

- (1) Should the court decide issues derived from a marriage contract concluded under religious (Islamic) law?
- (2) Can the court enforce the terms of such a contractual agreement?

Discussion

The court refused to follow the judgment of *Ismail*. It held that the question of whether a given contractual agreement is against public policy must be determined in light of the values of the community at large, and not merely those of a particular social group.

There are two underlying principles in chapter 3 of the new South African Constitution, namely the principle of equality, and the principle of tolerance and accommodation. These values recognize the plurality of South African society, and the importance of tolerance among different groups. These values change the nature of public policy, as understood in *Ismail*. No matter how broadly “public policy” is construed, a marriage concluded under Islamic law cannot be regarded, under the new constitution, as against public policy. Enforcing the terms of a contractual agreement concluded by two parties is not detrimental to the interests of society at large.

Conclusion

According to the new constitution, the court was not precluded from considering and enforcing the terms of a contractual marriage agreement that was concluded under Islamic law. The court proceeded to decide the remaining property issues by reference to the *Ismail* law of the community. The court therefore held that the defendant was not entitled to an equitable share of her husband’s estate on the basis of her contribution to that estate. The defendant was, however, entitled to maintenance in arrears for period of three years before the defendant’s claim for reconvention was served, and for three months after the marriage had been terminated by the third *talaq*.

Van Den Berg v. Van Den Berg

(South Africa, High Court, Transvaal Provincial Division, [2003] (6) SA 229; Case No. 22004/2001)

Court Holding

When one spouse receives compensation for a personal injury, that compensation is not the common property of the marriage.

Summary of Facts

The plaintiff applied to the court for a decree of divorce, child custody, division of the common property, and maintenance for the children and herself. The defendant cross-petitioned. He sought, among other things, entitlement to the full insurance compensation that he had received as a result of a personal injury. He claimed that this compensation did not form a part of the common property of marriage. The plaintiff argued that because the compensation was paid from an insurance contract, rather than directly from damage or injury, it formed part of the common property.

Issue

Does insurance compensation awarded to the defendant form part of the common property of the marriage?

Discussion

Under section 18(1) of the Matrimonial Property Act 88 of 1984, compensation earned as a result of injury or damage is excluded from the common property. The court held that simply because the insurance company paid the compensation under the obligation of a contractual term, the cause of the compensation nevertheless remains the result of injury or damage. Common property of the marriage includes the merger of only such properties as are not related to the legal personalities of one spouse. The compensation was intended to lessen the impact of the defendant's disability, and was thus intimately connected to the legal personality of the respondent.

Conclusion

Insurance compensation awarded to one spouse from personal injury or damage does not form part of the common property of marriage.

2. Marriage and Child Custody

Dissolution of marriage, remarriage, and child custody are areas in which gender rights are most often implicated indirectly. Thus, for example, the holding of the Nigerian court in *Ibe-Lamberts* is significant because it rejects the notion that a woman petitioning for divorce must demonstrate irreconcilable differences, cruelty, or adultery in order to be granted divorce. Rather, it was sufficient that the woman left her husband and lived separately from him for more than three years. Given that it is often difficult for women to prove cruelty or adultery, the court's holding is significant in that it removes barriers for women trying to obtain divorce. See also *Setto v. Motsibbe* and *Another* (a woman's testimony is sufficient to validate the marriage).

Custody cases have dual significance. First, as the High Court in *Krugel* noted, gender equality is implicated in these cases. Second, custody cases focusing on the "best interests of the child" standard may be useful in advancing the sexual and reproductive rights of adolescents.

NIGERIA

Ibe-Lamberts v. Ibe-Lamberts

(Nigeria, High Court of Lagos State, [2001] (2) LHCR 49–57)

Court Holding

A marriage may be dissolved, without proof of any matrimonial offense, if the parties have lived separately for a continuous period of three years prior to the date on which the petition for divorce is filed. A child's best interest remains the paramount consideration in deciding child custody.

Summary of Facts

The petitioner and respondent are married with one child. The petitioner and her child had lived

apart from the respondent for more than three years prior to the date on which he petition for divorce was filed. The petitioner sought a court declaration that would establish the marriage as “broken irretrievably” and grant her custody of the couple’s child. The respondent cross-petitioned for child custody and dissolution of the marriage based on the petitioner’s adultery. The respondent argued that the petitioner fled from the house without any consultation.

Issues

- (1) Do grounds exist for the dissolution of the marriage?
- (2) Should custody of the child be given to the petitioner?

Discussion

Section 15(2)(f) of the Matrimonial Causes Act, 1979, provides for the dissolution of a marriage if it is “broken irretrievably” based on one of the specified grounds. One such ground is the spouses’ living apart for more than three years before the filing of the petition. In *Ibe-Lamberts*, the couple had lived separately for approximately three years and three months before the motion was initiated. This serves as an adequate ground for the dissolution of the marriage; no further proof of matrimonial offense is needed. The petitioner was not required to prove the existence of “irreconcilable differences or cruelty.” The petitioner was not required to prove the existence of adultery.

Under section 17 of the Matrimonial Causes Act, 1979, the court is required to regard the best interest of the child as the paramount consideration in deciding child custody. At the time of the trial, the child was living in the United States with the petitioner. The petitioner was willing to grant the respondent the right of visitation with his child. The court decided that it was not in the interests of justice to move the child from the United States to Nigeria to live with the respondent’s mother and sister.

Conclusion

The marriage was declared dissolved, and custody of the child given to the petitioner.

Setto v. Motsibbe and Another

(Nigeria, Court of Appeal, Kaduna Division, [2002] (5) NWLR 121, [2002] FWLR 263)

Court Holding

Under Islamic law, a woman’s testimony asserting that she observed *iddat* (waiting period before remarriage of three completed menstrual periods) serves as probative evidence even if it is produced without an oath.

Summary of Facts

The appellant divorced the first respondent, his wife, by a letter dated March 11, 1999. His ex-wife married the second respondent on May 5, 1999; the wedding occurred two months and eight days following the divorce. The appellant sued the respondents for contracting a marriage before the first respondent completed her *iddat*. The ex-wife contended that she had completed

three menstrual periods between the divorce and the second marriage.

The Trial Court declared the second marriage invalid on the basis of the ex-wife having failed to complete *iddat*. On behalf of the respondents, the inspector of the Area Court appealed the decision to the Sharia Court of Appeal, which reversed the trial decision.

The appellant took his case to the Court of Appeal.

Issue

Should the court enter testimony, delivered in the absence of an oath, of the first respondent on her private matters (i.e., her menstrual cycle) as evidence that the *iddat* had been observed?

Discussion

Under Islamic law, a “divorced” woman is still bound by her marriage for the duration of *iddat* and the marriage is legally considered to exist during these approximately three months (or three completed menstrual cycles). This period is intended to give the spouses an opportunity for reconciliation, and to assure that the wife and husband have not conceived. A marriage contracted before the *iddat* is completed is null and void.

The appellant challenged the validity of the marriage between the respondents by arguing that his ex-wife could not have completed three menstrual cycles in two months and eight days. As a consequence, the marriage contracted before the *iddat* was completed was null and void. The respondents argued that the wife’s testimony that she had had three menstrual periods prior to the wedding should be sufficient evidence. Under Islamic law, when a woman testifies about matters of a private nature, her testimony is accepted as probative evidence, even if it is given in the absence of an oath.

Conclusion

The court accepted, on the basis of the wife’s testimony, that *iddat* had been completed before the respondents’ marriage. This marriage is therefore valid, and the appeal was dismissed.

SOUTH AFRICA

Krugel v. Krugel

(South Africa, High Court, Transvaal Provincial Division, [2003] (6) SA 220; Case No. 29567/2002)

Court Holding

Joint custody of children promotes gender equality and the children’s best interest.

Summary of Facts

The parties married in 1993 and divorced in 1996. They remarried in 1997, and again divorced in 1999. Two children were born during their first marriage. According to an agreement reached during the second divorce, both applicant and respondent are joint custodians of the children, who live with the applicant. The applicant moved to Cape Town, and applied to the court for sole custody of the children. The applicant claimed that his moving to Cape Town makes joint custody impossible. The respondent countered that it was unlawful for the applicant to move

to Cape Town without her consent. Moreover, she claimed that he did so with the intention of frustrating her right to joint custody.

Discussion

Joint custody is intended to establish a strong personal relationship between children and both parents. It provides parents with the opportunity to remain involved in their children's lives, and assures children that they are wanted and loved by both parents. If both parents are fit for custody, they should have an equal say in raising their children. In addition to promoting the best interests of the children, joint custody enhances gender equality.

Conclusion

The petition by the applicant was dismissed. Joint custody remains intact. Note, however, that the respondent's application regarding access was granted only partly. While the respondent sought extended access, she was granted access only for (i) every short school holiday, (ii) half of every long school holiday, (iii) daily telephone communications, (iv) one weekend every two months, and (v) every other long weekend.

Pinion v. Pinion

(South Africa, High Court, Durban and Coast Local Division, [1994] (2) SA 725; Case No. 7575/93)

Court Holding

Joint custody is not in the best interests of the child.

Summary of Facts

The plaintiff and defendant are married with one child. The plaintiff petitioned the court for a decree of divorce. The defendant did not challenge the petition. Both parties forwarded the terms of dissolution to the court for approval. In their settlement, the parties agreed to joint custody of their child.

Issue

Should the court approve the parties' agreement to joint custody of their child?

Discussion

In deciding whether to grant the parties joint custody of their child, the court regarded the interests of the child as the paramount consideration. The leading risk of joint custody is the possibility of conflict between divorced parents. Even if the parents resolved their conflict, its presence would negatively impact the child's well-being. The greatest benefit of a joint custody arrangement is the opportunity for the child to maintain a personal relationship with both parents. The court decided, however, that the disadvantages of joint custody outweigh its advantages.

Conclusion

The court rejected the joint custody arrangement on the basis that it did not consider the arrangement to be in the child's best interest.

President of the Republic of South Africa and Another v. Hugo

(South Africa, Constitutional Court, [1997] (6) BCLR 708; [1997] (4) SA 1; [1997] ZACC 4;)

Court Holding

It is not unfairly discriminatory for the Presidential Act No. 17 to permit the pardon of mothers with young children, but not of fathers.

Summary of Facts

In accordance with the South African Constitution, the Presidential Act No. 17 provides a special pardon to certain categories of persons in prison, including mothers with a child below 12 years of age. The rationale for including mothers in these categories was that doing so would be in the best interests of children since "[i]t is generally accepted that children bond with their mothers at a very early age and that mothers are the primary nurturers and care givers of young children." The applicant, the respondent's husband who was in prison and had a child younger than age 12 at the time the act was promulgated, challenged the act's constitutionality on the basis of gender equality.

He did not qualify for the pardon, however, because the act specifically references "mothers" with children younger than age 12. The applicant therefore argued that the act discriminated against fathers on the basis of gender. The Durban and Coastal Local Division of the Supreme Court agreed with the applicant, and held that the act violated the constitutional provisions of equality. The appellants appealed the decision to the Constitutional Court.

Issues

- (1) Did the president have the power to promulgate the act?
- (2) Is the act discriminatory, and therefore in violation of the constitutional right to gender equality?

Discussion

Five justices wrote separate opinions (all, except one, concurring in the conclusion that the act did not violate the constitution).

Justice Goldstone, writing for the majority, held that under section 82(1) of the interim South African Constitution, the president enjoys the power to issue an act and grant pardon to prisoners. However, the act must comply with the constitution. The constitutional principle of equality requires that everyone be afforded equal rights, dignity, and respect before the law. A given law is deemed discriminatory if it differentially affects the rights, dignity, or respect of a given group on the basis of certain enumerated grounds. The act focuses on three groups of prisoners: disabled persons, young persons, and mothers with children. *Prima facie*, the act was discriminatory unless it is shown that the discrimination was not unfair.

Justice Goldstone noted that it is not enough to say that the impact of the discrimination affected members of a group who were not historically disadvantaged. It must still be shown that in the context of this particular case, the impact of the discrimination on the people who were discriminated against was not unfair. Justice Goldstone also noted that a concept of unfair discrimination must recognize that, although our goal is a society that affords each human being equal treatment based on equal worth and freedom, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved. Each case, therefore, must require a careful and thorough understanding of the impact of the discriminatory action to determine whether its overall impact is one that furthers the constitutional goal of equality. To determine whether the impact of discrimination is unfair, it is necessary to look not only at the group who has been disadvantaged but at the nature of the power that effected the discrimination, and at the nature of the interests that have been affected by the discrimination. Justice Goldstone concluded that releasing all imprisoned fathers as well as mothers would have been impossible. Moreover, it would have almost certainly led to a public outcry. The presidential act does not restrict or limit the fathers' freedom—their freedom was limited as a result of their conviction. The act merely deprived fathers of an early release to which they had no legal entitlement. Moreover, the act's exclusion of fathers did not preclude fathers from applying for a presidential pardon on the basis of their individual circumstances. Justice Goldstone concluded that based on all the evidence, the act did not contravene the constitution.

Justice Discott concurred in the conclusion of the minority, but did so only on the basis that the question before the court had become merely abstract as events had overtaken the issue raised.

Justice Kriegler dissented; in his view, the notion relied upon by the president, namely that women are to be regarded as the primary care givers of young children, is a root cause of women's inequality. It is both a result and a cause of prejudice—a societal attitude that relegates women to a subservient, occupationally inferior, and unceasingly onerous role. Justice Kriegler further noted that reliance on the generalization that women are the primary care givers is harmful in its tendency to cramp and stunt the efforts of both men and women to form their identities freely. Justice Kriegler reasoned that in very narrow circumstances a generalization—even one that reflects a discriminatory reality—could be vindicated if its ultimate implications were equalizing. However, two conditions would need to be satisfied: namely, a strong indication that the advantages flowing from the perpetuation of a stereotype compensate for obvious and profoundly troubling disadvantages; and a context in which discriminatory benefits were apposite. Justice Kriegler concluded that neither of the conditions was satisfied in the present case. He therefore would have held that the act had constituted a breach of the constitution.

Justice Mokgoro concurred with the majority decision written by Justice Goldstone but on different grounds. He held that the act constituted “unfair discrimination” but was justified under section 33(1) of the constitution.

Justice O'Regan also concurred with the majority decision, but he held that although the act was discriminatory, it did not discriminate “unfairly.” Justice O'Regan held that at least two factors needed to be considered to determine unfairness: the group or groups that have suffered discrimination in the particular case, and the effect of the discrimination on the interests of those concerned. The more vulnerable the group adversely affected by the discrimination,

the more likely the discrimination will be held to be unfair. Similarly, the more detrimental the discrimination to the interests of the individuals affected by the discrimination, the more likely it will be held to be unfair.

Conclusion

The act is not unfairly discriminatory.

3. Marriage of Same-Sex Couples

Regarding same-sex marriage, only one court ruling was found. At least two South African courts held that same-sex spouses should be included in the definition of “spouse” in various statutory provisions. However, even there, it is not clear whether same-sex marriage would be officially recognized.

SOUTH AFRICA

Fourie v. The Minister of Home Affairs

(South Africa, Constitutional Court (CCT 25/03))

Court Holding

In deciding the legal recognition of same-sex marriage, the court must consider the issue in light of all other relevant laws.

Summary of Facts

Since June 1994, the applicants have been same-sex partners. They applied to the High Court to challenge the constitutionality of the Marriage Act, which defines marriage as a bond between a man and a woman. They asked the court for an order recognizing their permanent relationship as a legal marriage, and that the respondent registers the applicants as a married couple. The High Court dismissed the application. It held that marriage under the common law referred to a legal union between a man and a woman, to the exclusion of all others. As such, the court explained that to order the respondent to register the applicants as a married couple amounted to compelling the respondent to undertake an unlawful act. The court also denied that the case raised any constitutional issues, as the applicants had not challenged the constitutionality of the Marriage Act or the provisions of the Identification Act. The applicants asked for leave to appeal directly to the Constitutional Court and, if refused, to the Supreme Court of Appeals (SCA). The High Court refused to issue the leave to the Constitutional Court but granted a leave to the SCA. The applicants nevertheless approached the Constitutional Court pursuant to rule 18(7).

Issue

Did the High Court err in dismissing the application?

Discussion

Direct leave to the Constitutional Court may be granted if the question concerns a constitutional matter and is in the interests of justice to do so. The Constitutional Court agreed with the High

Court that the applicants had not raised a constitutional issue. Moreover, the Constitutional Court explained that the matter of marriage touches on complex legal issues, including laws regulating family relations, insurance, inheritance, labor, and taxes. These issues are of great importance not only to the applicants and their communities, but also to society in general. In seeking relief from the court, the applicants had not considered the broader consequences of recognizing same-sex unions as legal marriages. The court therefore held that in order to achieve coherence and harmony within the constitutional context, the recognition of same-sex marriage must be developed in a manner that is cognizant of other relevant laws.

Conclusion

The interests of justice require that the appeal be heard first by the SCA.

Satchwell v. President of The Republic of South Africa

(South Africa, Constitutional Court, [2003] (4) SA 266 (CC); Case No. CCT 48/2002)

Court Holding

An act that grants benefits to judges' heterosexual spouses, but not to their same-sex partners, discriminates on the basis of sexual orientation. It is thus unconstitutional.

Summary of Facts

The applicant is a judge, who has lived with her same-sex partner since 1986. Despite the similarity of their relationship to that of a married couple, the applicant's partner does not fall within the legal definition of a spouse. As a result, the partner cannot enjoy any of the benefits legally granted to judges' heterosexual spouses, pursuant to sections 8 and 9 of the Judges' Remuneration and Conditions of Employment Amendment Act and relevant regulations.

The applicant challenged the constitutionality of the act before a High Court. She argued that sections 8 and 9 infringe the right to nondiscrimination. The High Court found that these sections of the act discriminated on the basis of sexual orientation and marital status, and thereby infringed section 9(3) of the South African Constitution.

The case was forwarded to the Constitutional Court for confirmation.

Issue

Do sections 8 and 9 of the act infringe section 9(3) of the constitution?

Discussion

The act grants benefits to judges' spouses on the basis that the couple share all economic, emotional, and psychological aspects of life. There is a reciprocal support and attachment within the couple. Permanent and stable same-sex partnerships exhibit similar bonds and reciprocal duties of support. The Constitutional Court, therefore, upheld the decision of the High Court. The act is inconsistent with section 9(3) of the constitution, which prohibits discrimination based on sexual orientation. According to the Constitutional Court, there is no legitimate reason for providing benefits to heterosexual spouses while denying those same benefits to same-sex partners that

exhibit “reciprocal duties of support.” This emphasis suggests that the outcome would have been different if the same-sex couple in question did not exhibit such reciprocal duties.

Conclusion

Sections 8 and 9 of the act discriminate on the basis of sexual orientation, and therefore contravene section 9(3) of the constitution. The court therefore held that the act and its regulations should be amended to grant benefits to judges and their same-sex partners with whom they share reciprocal duties of support.

B. VIOLENCE AND ILL-TREATMENT

Violence and ill-treatment toward women are among the most tangible consequences of the economic, social, political, and cultural inequalities that exist between men and women. Gender-based violence occurs against women and girls of any age, within the family or domestic unit or any other interpersonal relationship, within the community or in the workplace, in an educational institution or health facility, during armed conflict or civil strife, or at any other time and place.

Gender-based violence compromises a woman’s right to bodily integrity and health, including her physical, psychological, reproductive, and sexual health. Due to the personal nature of gender-based violence and the fear of potential repercussions and social stigmatization, violations are often underreported. However, the information below suggests that in cases brought to court, judiciaries may increasingly afford women greater protection under the law to be free from all forms of violence.

1. Domestic Violence

Women often encounter violence, including physical or sexual violence, in the home. The consequences of such abuse can include loss of employment, lifetime disability, or death. Laws that condone or fail to protect women from domestic violence exacerbate women’s vulnerabilities. However, as the decision in *S v. Baloyi* illustrates, the adverse impact of such laws can be alleviated through favorable interpretation and construction of the laws by the courts. The fact that no other significant cases on domestic violence could be located is of concern.

SOUTH AFRICA

S v. Baloyi

(South Africa, Constitutional Court, [2000] (2) SA 425, Case No. 29/99)

Court Holding

A law that presumes the guilt of a person accused of domestic violence when he fails to appear before a court, without legitimate reason, is constitutional.

Summary of Facts

Baloyi was charged with domestic violence, and an interdiction was ordered against him.

A magistrate in a lower court convicted Baloyi for domestic violence on the basis of his failure to appear before the court. In the decision, the magistrate relied on section 3(5) under section 170 of the Criminal Procedure Act No. 51 (1997). This provision authorizes a court to convict an accused should he fail to appear before the court. The accused is provided an opportunity to satisfy the court that his absence was not due to any fault of his own.

Baloyi challenged the constitutionality of section 3(5) before the High Court. The court held that the provision shifts the burden of proof from the state to the accused. This shift contravenes the constitutional right to the presumption of innocence. Moreover, the court held that any limitation of the presumption of innocence is not reasonably justified.

The High Court forwarded its decision to the Constitutional Court for confirmation.

Issue

Does section 3(5) violate the presumption of innocence in the South African Constitution?

Discussion

There are two competing interests in this case—the right of an accused to be presumed innocent, and the right of a victim of domestic violence to see her abuser punished. Domestic violence is a unique criminal offense due to its hidden and repetitive nature, and its impact on victims and families. Everyone deserves the legal right to be free from domestic violence and its effects. As domestic violence predominantly affects women, the constitutional right to gender equality is jeopardized by a legal system that fails to adequately address this violence.

Section 3(5) is intended to accelerate the prosecution of domestic violence, and not to shift the burden of proof to the accused. As a consequence, the law effectively protects victims of domestic abuse, while preserving the accused's right to the presumption of innocence.

Conclusion

Section 3(5), which presumes the guilt of a person accused of domestic violence when he fails to appear before a court without legitimate reason, is constitutional. The order of the High Court is therefore reversed.

2. Sexual Assault

The cases reported herein indicate an increasing willingness among the judiciary to take on cases of sexual violence to afford women greater protection of their right to not be subjected to various forms of violence. Thus, for example, the traditional requirement of independent corroboration for sexual assault claims has been held by many courts to be discriminatory, unconstitutional, and unnecessary. In the most recent decision of *Mukungu v. Republic*, the Kenyan Court of Appeal held that prior cases requiring corroboration in sexual offenses against adult women and girls are no longer good law. Earlier, the courts of Namibia and South Africa similarly held that it is inappropriate to strictly apply the “cautionary rule,” which requires judges to give less weight to the testimony of a complainant in sexual assault cases.

Two cases from South Africa are noteworthy for the revolutionary approach undertaken by the judiciary in determining state liability for failure to protect women from sexual assaults,

including rape. The courts in *Carmichele v. Minister of Safety and Security* and *Van Eeden v. Minister of Safety and Security* broke new ground by stating that judicial development of the common law (including the law relating to the duty and standard of care) must be undertaken consistently with the object, spirit, and purpose of the Bill of Rights.

Unfortunately, however, some laws remain on the books that continue to make rape convictions exceedingly difficult to obtain. An example is the requirement that complete penile penetration must be proven in order to sustain the charge of rape.

BOTSWANA

Ishmael Dintwa v. State

(Botswana, High Court, Miscra F.92/1998)

Court Holding

Section 142(1)(a) of the Botswana Penal Code (as amended by Act No. 5 of 1998) automatically denies bail to persons charged with rape. This provision violates an accused's right to liberty and is thus unconstitutional.

Summary of Facts

The applicant, Dintwa, challenged the constitutionality of section 142(1)(a) of the Botswana Penal Code, as amended by Act No. 5 of 1998. The section denies a person accused of rape the right to bail. The applicant argued that the section was contrary to section 5(3)(b) of the Constitution of Botswana, which states that any person who is arrested or detained upon the reasonable suspicion of having committed a criminal offense shall not be deprived of his personal liberty.

He also contended that the penal code section violated section 10(2)(a) of the constitution.

Issue

Does section 142(1)(a) of the Botswana Penal Code violate an accused's right to liberty, as protected under section 5(3)(b) of the constitution?

Discussion

Any person charged with a crime is presumed to be innocent until found guilty by a court of law. The court therefore found that subjecting a person to automatic detention while awaiting trial, as permitted under section 142(1)(a) of the penal code, contravenes the person's constitutional right to liberty. While section 5(3)(b) of the constitution establishes some limitations to the right to liberty, section 142(1)(a) of the penal code does not fall within these exceptions. Section 5(3)(b) of the constitution also provides that an accused should be released on bail if he or she is not tried in a reasonable time.

Conclusion

Section 142(1)(a) of the Botswana Penal Code violates an accused's right to liberty as guaranteed under section 5(3)(b) of the Constitution of Botswana.

KENYA

Mukungu v. Republic

(Kenya, Court of Appeal, [2003] (2) EA)

Court Holding

The requirement for corroboration in sexual offenses affecting adult women and girls is unconstitutional.

Summary of Facts

A woman was raped by a man whom she allegedly knew, but not by name. She reported the rape and the assailant was charged. The assailant was not medically examined, and there was no medical evidence to connect him to the alleged offense. Nor was there any other independent evidence connecting the accused to the crime, although there was ample evidence that the complainant was raped. The Trial Court believed the complainant and convicted the accused. The accused appealed. The High Court confirmed the conviction. The accused appealed to the Court of Appeal on the ground that his conviction was based on uncorroborated evidence.

Issue

Can a conviction of rape be entered without independent corroborated evidence?

Discussion

The Court of Appeal considered the provisions of the Kenyan Constitution that stipulate the right to not be discriminated against, and concluded that the requirement for corroboration in sexual offenses against adult women and girls is unconstitutional. The court went on to say that “[w]e think that the time has now come to correct what we believe is a position which the courts have hitherto taken without a proper basis, if any basis existed for treating female witnesses differently in sexual cases, such basis cannot properly be justified presently. The framers of the Constitution and Parliament have not seen the need to make provision to deal with the issue of corroboration in sexual offences. In the result, we have no hesitation in holding that the decisions which hold that corroboration is essential in sexual offences before a conviction are no longer good law as they conflict with section 82 of the Constitution.”

Conclusion

A requirement that a conviction of rape must be based on independent corroborated evidence is unconstitutional.

NAMIBIA

State v. Katamba

(Namibia, Supreme Court, [2000] (4) BCLR 405 [Nm S]; 3 CHRLD 72–73)

Court Holding

Applying the cautionary rule of evidence in single-witness sexual assault cases violates the rights of the victim. It is thus legally inappropriate.

Summary of Facts

At the trial level, the judge applied the cautionary rule and found the respondent not guilty of rape and abduction. The cautionary rule requires the court to consider the intrinsic danger of deciding sexual assault cases only on the basis of the alleged victim's testimony, and to pay heed to the existence of factors that minimize the risk of a wrongful conviction. In a previous case, the High Court criticized the cautionary rule of evidence as contrary to the constitutional protection against gender discrimination (*S v. D and Another* [1992] (1) SACR 143 [Nam HC]).

The state appealed to the Supreme Court, claiming that the trial judge inappropriately applied the cautionary rule in a case of alleged sexual assault.

Issue

Is the application of the cautionary rule of evidence in sexual assault cases legally appropriate?

Discussion

The application of the cautionary rule violates victims' basic rights. While protecting the constitutional rights of alleged sexual offenders, courts should consider the norms and views of Namibian society, which oppose the placement of evidentiary burdens on victims (*S v. Van den Berg* [1995] (4) BCLR 479 [Nam HC]; *S v. Vries* [1996] (2) SACR 638 [Nam HC]; and *S v. Namunjepo* [1999] (2) CHRLD 331 [Nam SC], considered).

Namibian Courts should not apply the cautionary rule in sexual assault cases, save where the evidence forwarded is clearly unreliable (*dicta* of Lord Taylor CJ in *R v. Makanjuola, R v. Easton* [1995] (3) All ER 730 [UK E and W {A}] considered). Adequate protection for accused persons is provided through the presumption of innocence and cautionary rules concerning young witnesses' evidence.

Conclusion

The trial judge erred by strictly applying the cautionary rule in a case of alleged sexual assault.

NIGERIA

Jos Native Authority Police v. Gani

(Nigeria [1967] NNLR 107)

Court Holding

In charges of rape, the sole uncorroborated testimony of a complainant cannot lead to conviction.

Okoyomon v. State

(Nigeria, Supreme Court, [1973] NMLR)

Court Holding

Before an accused can be found guilty, evidence in rape charges must specifically show the existence of penetration.

Summary of Facts

Okoyomon was charged with rape. According to the charge, Okoyomon met a group of young women on their way to fetch firewood. He offered to direct one of the women to a place with plenty of wood. When they arrived at a specific spot, the accused had sex with the woman. A witness saw the accused lying on top of the victim. The medical examination report indicated that the woman's hymen was broken, and revealed the existence of vaginal discharge consistent with rape. The accused denied the allegation. A trial judge found Okoyomon guilty of rape and sentenced him to four years' imprisonment. The accused appealed the decision to the Supreme Court.

Issue

Did the Trial Court err in finding the accused guilty of rape?

Discussion

Before a court may find an accused guilty of rape, the Nigerian Criminal Code requires the prosecution to prove actual penetration. In the present case, this evidence was lacking.

The medical examination report did not specifically indicate when the woman's hymen had been torn and by whom. The fact that the victim was diagnosed with a venereal disease did itself support the charge of rape. Finally, the witness's testimony did describe or otherwise indicate that the act of penetration has been witnessed.

Conclusion

According to criminal law, the Trial Court had insufficient evidence to find the accused guilty of rape.

State v. Ojo

(Nigeria [1980] (2) NCR 319)

Court Holding

In order to convict an accused of rape, the prosecutor must demonstrate complete penetration of the vagina during sexual intercourse.

Upahar v. State

(Nigeria, Court of Appeal, Jos Division, [2003] FWLR 1513)

Court Holding

Before an accused is convicted of rape, corroborative evidence, in addition to evidence provided by the complainant, must demonstrate penetration.

Summary of Facts

The appellants accosted the complainant, a young woman, on her way home from fetching water. With the help of the second appellant, the first appellant dragged the complainant into the bush and sexually assaulted her. The complainant's brother happened upon the scene of the assault during its commission.

The lower court convicted the appellants of conspiracy to commit rape. The appellants appealed this decision to the lower Court of Appeal.

Issue

Did the lower court err in finding the appellants guilty of rape and conspiracy to commit rape?

Discussion

In order to prove the offense of rape, the prosecution must establish through corroborating evidence from independent sources that the accused, intentionally and without consent, completely penetrated the complainant's vagina. A rape conviction cannot solely be based on the complainant's testimony. A conspiracy offense may be proven either by direct evidence or by inference from factual particulars of the crime's commission.

In the present case, the brother's testimony constituted independent evidence. He testified that he had seen the first appellant atop the complainant. As the law requires proof of penetration, this evidence is insufficient to support a charge of rape.

In order to prove the charge of abetting, the prosecution must demonstrate that the second appellant positively acted to aid the first appellant's criminal commission. The prosecution forwarded non-rebutted evidence that the second appellant held the complainant's legs while the first appellant assaulted the complainant. The lower judge thus rightly convicted the second appellant on the charge of conspiracy to commit a crime.

Conclusion

The lower court erred in convicting the first appellant of rape. There was insufficient independent corroborating evidence to support this charge. The first appellant's conviction was therefore set aside, and reduced to attempted rape. The second appellant's conviction was also reduced to abetting attempted rape.

SOUTH AFRICA

Carmichele v. Ministry of Safety and Security

(South Africa, Constitutional Court, [2001] (4) SA 938; [2001] (10) BCLR 995)

Court Holding

Although the major engine for law reform should be the legislature, courts are under a general duty to develop the common law where it deviates from the spirit, purport, and objects of the fundamental rights provisions.

Summary of Facts

A female plaintiff, Carmichele, was viciously assaulted by a man, Coetzee, who had a history of assaults. At the time of the attack, Coetzee was facing a charge of rape but was released without bail, despite the fact that several individuals had attempted to persuade the police and the senior public prosecutor that Coetzee should not be released. It was during the time that Coetzee was at liberty, awaiting trial, that he assaulted Carmichele. Carmichele brought an action against the relevant ministers for alleged dereliction of duty by the police and the prosecutor. The High Court dismissed the case on the ground that a duty of care had not been prima facie established. An appeal was made to the Supreme Court of Appeal, which upheld the High Court's ruling. Carmichele subsequently applied to the Constitutional Court.

Issue

Under these facts, did the police or prosecutors owe a duty of care to the victim of violence, and, if so, was the standard of care breached?

Discussion

Section 173 of the South African Constitution gives to all higher courts the inherent power to develop the common law, taking into account the interests of justice. 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. The court held that it follows implicitly that where the common law does deviate from this standard, the courts have an obligation to act. In deciding whether a duty of care existed in this case, the court looked to the relevant statutory provisions that imposed positive obligations on members of the police force to preserve freedom and security. The court noted that in addressing such 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." The court also recalled South Africa's duty under international law to prohibit all gender-based discrimination. The court noted that the police is one of the primary agencies of the state responsible for the protection of the public in general, and women in particular, against the violation of their fundamental rights by perpetrators of violent crime. The court found that the police, therefore, had a duty toward the plaintiff and that under the facts of the case, had breached that duty. The Constitutional Court, however, remanded the case back to High Court to consider whether under these particular facts, the police and the prosecutors had breached their duty of care.

Conclusion

Common law must be developed consistently with the objectives and purposes of the Bill of Rights. Where common law deviates from the objectives and purposes of the Bill of Rights, the courts have an obligation to remove the cause of such deviation.

NOTE: On remand, the High Court found that certain officials owed a duty of care to the plaintiff to protect her against the risk of sexual violence perpetrated by Coetzee, and that they had negligently failed to do so. That failure was unlawful. The court held that the standard that was required of the police and prosecutors was that such individuals act with the care and diligence that ordinary members of the police force and prosecutors brought to their task. The court further held that on the facts, the plaintiff had discharged the onus of establishing a causal link between the actions and omissions of the police and prosecutor and the assault on her. Accordingly, the court found the defendants jointly and severally liable to the plaintiff for the damage she suffered as a result of Coetzee's attack on her. The Supreme Court of Appeal upheld the ruling.

S v. J

(South Africa, Supreme Court of Appeal, [1998] (2) SA 984, Case No. 35/97)

Court Holding

In sexual assault cases, it is inappropriate to strictly apply the cautionary rule.

Summary of Facts

A 17-year-old schoolgirl complained that the appellant, a police officer, raped her. She alleged that the appellant offered to give her a driving lesson in his car. During the lesson, he asked her to stop the car, forcefully removed her clothes, inserted his fingers into her vagina, and exposed his penis. She did not scream for help, but managed to jump out of the car. The officer denied the allegation. He claimed that they had discussed the possibility of an intimate affair, and that she did not resist his sexual contact. He denied exposing his penis. The evidence revealed that the complainant was in shock, and had found the medical examination painful. There were abrasions on her vagina and buttocks, which indicated unlubricated sexual intercourse.

A Regional Trial Court convicted the officer, and sentenced him to 18 months of imprisonment. The officer unsuccessfully appealed to a Provincial Court, before appealing to the Supreme Court of Appeal. The officer claimed that the Trial Court failed to adhere to the cautionary rule of evidence, which requires judges to give less weight to the testimony of a complainant in sexual assault cases.

Issue

Did the judge err in failing to strictly apply the cautionary rule of evidence?

Discussion

The cautionary rule of evidence in cases of sexual assault is premised on the belief that "women are habitually inclined to lie about being raped." The court recognized, however, that this perception is outdated. The rule unjustly assumes that complainants of sexual assault are particularly unreliable. A judge may advise a jury to exercise caution with respect to the unsupported testimony of a witness. He or she should not do so, however, on the mere basis that the witness is a "complainant of sexual assault" (*R v. Makanjuolo*, *R v. Easton* [1995] (3) All ER

730 [CA]). The strict application of the rule in sexual assault cases lessens the state's burden of proof, and can therefore result in different outcomes of cases with equally weighted evidence. Moreover, the cautionary rule is inconsistent with the constitutional right to equality.

In the present case, the material evidence is more consistent with the complainant's testimony than that of the appellant. The Regional Trial Court therefore did not err in convicting the officer.

Conclusion

In sexual assault cases, it is inappropriate to strictly apply the cautionary rule of evidence. Neither of the lower courts thus erred in failing to apply the cautionary rule. The appeal is dismissed.

Van Eeden v. Minister of Safety and Security

(South Africa, Supreme Court of Appeal, Case No. 176/2001)

Court Holding

The police owe a positive duty of care to a plaintiff who has suffered injury at the hands of an individual who has escaped from police cells.

Summary of Facts

Mohamed escaped from police cells where he was being held for identification. Mohamed was facing 22 charges, including rape and indecent assault. Within six days of his escape, he resumed sexual attacks on young women. The appellant was the third victim of such attacks. She instituted an action against the state on the grounds that the members of the police owed her a legal duty to take reasonable steps to prevent Mohamed from escaping and causing her harm, and that they negligently failed to comply with such duty.

Issue

Do the police owe a positive duty of care to a victim of sexual violence?

Discussion

The court based its decision on the ruling in *Carmichele v. Ministry of Safety and Security*, a case that required the courts to develop common law consistently with the objects and spirit of the Bill of Rights. The court noted that freedom from violence is recognized as fundamental to the equal enjoyment of human rights and fundamental freedoms, and that the state is required to protect individuals, both by refraining from such violence itself and by taking active steps to prevent violation of human rights. The court held that this obligation places a positive duty on the state to protect everyone from violent crime. Moreover, the state is obliged under international law to protect women against violent crime and against the gender discrimination inherent in violence against women. The police service is one of the primary agencies of the state that is responsible for the discharge of its constitutional duty to protect the public in general and women in particular against the violation of their fundamental rights by perpetrators of violent crime. The court rejected the notion that a special relationship between a plaintiff and defendant is an absolute

prerequisite for imposing a legal duty, because to hold otherwise would mean “that the common law does not adequately reflect the spirit, purport and objects of the Bill of Rights.” Accordingly, the court held that the police owed a duty of care to the plaintiff, and they thus acted negligently and must be held liable for damages suffered by the appellant.

Conclusion

The police owe a legal duty to act positively to prevent the escape of an offender held in police custody. Negligence on behalf of the police will result in liability for damages suffered by individuals at the hands of the escaped offender.

3. Prostitution/Sex Work

Sex work is a complex issue as it relates to women’s rights. Although sex work can be coerced and under certain circumstances can involve sexual violence, exploitation, or psychological violence, evidence also suggests that because of various socioeconomic factors, sex work is sometimes an economic activity entered into knowingly and freely by women for purposes of gaining economic independence. The criminalization of prostitution and of prostitution-related activities arguably deprives those women who entered the work voluntarily of their livelihood. As the sole case found below illustrates, however, there is no indication that African Commonwealth courts have adopted this view when examining statutes criminalizing sex work or activities related to sex work.

SOUTH AFRICA

S v. Jordan and Others

(South Africa, Constitutional Court, [2002] (6) SA 642 (CC); [2002] (11) BCLR 1117 (CC))

Court Holding

The prohibition on brothel and prostitution activities is a justified limitation on constitutional rights.

Summary of Facts

The applicants—a brothel owner, a brothel employee, and a prostitute—admittedly violated section 20(1)(aA) of the Sexual Offences Act, 1957, which prohibits engagement in sexual relations for financial gain, and sections 2, 3(b) and 3(c), which prohibit partaking in brothel activities. The applicants challenged the constitutionality of these provisions. They argued that the act is inconsistent with the constitutional rights to equality (section 8), human dignity (section 10), privacy (section 11), security of a person (section 13), and engagement in economic activities (section 26).

Upon a finding of guilt by a Magistrate Court, the applicants appealed to the High Court. This court held that section 20(1)(aA) was unconstitutional. It did not, however, render the same finding with respect to sections 2, 3(b) and 3(c). Rather, the court held that the provisions were a justifiable limit on constitutional rights. The maintenance of a brothel

exploits prostitutes, and thereby constitutes trading in human persons. This criminal prohibition is necessary to eliminate the commercial exploitation involved in prostitution. The case was appealed to the Constitutional Court.

Issue

Did the High Court err in holding that section 20(1)(aA) is unconstitutional, and that the limitation of rights under sections 2, 3(b) and 3(c) is justified in order to eliminate the commercial exploitation of prostitutes?

Discussion

The court held that the central objective of section 20(1)(aA) is the eradication of the commercial exploitation of prostitutes. This is a legitimate objective, which justifies certain restrictions on individual rights and liberties. For example, the legislature intended to eradicate the harmful practice by restricting individuals' right to economic activity. The court similarly held that individuals' right to privacy and autonomy were outweighed by this public interest in the eradication of prostitution. While prostitution is by its very nature carried out in the private realm, prostitutes normally invite the public to engage in such acts. The High Court therefore erred in holding that section 20(1)(aA) was unconstitutional. The restrictions set out by the section, like those of sections 2, 3(b), and 3(c), are justified under the constitution.

Conclusion

Both the prohibition against providing sex for gain (section 20[1][aA]), and the keeping of a brothel (sections 2, 3[b], and 3[c]) are justified limitations on individuals' constitutional rights. These restrictions are necessary to combat the social ills of prostitution. The appeal is dismissed.

4. Pornography

Pornography is a subject that has generated a significant amount of controversy. Some argue that pornography contributes to the objectification of women and offends their integrity. Others, however, contend that blanket prohibition against pornography denies woman's sexuality and expression thereof.

The cases described below do not deal expressly with the rights of women. Nonetheless, they are helpful in ascertaining the framework within which the courts address pornography. These cases illustrate that the arguments regarding pornography are generally framed within the context of freedom of speech and expression, without any reference to the effects of pornography on the status of women.

Mere possession of pornography appears to be generally allowed and prohibitions on possession tend to be considered unconstitutional, except in the case of the possession of child pornography. Public interest or public morals are often considered by the courts in deciding whether possession or exhibition of pornography should be allowed. However, once again, the "public interest" analysis rarely includes consideration of women and the impact of pornography on women's rights.

NAMIBIA

Fantasy Enterprises CC t/a Hustler the Shop v. Minister of Home Affairs; Nasilowski and Others v. Minister of Justice and Others

(Namibia, High Court, Case No. A159/96; [1998] (2) CHRLD 235)

Court Holding

A law prohibiting the possession of obscene materials violates the constitutional right to freedom of expression.

Summary of Facts

The applicants were charged as dealers of obscene and pornographic materials, including sexually explicit videos, toys, and magazines. Section 2(1) of the Indecent and Obscene Photographic Matter Act, 1967 prohibits the production, sale, or supply of obscene and pornographic materials; and section 17(1) of the Combating of Immoral Practices Act of 1980 proscribes the manufacturing, selling, or supplying of devices for use in unnatural sexual acts. The applicants challenged the constitutionality of these provisions. They alleged that the provisions violated the constitutional rights to privacy (article 13[1]), the right to freedom of expression (article 21[1][a]), and the right to engage in an occupation, trade, or business (article 21[1][j]). The applicants primarily claimed that section 2(1) of the act of 1967 was unreasonably vague, and thus barred them from effectively carrying out a trade. The respondents did not object to this application.

Issue

Does the prohibition against possession of obscene materials, under section 2(1) of the 1967 act, violate the fundamental freedom of expression guaranteed under article 21 of the constitution?

Discussion

The applicants challenged the constitutionality of the prohibitive provisions. Article 13(1) of the constitution protects against illegal and unreasonable interferences with a person's privacy. The court decided, however, that articles 21(1)(a) and (j) were more relevant to the case. Article 21(1)(a) guarantees all persons the right to freedom of speech and expression. This protection extends to graphic expressions that are disturbing, offending, and shocking. Section 2(1) of the act of 1967 violates this right to freedom of expression.

To rectify the violation, the court held that section 2(1) should be restrictively interpreted based on the intent of the legislature. Contrary to the underlying purpose of the act of 1967, section 2(1) is interpreted in a way that uniformly prohibits the possession of all pornographic images, without regard to the identity of the person who possesses the images, and the purposes for which he or she does so. The section fails to discriminate between the possession of pornography for educational purposes and possession intended for the sexual exploitation of children. Furthermore, the underlying principle of section 2(2), the Christian view of life, is incompatible with article 1(1) of the constitution, which calls for secular and

democratic governance in Namibia. The values embodied in section 2(1) of the 1967 act do not reflect the religious, traditional, cultural, and linguistic composition of a heterogeneous Namibian society. Section 17(1) of the act of 1980 is also unconstitutionally vague. If the term “natural sexual acts” is limited to sexual intercourse between consenting men and women, all devices used during sexual intercourse for any reason, including contraception, would fall within its ambit. This interpretation is unreasonable, and contrary to the legislators’ intentions. The court therefore held that when charging persons under the provisions of these acts, the burden of proof lies with the law enforcing institutions.

Conclusion

Section 2(1) of the act of 1967, which prohibits the possession of obscene materials, violates the fundamental freedom of expression, as guaranteed by article 21 of the constitution. Section 17(1) of the act of 1980, which proscribes the manufacturing, selling, or supplying of devices for use in unnatural sexual acts is unconstitutionally broad when interpreted with respect to section 2(1) of the act of 1967. It is not proper, however, for the court to order the legislature or executive branch to remedy the legislative provisions.

SOUTH AFRICA

Case and Another v. Minister of Safety and Security and Others; Curtis v. Minister of Safety and Security and Others

(South Africa, Constitutional Court, [1996] (3) SA 617 (CC); [1996] (5) BCLR 609 (CC); [1996] (1) BHRC 541)

Court Holding

An act prohibiting the possession of sexually explicit materials violates constitutionally protected rights to privacy and freedom of expression.

Summary of Facts

The applicants were charged with possession of sexually explicit videocassettes, which is proscribed under section 2(1) of the Indecent or Obscene Photographic Material Act 37 of 1967. The videocassettes were deemed indecent or obscene photographic matter. Under section 1 of the act, indecent or obscene photographic matter consists of any photographic item that displays different types of explicit sexual behavior. The behaviors enumerated in section 1 encompass a broad range of sexual conduct. The applicants claim that the breadth of sexual behavior covered under sections 2(1) and 1 is overly broad, and thus violates their right to privacy and freedom of expression, as protected under sections 13 and 15, respectively, of the constitution.

Issue

Are sections 2(1) and 1 of the act too broad, and thus do they violate the constitutional rights to privacy and freedom of expression?

Discussion

Section 2(1) prohibits the mere possession of photographic matter depicting explicit sexual acts. The court held that because the possession of materials for one's own use is a private act, it is protected under the constitutional right to privacy. Moreover, the definition of indecent or obscene photographic matter under section 1 is overly broad. While the rights to privacy and freedom of expression are not absolute and in some exceptional situation can be limited under section 33(1) of the constitution, the limitation must be reasonable and justifiable. Section 2(1) of the act does not fall within the scope of a reasonable or justifiable limitation.

Conclusion

Section 2(1) of the act violates the right to privacy as guaranteed under section 13 of the constitution.

De Reuck v. Director of Public Prosecution, Witwaters and Local Division, and Others
(South Africa, Constitutional Court, [2003] (12) BCLR 1333)

Court Holding

An act that prohibits possession of child pornography is not unconstitutional.

Summary of Facts

The applicant was charged with possession of sexually explicit materials under section 27(1) of the Films and Publications Act of 1996. The applicant applied to the High Court for a declaration that the provisions of section 27(1) were contrary to the constitution because they failed to provide for a defense of legitimate purpose of the public good or public interest, where such material was possessed or imported for the creation of a bona fide documentary or other work of art, without involving real children; because the act had an insufficient protection of privacy; and because the definition of child pornography was imprecise. The High Court dismissed the application and held that the act did not violate the constitution. The applicant appealed to the Constitutional Court.

Issue

Was the act overly broad and contrary to the constitution?

Discussion

The common core of the definition of child pornography is the notion of stimulation of erotic rather than aesthetic feeling. Thus, any image that predominantly stimulated aesthetic feeling was not considered pornographic by that definition. To determine whether an image constituted child pornography, it is necessary to examine whether the image, viewed objectively and as a whole, has as its predominant purpose the stimulation of erotic feeling in its target audience. The image will not constitute child pornography unless it explicitly depicts a child engaged in sexual conduct or display of genitals, or a child assisting another person to engage in sexual conduct, for the purposes of stimulating sexual arousal in the target audience.

Criminalizing the possession of child pornography imposes a limitation on one's right to privacy. However, such limitation is reasonable and justifiable. The purpose is to curb child pornography, which is regarded as an evil in all democratic societies. The degradation of children through child pornography is a serious harm that is likely to impair the dignity of the child and devalue the person of the child.

The act provides an exemption procedure that permits importation and possession of child pornography for purposes of bona fide research into child pornography. Based on the above, the act is not unconstitutional.

Conclusion

The act prohibiting possession of child pornography is not unconstitutional.

Prinsloo v. RCP Media Ltd (t/a Rapport)

(South Africa, High Court, [2003] (4) SA 456; Case No. 32983/2002)

Court Holding

An individual is permitted to publish images of others' sexual conduct when the public interest and the promotion of freedom of expression outweigh the constitutional rights to privacy and dignity.

Summary of Facts

The applicant, Mr. Prinsloo, gave film and a compact disc consisting of photographic images to the respondent to develop. The images showed the applicant and his common-law wife engaging in sexual activities. The film and compact disc were allegedly stolen from the respondent's premises. The applicant applied for an urgent relief order that the respondent return the photographic materials. He argued that there was a real possibility that the materials would be shown to the public. This exposure would violate his and his common-law wife's privacy and dignity. Moreover, the publicity would detrimentally affect the applicant's and his wife's professional reputation and integrity as lawyers.

The respondent refused to return the photographic material. RCP Media Lab argued that it was their constitutional right and professional duty to inform the public of the applicant's and his wife's compromised integrity. The respondent contended that it was their duty to ensure the flow of information. During the investigation of the controversy, the respondent claims that the applicant misrepresented information. This event, it is argued, triggers the interest of the public and the press.

Issues

- (1) Does publicizing photographic images that show private sexual conduct violate individuals' right to privacy?
- (2) If so, does the public interest outweigh the violation of privacy?

Discussion

In this case, the court is required to balance two competing rights—the applicant’s right to privacy and dignity, and the respondent’s right to freedom of expression. The public interest in ensuring the flow of information and transparency is also an important consideration in the court’s decision.

There is a clear distinction between the public interest, and the public becoming interested in an issue. In the present case, the public interest would be engaged if the photographic materials exposed sexual activities that compromise the applicant’s and his wife’s professional integrity—for instance, the exposure of an inappropriate sexual relationship with clients. This would amount to a violation of professional ethics, and is thus clearly within the public interest. In the case at hand, however, the images reveal private sexual conduct carried out in the bedroom of the applicant between common-law spouses.

There is no public interest that justifies revealing the images to society.

To justify the publication of images revealing another’s sexual conduct, the public interest must be extremely significant.

Conclusion

The court withheld judgment, pending the resolutions of other relevant issues.

CHAPTER III

RIGHTS RELATING TO REPRODUCTIVE AND SEXUAL HEALTH, INFORMATION, AND EDUCATION

As this section illustrates, the issues that fall under this broad category of women's rights—those relating to women's access to and information about reproductive health services (including maternal health, contraception, family planning, abortion, and diagnosis and treatment of HIV/AIDS and other sexually transmissible infections) and rights to sexuality education, employment, education, and reproductive health—are seldom the subject of litigation in African Commonwealth countries.

A. ABORTION

Abortion laws and policies in the Africa region are among the most restrictive in the world. Correspondingly, Africa has the highest mortality due to abortion in the world—an estimated 680 deaths per 100,000 procedures.⁷ Additionally, Africa accounts for 25% of the 20 million abortions performed annually in illegal, often unsafe, conditions.⁸ All African Commonwealth countries permit legal abortions when needed to save the pregnant woman's life, and many laws technically allow it for other indications, such as the woman's health or in cases of rape.⁹ However, very few African women are able to access a safe, legal abortion, even if their situation meets a legal indication under their country's law.¹⁰

In African Commonwealth countries, activists are working earnestly to reform abortion laws legislatively, but very few have succeeded to date. South Africa is the only country in the African Commonwealth that allows abortion without restriction as to reason.¹¹ A challenge to the South African Choice on Termination of Pregnancy Act was dismissed on the ground that the act did not violate the South African Constitution.

SOUTH AFRICA

Christian Lawyers' Association v. National Minister of Health and Others

(South Africa, High Court, Transvaal Provincial Division, [2004], Case No. 7728/2000)

Court Holding

The provisions of the Choice on Termination of Pregnancy Act, 1996 (Choice Act) allowing pregnant women under the age of 18 (minors) who give their informed consent to terminate their pregnancies during the first 12 weeks of pregnancy without having to consult or obtain the consent of parents or guardians, undergo counselling, and wait for a prescribed period, are constitutional. The constitution requires that the Choice Act make a pregnant woman's informed consent the cornerstone of its regulation of her right to terminate her pregnancy. To provide otherwise would be unconstitutional.

Summary of Facts

With limited exceptions, section 5(2) of the Choice Act makes informed consent of the pregnant woman the sole requirement for the termination of her pregnancy. Section 5(3) provides that in the case of a minor, the minor should be advised to consult her parents, guardians, family members, or friends before the pregnancy is terminated. The plaintiff, Christian Lawyers' Association of South Africa, sought to strike down as unconstitutional sections 5(2) and

5(3) of the Choice Act on the ground that minors are not capable of giving informed consent to terminate their pregnancies without the controls described in the paragraph above. The defendant, the Minister of Health, moved to strike the claim on the ground that it disclosed no reasonable cause of action.

Issue

Are sections 5(2) and 5(3) of the Choice Act constitutional?

Discussion

The court found that the distinguishing line in the Choice Act between pregnant women who may access the option to terminate their pregnancies unassisted versus those who require assistance is the actual capacity of a particular pregnant woman to give informed consent, as determined on a case-by-case basis by the medical practitioner, depending on the emotional and intellectual maturity of the individual concerned. This is consistent with the fundamental right of self-determination with respect to health that is guaranteed by several provisions of the South African Bill of Rights: right to bodily and psychological integrity (section 12[2]); right to access reproductive health care (section 27[1]); right to have inherent dignity respected (section 10); and right to privacy (section 14).

Conclusion

The court held that even if the facts as pleaded by the plaintiff were true (that a minor is not capable of giving informed consent), the Choice Act was constitutional. Because a minor would never be able to give informed consent as required by section 5(2), she would not be able to terminate her pregnancy unassisted. From this perspective, the plaintiff's complaint was essentially about the failure of the Choice Act to impose stricter regulation on something that the act already prohibited. The plaintiff's claim, therefore, failed to disclose a reasonable cause of action. Although it was not required to do so, the court then went on to reject the correctness of the assertion that minors were not capable of giving informed consent. The court also observed that section 5(3) of the Choice Act contained mechanisms to protect the best interests of minors and that these mechanisms were constitutional.

Christian Lawyers' Association of South Africa and Others v. Minister of Health and Others

(South Africa, High Court, Transvaal Provincial Division, Case No. 1629/97; [1998] (1) BCLR 1434 (T); [1999] (3) LRC 203)

Court Holding

Section 11 of the constitution does not protect the right to life of a fetus. The Choice on Termination of Pregnancy Act is thus not contrary to the South African Constitution.

Summary of Facts

The plaintiff, Christian Lawyers' Association of South Africa, challenged the constitutionality of the Choice on Termination of Pregnancy Act of 1996, which permits abortion on request

during the first trimester of pregnancy. The association argued that section 11 of the constitution protects the right to life of everyone, and the terms “everyone” and “every person” include a fetus from the moment of conception. The association claimed that this interpretation was supported by the constitution’s drafting history. The defendants responded that a fetus was not legally recognized under section 11 of the constitution. They furthermore contended that a pregnant woman’s right to decide whether to terminate a pregnancy is constitutionally protected.

Issues

- (1) Is a fetus protected under the right to life, as provided by section 11 of the constitution?
- (2) Is the Choice on Termination of Pregnancy Act unconstitutional?

Discussion

The court decided that in addressing this issue, it should not rely on medical or scientific evidence as to when human life commences, nor should it rely on a religious or philosophical argument. Rather, the court proceeded on the basis that, given the controversial nature of abortion under the common law, the constitution would have unequivocally protected the fetus had it been the intent of the drafters. Section 11 of the Constitution of South Africa, however, does not expressly protect the right to life of a fetus.

In addition, under section 12(2) of the constitution, everyone is guaranteed the right to security and autonomy over their reproduction. This provision does not contain any exception for the protection of the fetus. Section 28 of the constitution, which protects the right of the child, explicitly defines a child as a person under the age of 18 years. Since “age” begins at birth, a fetus is not recognized as a child. It may be inferred from the fact that section 28 does not explicitly or implicitly apply to a fetus, that section 11 was not intended to protect a fetus. Finally, if the court were to extend the interpretation of section 11 to include the protection of a fetus, the resulting legal regime would violate women’s constitutional rights.

Conclusion

Section 11 of the constitution does not protect the life of a fetus. The Choice Act thus conforms to the constitution.

B. HIV/AIDS

Approximately 25.4 million people in sub-Saharan Africa are HIV positive. Women account for 13.3 million of these individuals and make up 57% of adults infected in the region.¹² Women and young people, especially adolescent girls, are particularly vulnerable to HIV infection due to an increased biological susceptibility and lower socioeconomic and political status relative to men. Young women face a heightened risk of HIV infection due to their sexual exploitation; early sexual initiation; inability to negotiate safe sex with their often older partners; insufficient sexuality education; lack of access to condoms, particularly female condoms; and lack of access to reproductive health services.¹³

The cases presented below address some of the issues relevant to the rights of women living with HIV/AIDS. The cases can be broadly divided into two categories: those addressing

the issue of access to and quality of health care for people living with HIV/AIDS, and those addressing issues of discrimination against people living with HIV/AIDS. Access to quality health care is a significant issue for women living with HIV/AIDS. Although much attention has been given to pregnant women living with HIV/AIDS, most of it has been focused on the prevention of transmission to children, rather than on the woman's health in general. The case of *Minister of Health v. Treatment Action Campaign* addresses a government's obligation to take effective, comprehensive, and progressive measures to combat the spread of HIV/AIDS.

Because the laws and customs of many countries deny women equal enjoyment of their human rights, women are particularly affected by discrimination that is often directed toward people living with HIV/AIDS. For example, discrimination based on HIV/AIDS status in the context of access to education has a disproportionately negative impact on girls, whose access to education may already be limited. Similarly, requirements for HIV/AIDS testing in places of employment disproportionately affect women in circumstances where women are generally denied equal access to employment. Moreover, testing requirements may put women at risk of physical abuse, abandonment, neglect, or even ostracism by families and communities. Studies from Kenya report that 20% of HIV-positive women suffer violence after revealing their status to their partners.¹⁴

Generally, the courts appear to hold that discrimination based on HIV/AIDS is unconstitutional. In an interesting case dealing with a criminal statute that made HIV status an aggravating circumstance in rape convictions, a Botswana Court of Appeal held that Botswana's constitutional prohibition on discrimination should include discrimination based on a person's HIV status.

With respect to testing, courts covered in this report generally allow employers to conduct HIV/AIDS tests, provided that such tests are voluntary and anonymous.

BOTSWANA

Makuto v. State

(Botswana, Court of Appeal, 3 CHRLD 151–152)

Court Holding

On the facts of this case, the HIV-positive status of a person convicted of rape does not constitute an aggravating circumstance in assessing the length of a sentence.

Summary of Facts

Makuto was convicted of rape. Pursuant to section 142(2) of the Penal Code of Botswana (as amended by the Penal Code [Amendment] Act 1998 [No 5 of 1998]), he was ordered to undergo an HIV test for the purpose of assessing his sentence. Section 142(2)(b) requires that an HIV-positive person convicted of rape receive the maximum punishment of 20 years' imprisonment. If at the time he committed the rape, the offender was unaware of his HIV status, section 142(2)(a) requires a minimum sentence of 15 years' imprisonment. A person convicted of rape who is not HIV-positive is ordinarily sentenced to a minimum of 10 years' imprisonment.

The test revealed that Makuto was HIV positive. He therefore received a sentence of 16 years and strokes of the light cane. Makuto appealed the sentence. He alleged that

mandating a harsher sentence on the basis of a person's HIV status is discriminatory on the ground of disability, and thus unconstitutional. Section 15 of the Constitution of Botswana proscribes discrimination by a public authority. Makuto also contended that section 142(2) of the penal code is unjust, as it presumes that an HIV-positive offender infected the rape victim with HIV.

Issues

- (1) Does the consideration of the HIV status of a person convicted of rape as an aggravating circumstance in sentencing, as required by section 142(2) of the penal code, contravene section 15 of the constitution?
- (2) Is the presumption that an HIV-positive person convicted of rape has infected the victim unjust?

Discussion

Section 15 of the constitution proscribes discrimination on the grounds of "race, tribe, place of origin, political opinions, colour or creed." It does not specifically enumerate HIV status as a prohibited ground of discrimination. The framers of the constitution did not, however, intend the listed grounds to be exhaustive (*A.G. v. Dow* [1992] LRC [Const] 623 [Botswana {A}] applied). Discrimination based on HIV status falls within the scope of the provision. The imposition of a harsher penalty because of an offender's HIV-positive status thus amounts to discrimination. Section 15(4)(e) of the constitution allows for justifiable limitations on a person's right to nondiscrimination. The court found that the heavier punishment imposed on HIV-positive offenders was justified. Section 142(2)(b) is intended to deter HIV-positive people from committing rape, and to limit the spread of the disease.

The court held that the limitation on an offender's right to nondiscrimination is justified only when the offender knew that he was HIV positive when he committed the rape. Section 142(2) should thus apply only where the court is satisfied that the offender was HIV positive at the time of the rape, and that he knew his health status (*State v. Ontshabetse Lejony* Cr App 23/2000, unreported [Botswana HC] applied). The court determined that Makuto was tested only after his conviction. As a consequence, the court was not satisfied that Makuto was or knew he was HIV positive when he committed the crime.

Conclusion

The discriminatory treatment under section 142(2) does not contravene section 15 of the constitution, provided the penal provision is applied in a manner that achieves its legislative objectives, namely to deter HIV-positive persons from committing rape, and to limit the spread of the disease. In the present case, the court was unable to determine whether the offender was or knew he was HIV positive at the time he committed the rape. As a consequence, the imposition of a harsher penalty is unjustified, as it would not serve the objectives of the penal provision. The state cannot regard the offender's present HIV status as an aggravating circumstance in sentencing, as mandated by section 142(2). The court replaced Makuto's 16-year sentence with a 10-year sentence.

KENYA

Nyumbani Children's Home v. The Ministry for Education and The Attorney General

(Kenya, High Court at Nairobi; Application No. 1521 of 2003 (OS))

Court Holding

Public schools cannot prohibit HIV-positive children from enrolling in school programs.

Summary of Facts

The applicant, Nyumbani Children's Home, requested a declaration from the High Court requiring public schools to permit HIV-positive children to enroll in their programs. The applicant represented 91 children who were prohibited from attending public schools because of their HIV status. Forty-one children attended costly private schools, and the remaining 50 children studied informally at home.

The applicant, in collaboration with the Chamber of Justice, claimed that the public schools' policy unjustly discriminated against the children on the basis of their HIV status. There is no justifiable reason for precluding these children from attending public schools. The applicant offered scientific evidence that demonstrates that HIV-positive children can live normal and healthy lives without affecting the well-being of other children.

Issue

Is prohibiting HIV-positive children from enrolling in public school programs against the law?

Conclusion

Prior to the court considering the case, the parties privately settled the matter. The public schools agreed to abolish the admission policy prohibiting the enrollment of HIV-positive children.

SOUTH AFRICA

Hoffmann v. South African Airways

(South Africa, Constitutional Court, [2001] (10) BHRC 571; 3 CHRLD 146–148; [2002] (2) SA 628)

Court Holding

An employer who declines to hire an HIV-positive applicant violates section 9 of the constitution, which prohibits unfair discrimination.

Summary of Facts

Hoffmann is an HIV-positive man who applied to work as a cabin attendant with South African Airways (SAA). He successfully completed the required four-stage selection process; however, the required medical examination revealed his HIV-positive status. On the basis of

the examination results, SAA rejected his application. Hoffmann challenged that rejection. He argued that denying employment on the basis of HIV status violates the constitutionally protected rights to equality, human dignity, and fair labor practices. SAA defended its action on the basis of public health concerns. Hoffmann, because of his HIV-positive status, was unable to receive a yellow fever vaccination, which posed risks to customers. SAA also argued that the short life expectancy of HIV-positive persons and the high cost of training made hiring such persons uneconomical. Employing an HIV-positive person would adversely impact the efficient operation of the airline, and the public perception of the airline's efficient operation. The High Court dismissed the application. Hoffmann appealed to the Constitutional Court.

Issue

Do the constitutional rights of equality and fair labor prohibit an employer from refusing to employ an HIV-positive person on the basis of his or her HIV status?

Discussion

Medical evidence demonstrates that there are four stages to the development of HIV/AIDS. It is only during the third stage that HIV-positive persons may pose risks to public safety. There is no evidence that when Hoffman applied for the job at SAA, he had reached the third stage, and therefore posed a risk to public safety.

In determining whether a discriminatory act is unfair, the court must consider the following factors: (1) the status of the victim in society, (2) the objective of the discrimination, and (3) the extent to which the victim's interests are affected, and the impact of the discrimination on the human dignity of the victim (*Harken v. Lane NO and Others* [1998] (1) SA 300 (CC) applied).

HIV-positive persons are vulnerable to societal stigmatization and marginalization. In the employment context, such treatment condemns HIV-positive persons to chronic unemployment and impoverishment, or "economic death" (*dicta* of Tipnis J in *Bombay Indian Inhabitant v. M/S ZY and another AIR* [1997] [Bombay] 406 at 431 applied).

The commercial interests of SAA, while legitimate concerns, cannot justify prejudicial and stereotypical treatment. The determination of whether to employ an HIV-positive person must be based on scientific findings of the employee's incapacity to perform the necessary work. Moreover, SAA's refusal was inconsistent with its policies. HIV testing was mandatory only for new but not for all employees. It was therefore possible that some cabin attendants, already employed by SAA, were HIV positive, and yet they could satisfactorily perform their employment duties.

Conclusion

In refusing to employ Hoffmann on the basis of his HIV status, SAA violated section 9 of the South African Constitution. This provision guarantees the right to equality and prohibits unfair discrimination.

Irvin and Johnson v. Trawler and Line Fishing Union and Others
(South Africa, Labour Court, Case No. C1126/2002 [Unreported])

Court Holding

The Employment Equity Act 55 of 1998 does not prohibit employers from conducting anonymous and voluntary HIV testing of employees.

Summary of Facts

The applicant, an employer, planned to require a sample of its 100 employees to undergo voluntary and anonymous HIV testing. The applicant defended its intention by claiming that in planning for manpower needs, it was necessary to assess the prevalence of HIV among employees. The applicant also intended to use the test results to determine the impact of HIV in the workplace, establish support facilities for employees living with HIV, and develop preventive measures to protect employees from infection. The applicant had already undertaken measures to raise employees' awareness of HIV/AIDS, and to encourage them to seek voluntary testing and counseling. Section 7(2) of the Employment Equity Act 55 of 1998 prohibits the "testing of an employee to determine that employee's HIV status" unless the Labour Court finds that the testing is justified. The applicant applied to the Labour Court for a declaration that its plan for anonymous and voluntary HIV testing did not fall within the ambit of section 7(2) of the act, or alternatively, that the plan was justified under the section.

Issue

Is the applicant's plan to anonymously test some of its employees for HIV prohibited under section 7(2) of the act, or is it justifiable?

Discussion

The fundamental purpose of section 7 is to prevent employers from unfairly discriminating against employees on the basis of their health condition. The court reasons that in determining whether testing falls within the ambit of section 7, one must consider whether either the intent or the effect of the testing is discriminatory. Thus, the court concludes that under section 7, employers cannot require their employees to undergo medical testing, if the employer intends to use the results to discriminate among employees. If the employers could not, however, discover the medical condition of specific employees because the testing is performed anonymously, the discriminatory element is removed. So long as the court is assured that the applicant will not have access to the testing result of a particular employee, the applicant's plan does not fall within the scope of section 7(2). The employer must therefore ensure the anonymity of the testing, which must be conducted by an independent, professional testing agency.

The court also discussed the voluntary nature of HIV testing. If employees freely consent to be tested, then the medical testing falls outside of section 7(2). Employers cannot attach any sanction or disadvantage to employees who refuse to undergo testing. Section 7 therefore applies only to compulsory or involuntary testing. In such cases, employers require a court order before proceeding with their testing program.

Conclusion

The anonymous and voluntary HIV testing of employees is not prohibited by section 7 of the act. The question of justifiability is therefore unnecessary.

PFG Building Glass (Pty) Ltd. v. Chemical Engineering Pulp Paper Wood and Allied Workers' Union (CEPPAWU) and Others

(South Africa, Labour Court, [2003] (24) ILJ 974 (LC); Case No. J90/03)

Court Holding

HIV testing of employees does not violate the Employment Equity Act 55 of 1998, provided it is conducted anonymously and voluntarily.

Summary of Facts

The applicant, PFG Building Glass (Pty) Ltd., tested its employees for HIV without the Labour Court's authorization. The applicant initially applied to the court for an authorization order. However, it subsequently abandoned this claim. Instead, the applicant requested that the court declare that HIV testing of employees does not contravene section 7(2) of the Employment Equity Act 55 of 1998. Section 7(2) of the act prohibits medical testing of employees to determine their HIV status, unless the Labour Court determines that the test is justifiable.

Issue

Does HIV testing of employees without prior authorization from the Labour Court contravene section 7(2) of the act?

Discussion

The court noted that the act's provisions must be interpreted in light of the constitution, the act's purpose, other relevant good practices, and obligations under international law. The right to security and bodily integrity, the right to privacy, and the right to not be subject to "medical or scientific experiments without informed consent" all apply to the testing of employees' HIV status. Given the stigma and discrimination attached to a positive HIV status, employees' right to privacy (section 14 of the constitution) is particularly important.

The court recognized, however, that an individual's right to privacy and autonomy are not absolute. An employer's right to information and to engage in a trade, occupation, or profession may justify reasonable limitations on employees' rights to privacy and autonomy. In order to achieve a fair balance between competing rights, the employer may limit employees' rights to privacy, dignity, and equality only so far as is necessary to achieve the legitimate objectives of testing for a devastating disease. In other words, the data collected in the testing should be used only for the management of the enterprise in relation to the impact of HIV on the workforce. The act clearly indicates that HIV testing may not be used to unfairly discriminate against employees.

As such, the purpose of the testing cannot be to determine the HIV status of a particular employee, except in cases where the nature of the work requires an employee to be

HIV negative. The court recognized that preserving anonymity is central to the avoidance of workplace discrimination based on HIV status.

In the case at hand, the HIV testing of employees was anonymous. The risk of discriminatory conduct flowing from the test results is thus minimal.

Conclusion

The court granted the applicant's request, because the testing would be conducted anonymously and voluntarily.

Treatment Action Campaign, Dr. Haroon Saloojee, Children's Rights Centre v. Minister of Health and Others

(South Africa, High Court, Transvaal Provincial Division, CCT 8/02, Case No. 21182/2001)

Court Holding

The failure to make available nevirapine, a drug that reduces the risk of mother-to-child HIV transmission, and the failure to employ effective, comprehensive, and progressive measures to combat the spread of HIV/AIDS, constitutes a breach of section 27 of the South African Constitution.

Summary of Facts

The South African government implemented a program dealing with mother-to-child transmission of HIV. While nevirapine was regarded as the most effective drug for combating transmission, the government restricted its availability. The respondents, Treatment Action Campaign and Children's Rights Centre, argued that this restriction was unreasonable and unconstitutional. Article 27(1) guarantees everyone the right to have access to health-care services, including reproductive health care. Article 28 (1) provides children the right of special protection. The respondents claimed that these constitutional provisions required the government to plan and implement an effective, comprehensive, and progressive program to prevent mother-to-child transmission of HIV.

In response, the Minister of Health argued that the effective provision of nevirapine required appropriate logistic and manpower infrastructures. These were currently not in place. The government particularly stressed concern with the drug's side effects and the development of drug resistance due to misadministration. Moreover, the minister contended that parents, not the state, had the primary obligation for providing children with basic health care.

The High Court decided in favor of the respondents. The court ordered the Minister of Health to make nevirapine available in the public health sector, employ effective and comprehensive measures to reduce mother-to-child transmission of HIV, and provide voluntary testing and appropriate counseling. The Minister of Health appealed to the Constitutional Court.

Issues

(1) Does the government's failure to provide nevirapine through public health-care services violate articles 27(1) and 28(1) of the constitution?

(2) Is the government obliged to employ an effective, comprehensive, and progressive program to prevent mother-to-child transmission of HIV?

Discussion

In previous decisions, the Constitutional Court has recognized that the government has a positive duty to ensure the socioeconomic rights that are guaranteed in sections 26 and 27 of the constitution (*Soobramoney v. Minister of Health, KwaZulu-Natal* [1998] (1) SA 765 (CC), [1997] (12) BCLR 1696 (CC); and *Government of the Republic of South Africa and Others v. Grootboom and Others* [2001] (1) SA 46 (CC), [2000] (11) BCLR 1169 (CC)).

Recognizing the limitations of the state's available resources, the court circumscribed the state's obligations to provide for socioeconomic rights through the standard of meeting a "minimum core" of needs, as developed by the Committee of Economic, Social and Cultural Rights.¹⁵ According to this standard, the state is obliged to take appropriate measures "to the maximum of its available resources" to meet basic or "minimum core" socioeconomic needs.

The government is therefore obligated to assume "reasonable measures progressively" to reduce the spread of HIV. The appropriate scope of the state's positive obligation to provide access to health-care services is determinable by reference to article 27(2). This provision obligates states to take reasonable legislative and other measures, within the scope of their available resources, to achieve the progressive realization of access to health-care services.

On the basis of the evidence provided, the court determined that the provision of nevirapine to all persons who required it was within the capacity of state resources. Where adequate counseling and testing facilities were made available, the administration of the drug was relatively simple. Moreover, the court affirmed that the state has a duty to respect and promote the rights of children when parents cannot fulfill those rights. This fact was particularly relevant to the decision, as most women requiring nevirapine cannot afford care at private medical institutions.

Conclusion

The court upheld the decision of the High Court, albeit through different reasoning. The government's failure to make nevirapine available, and to employ effective, comprehensive, and progressive measures to combat the spread of HIV, violates article 27(2) of the constitution.

C. REPRODUCTIVE STATUS AND RIGHT TO EDUCATION

Although the right to education implicates gender as a general matter, the cases below focus specifically on the right to education of pregnant women. Many educational policies in the African Commonwealth countries restrict pregnant women's access to education. However, in the few cases in which such restrictions were challenged, the courts found them to be unconstitutional and contrary to the public interest.

BOTSWANA

Student Representative Council of Molepolole College of Education v. Attorney General
(Botswana, Court of Appeal, [1995] (3) LRC 447)

Court Holding

A regulation that expels students who become pregnant while enrolled at a college is unconstitutional.

Summary of Facts

The appellant, the Student Representative Council (SRC), challenged the constitutionality of regulation 6 of the of the Teachers' Training College. This regulation requires female students to immediately inform the college if they become pregnant. A woman who becomes pregnant between December and April or between May and November is obliged to leave the college or miss the following semester. If a female student becomes pregnant for a second time, the college may permanently expel her. The SRC argued that regulation 6 contravenes section 15(3) of the constitution, which prohibits sex-based discrimination.

Issue

Does regulation 6 discriminate against female students on the basis of sex?

Discussion

Differential treatment between women and men does not per se contravene section 15(3) of the constitution. In some cases, the law must differentiate between the sexes in order to achieve a legitimate objective within the public interest or to redress an injustice. Any law that treats the sexes differently must, however, be "reasonable and fair [and] made for the benefit of the welfare of the gender."

A regulation that forces pregnant students to leave school for a whole year is unreasonable. According to African communal social values, relatives and members of family usually take care of children whose parents are at school or work. It is unfair to deny pregnant female students the opportunity to continue their studies.

Moreover, it appeared from testimonies that pregnant students who are married would be permitted to continue their education. This policy amounts to discrimination between married and unmarried students. More importantly, however, that testimony indicates that the regulation is designed to punish unmarried pregnant women, rather than assist them. Further, a male student who impregnates a woman is not punished under regulation 6.

Conclusion

Regulation 6 is unfairly discriminatory because it unreasonably and without justification denies pregnant students the opportunity to continue their education. The regulation is thus unconstitutional.

KENYA

See *HIV/AIDS: Nyumbani Children's Home v. The Ministry for Education and The Attorney General*

(Kenya, High Court at Nairobi; Application No. 1521 of 2003 (OS))

SOUTH AFRICA

Mfolo and Others v. Minister of Education, Bophuthatswana

(South Africa, Supreme Court, Bophuthatswana and General Division, [1992] (3) LRC 181; [1994] BCLR 136)

Court Holding

A regulation that prohibits pregnant women from pursuing their studies is unconstitutional.

Summary of Facts

The applicants are four pregnant women who were suspended from pursuing their studies and writing their final examinations. Their suspension is pursuant to regulation 13(2) of the Teachers' Training College. This regulation suspends female students who have become pregnant during an academic year. The regulation was promulgated pursuant to section 10(1) of the Bophuthatswana National Education Act 2 of 1979. The applicants challenged the regulation as inconsistent with section 9 of the constitution, which grants all persons equality before the law.

Issue

Does a regulation that suspends pregnant women from pursuing their studies contravene section 9 of the constitution?

Discussion

The constitutional right of equality before the law applies not merely to matters before a court of law. Rather, the right applies to any law or regulation promulgated by the state. However, the right of equality before the law is not absolute. The law may discriminate on various grounds to achieve legitimate objectives, provided the discrimination is based on "reasonableness" and "rationality." In the present case, no legitimate objective is achieved by prohibiting pregnant women from continuing their studies. There is thus no correlation between a legitimate objective or the purposes of the regulation, and its discriminatory effects. The regulation is thus unconstitutional.

Conclusion

Regulation 13(2) is in contravention of section 9 of the constitution.

ZIMBABWE

Lloyd Chaduka and Morgenster College v. Enita Mandizvidza

(Zimbabwe, Supreme Court, Judgment No. SC 114/2001; Civil Appeal No. 298/2000)

Court Holding

A clause in a student-college contractual agreement that requires women to withdraw from the college if they become pregnant is contrary to public policy and the constitution.

Summary of Facts

The respondent, Ms. Mandizvidza, was a student at the Morgenster Teacher Training College, the appellant. The college was a private institution run by the Reformed Church in Zimbabwe. Upon enrollment at the college, the respondent signed a contract stipulating that students who become pregnant or cause another student's pregnancy must withdraw from the training. In December 1998, the respondent was married in accordance with customary law and tradition. She became pregnant. On July 9, 1999, during the respondent's final year of study, the college asked the respondent to withdraw from the college in accordance with the signed contract.

The respondent lodged a complaint against the college with the Minister of State in the president's office. In its defense, the college claimed that the decision was justified on the following grounds: (1) the maintenance of moral standards; (2) contractual obligations that the respondent had signed; and (3) the respondent had not been expelled from the college, but withdrew voluntarily.

The respondent applied to the court for interim relief to sit for her final examinations. The court granted this relief on the basis that clause 7(a) of the college contract contravened section 23 of the constitution. As such, the college's request for withdrawal was null and void. The court held that the respondent should be allowed to pursue her training (*Mandizvidza v. Chaduka NO and Others* [1998] (2) ZLR 375).

The college appealed to the Supreme Court. It argued that section 23 of the constitution, which prohibits gender-based discrimination, does not apply to a private contract. Rather, the case ought to be governed by the law of contracts.

Issues

- (1) Is the college a "public authority" under the meaning of section 23 of the constitution?
- (2) Is clause 7(a) of the contract unconstitutional?

Discussion

The term "public authority" is not defined under section 23 of the Constitution of Zimbabwe. The word "public" is defined elsewhere in the constitution as relating to the state. "Public authority" thus refers to an authority related to the state. Given that the college operates for the benefit of the public, and not for private profit, the court held that the college properly falls within the definition of "public authority."

Even if the college is not considered a public authority, other laws specifically prohibit gender-based discrimination by private entities. Therefore, while private discrimination, such as

the college contract, may not fall within the purview of the constitution, it is contrary to public policy (*contra bonos mores*) (*Sasfin [pvt] Led v. Benkes* [1989] (1) SA 1 [A] at 71-9A; *Botha [now Griesse] v. Finanscredit [pvt] Ltd* [1989] (3) SA 773 [A] at 7821-783C; and *Mufamadi and Others v. Dorbye Finance [pty] Ltd* [1996] (1) SA 799 [A] at 801 1-80. 1 A).

Conclusion

Even if the college is not a “public authority” falling within the meaning of section 23 of the constitution, the expulsion of female students who become pregnant while attending the college constitutes gender-based discrimination, and is thus contrary to public policy. The clause of the college contract is thus null and void. In this case, the court found that the respondent’s withdrawal was not voluntary, but coerced.

CHAPTER IV

DUE RESPECT FOR DIFFERENCES: DISCRIMINATION BASED ON GENDER AND SEXUAL ORIENTATION

A. GENDER DISCRIMINATION

In many parts of Africa, women's rights to property are, by law, unequal to those of men. Their rights to own, inherit, manage, and dispose of property are under constant attack from customs, laws, and individuals, including government officials, who believe that women cannot be trusted with or do not deserve property simply because of their gender.¹⁶ Many organizations dedicated to women's legal issues have challenged such discrimination in the courts. As the cases below illustrate, however, approaches to secure women's rights to head families and inherit property vary from country to country.

In Nigeria, the courts appear to hold that males and females have equal inheritance rights and that, even under ethnic customary laws, a woman can become a head of the family. In addition to being influenced by gender, inheritance rights are also affected by whether the heir was born in or out of wedlock. Thus, for example, a South African Court of Appeal held that customary law that excludes an illegitimate female child from the right of inheritance and succession does not violate the nondiscrimination provision of the constitution, because all illegitimate children are excluded from inheritance.

NIGERIA

Akande v. Oyewole

(Nigeria, Court of Appeal, Ibadan Division, [2003] (6) WRN 36–53)

Court Holding

Under customary law, a female family member has the right to inherit family land and bequeath it to her children.

Summary of Facts

This case is an appeal against a Trial Court judgment. At the trial level, the plaintiff (respondent) claimed that the land and the houses occupied by the defendant's father, Mr. Abatan, belonged to the Agbedegbede family, and that Mr. Abatan was allowed to occupy the houses on the land as a licensee. The plaintiff sought a declaration from the court that the defendant (appellant) does not own the land in question because he is not a member of the Agbedegbede family, since he is related to the family only through a paternal grandmother, Mrs. Molomo. The Trial Court judge agreed with the plaintiff that family membership cannot be established through the maternal line. The judge thus denied the defendant's capacity to inherit property belonging to the Agbedegbede family.

Issue

Is the defendant a member of the Agbedegbede family, and thus entitled to inherit familial property?

Discussion

Under customary law, absolute ownership rights on family property remain in the family. Occupancy and use of property, however, are transferable. In this case, the Trial Court judge decided that the defendant's father (the appellant) was not a member of the family. The judge did not recognize inheritance through the maternal line. This conclusion, however, conflicts with well-established precedent recognizing the property rights of women under customary law. If Mrs. Molomo, the defendant's grandmother, and her son, the defendant's father, were members of the family, the defendant has a right to inherit his father's property built on family land.

Conclusion

The trial judge erred in failing to recognize inheritance through the maternal line.

Amusan v. Olawumi

(Nigeria, Court of Appeal, [2002] FWLR 1385)

Court Holding

Under Yoruba customary law, both male and female children of a deceased have equal rights to inherit.

Summary of Facts

Mr. Orebiyi, survived only by his daughter, Agoremiklekun, died intestate. At the trial level, the appellants, Agoremiklekun's children, argued that the property should devolve to them through their mother, as she was entitled to inherit her father's property. The respondents, relatives of the deceased's brother, Atuwonka, contended that under Yoruba tradition, women are not entitled to inherit. As such, they should inherit the property of the deceased through Atuwonka. The Trial Court decided in favor of the respondents. The appellants appealed to the Court of Appeal.

Issue

Do female children of a deceased enjoy the right to inherit under Yoruba customary law?

Discussion

According to Yoruba customary law, when a person dies intestate and is survived by children, male and female children have equal rights to inherit their father's property. The right of inheritance derives from the fact that in some circumstances, women can be the head of a household according to customary law. In cases where children do not survive a deceased, his parents inherit the property. In the absence of surviving parents, the property vests in the brothers and sisters of the deceased. As a daughter of the deceased, Agoremiklekun had the right to inherit the deceased's property, including any land owned by him.

Conclusion

The Trial Court erred by denying inheritance rights to the deceased's daughter and her successors under the father's estate. Under Yoruba customary law, both male and female children have equal rights to inherit property of their father.

Ashipa v. Ashipa

(Nigeria, High Court of Lagos State, [2002] (3) LHCR 60–84)

Court Holding

Under Yoruba customary law, nothing prevents a female member from heading the family.

Summary of Facts

The plaintiffs challenged Mrs. Silifatu's status as the head of the family. Mrs. Silifatu accepted the duty of heading the family after her older brother declined to take the position because of ill health. The plaintiffs argued that, as a daughter, Mrs. Silifatu could not be head of the family under Yoruba customary law. The plaintiffs thus petitioned the court for a declaration that they were the representatives of the Ogunmola Ashipa family of Ijagemo, as indicated in a registered power of attorney.

Issue

Is the appointment of Mrs. Silifatu as the head of the family valid under Yoruba customary law?

Discussion

The plaintiffs could adduce no evidence before the court that Yoruba customary law prohibits the appointment of a female as the head of a family. The appointment of the head of a family is exclusively a family matter. It is not to be decided by the community in general. As decided in previous Supreme Court cases, although the head of a family is traditionally the eldest male, a female member can also be appointed to the position depending on the circumstances. Further, a recent decision of the Court of Appeal in *Ukeja v. Ukeja* (unreported, No. OA/1.174/93) held that any custom that discriminates against women is void and contravenes the constitution.

Conclusion

The appointment of Mrs. Silifatu as the head of the family was valid under Yoruba customary law.

Folami v. Cole

(Nigeria, Supreme Court, [1990] (2) NWLR 445–457)

Court Holding

Under Yoruba customary law, in the case of intestate succession, a female child can be the head of a family and manage the family property, if she is the eldest child and all other surviving children are female.

Summary of Facts

The defendant (the respondent), Flore A. Cole, assumed her powers as head of the family, and sold a piece of family land. Being the eldest child of surviving sisters, she automatically assumed this position. The plaintiffs (the appellants) challenged the legality of the sale, arguing that under Yoruba custom, Flore may assume the position of head of the family only with the consent of her sisters.

Issues

- (1) Can the eldest female child automatically become the head of the family or does she require the consent of family members to do so?
- (2) Is the sale of property carried out by the eldest female child valid?

Discussion

According to Yoruba custom, the eldest male member traditionally manages family property. In some cases, however, the eldest surviving female child can head the family, if there is no male family member in a position to lead; if the eldest female child is influential and capable of managing the family property; or if all the “surviving children are female.” The disposal of property by the head of a family, without the consent of family members, is valid but voidable. The transaction may be set aside if family members petition the court, and the court declares the sale void. Any deal undertaken by a family member who is not the head of the family is always void.

Conclusion

The court dismissed the appeal because Flore A. Cole, as the eldest female in the absence of any surviving male children, automatically became head of the family. The sale of the property was valid because the appellants did not institute any court challenge against the sale itself.

Mojekwu v. Mojekwu

(Nigeria, Court of Appeal, [1997] (7) NWLR 283)

Court Holding

A customary law that allows only males to exercise a right to inheritance, despite a closer surviving female family member, is unconstitutional.

Summary of Facts

The appellant, Mr. Mojekwu, sought a declaration from the court granting him the right to

inherit his uncle's property. The appellant argued that according to the native law and custom of Nnewi, a town in Anambra state, as the only surviving male relative, he is entitled to inherit the property, regardless of the existence of a more closely related female family member. If a deceased is not survived by a male in the direct line, the first son of the late brother or nephew of the deceased inherits the deceased's property. Based on established custom, the appellant paid the necessary *kola* to the Mgbelekeke family, and thereby received consent from the family to inherit the property.

The respondent, Ms. Mojekwu, the second wife of the deceased, challenged the appellant's ownership of the property. She argued that because he was not the head of the Mojekwu family, the respondent was not entitled to inherit the property. The Trial Court judge decided in favor of the respondent. Mr. Mojekwu appealed to the Court of Appeal.

Issues

- (1) Is the Nnewi custom that allows only males to exercise a right to inheritance, despite a closer surviving female family member, unconstitutional?
- (2) Did the Trial Court judge err in granting the property to the respondent?

Discussion

The court determined that Nnewi customary law discriminates on the basis of gender, and is thus unconstitutional. The court refused to apply a customary law repugnant to natural justice, equity, and good conscience.

The court therefore decided the case according to the Mgbelekeke family's customary tenancy, as applied by the Kola Tenancy Law of 1935. Pursuant to this law, both male and female children of a deceased are entitled to inherit land, possessed under *kola* tenancy, once they produce further *kola*. The mere signature or consent of family members giving Mr. Mojekwu ownership in the property did not stop Ms. Mojekwu's claim on the land.

Conclusion

Nnewi customary law discriminates against women, and is thus repugnant to natural justice, equity, and good conscience. The appellant's claim to the disputed land is therefore dismissed.

Muojekwo and Others v. Ejikeme and Others

(Nigeria, Court of Appeal [Enugu]; [2000] (5) NWLR 402; [1999] (3) [1] CHRLD 116)

Court Holding

A customary law that provides unequal inheritance rights to female and male family members is inequitable and repugnant to justice.

Summary of Facts

The appellants are the deceased's granddaughter and great-grandsons. They were born to the deceased's daughter, and to her two daughters, respectively. The appellants claim entitlement

to the deceased's property on the basis of the Nnewi custom of *nrachi*. According to *nrachi*, a man may keep an unmarried daughter in his house to raise his other children, particularly males, to succeed him. This daughter is entrusted with the administration of the father's property, and children born to her are thus entitled to inherit their grandfather's property.

The respondents are male members of the deceased's brother's family. They argue that *nrachi* was not followed with the appellants' mother (or grandmother), but with her sister. This sister died without leaving a child.

According to custom, upon the extinction of the deceased's family lineage, the respondents are entitled to inherit the deceased's property. The trial judge applied this custom, and granted the respondents the rights to inheritance. The deceased's great-grandsons and granddaughter appealed.

Issues

- (1) Was the custom of *nrachi* followed and is thus applicable in the case?
- (2) Are the deceased's brother's family, the respondents, entitled to inherit the deceased's property?

Discussion

The court held that the custom of *nrachi* violates the very essence of family life. The custom denies the paternity of female children's natural father, and is thus inequitable. The custom is repugnant to the basics of natural justice and good sense, and is thus judicially unenforceable (*Edet v. Essien* [1932] (11) NLR 47 [Nig DC] considered). The female child of a deceased is entitled to her father's estate whether or not *nrachi* had been followed.

Conclusion

Given the unenforceability of the custom of *nrachi*, the appellants by virtue of their blood relation to the deceased are entitled to inherit his property (*Adeseya v. Taiwo* [1956] SC NLR 265 [Nig SC]; and *Ogunmefun v. Ogunmefun* [1931] (10) NLR 82 considered).

Nzekwu v. Nzekwu

(Nigeria, Supreme Court, [1989] (2) NWLR 373)

Court Holding

According to Onitsha customary law, a widow can exercise certain rights respecting her late husband's property.

Summary of Facts

Mr. Nzekwu died intestate. Following his death, the plaintiff, the wife of the deceased, and her two children moved to a house owned by her late husband, without the permission of his family. During the Nigerian civil war, the plaintiff abandoned the house. Upon her return, she found

the house occupied by persons who bought the land from the defendants, members of Nzekwu's family. The defendants argued that they had inherited the land, and were entitled to dispose of it. The Trial Court decided in favor of the plaintiff. The defendants unsuccessfully appealed to the Court of Appeal.

Issue

Under Onitsha customary law, does a widow have rights to the property of her deceased husband?

Discussion

According to Onitsha customary law, a widow may exercise rights related to her late husband's property with the consent of her husband's family. Even a widow without children has the right to share in the deceased's farmland. Subject to her good behavior, the widow may occupy buildings owned by the deceased. A widow also has the right to maintenance by the deceased's family. If the family is unable to maintain her, the widow has a right to income generated from deceased's land. The widow is not, however, entitled to any absolute ownership rights. For example, she cannot sell any of her late husband's property.

The court decided that any custom under Onitsha customary law that absolutely denies a widow any right related to the property of her deceased husband is barbarous and uncivilized. Such a custom is thus considered repugnant to equity and good conscience.

Conclusion

A widow is entitled to enjoy certain rights related to property owned by her deceased husband. She is not entitled, however, to any absolute ownership rights.

Sharu v. Umma

(Nigeria, Court of Appeal, Kaduna Division, [2002] FWLR 766)

Court Holding

As an exception to the general rule, the Sharia Court of Appeal may accept evidence not previously submitted to the court.

Summary of Facts

Mr. Alhaji Sharu Balarabe died leaving behind a widow, Hajiya Umma, six children, and property. At the hearing of the property distribution, the appellant, Ms. Sa'a, claimed that she was married to the deceased, and that at the time of his death "she was observing her *iddat* in his favour." The plaintiff, Hajiya Umma, denied the appellant's claim, and asserted that the deceased was mentally ill at the time of the described marriage.

The Trial Court decided in favor of the appellant, and distributed the deceased's properties among all the heirs, including both the appellant and respondent. Dissatisfied with

the result, the appellant appealed the court's decision to the Sharia Court of Appeal. She argued that the respondent was ineligible to receive any of the inheritance because the respondent was not married to the deceased at the time of his death. The Sharia Court of Appeal disagreed with the appellant, and found the existence of subsisted marriage between the respondent and the deceased.

The appellant thus appealed to the Court of Appeal.

Issues

- (1) Did the Sharia Court of Appeal err by accepting additional evidence, which was not before the Trial Court?
- (2) Did the appellant establish her case against the validity of the marriage between the respondent and the deceased?

Discussion

The authority for assessing plausibility of evidence rests mainly with the Trial Court. This court entertains the in-person testimonies of witnesses and enjoys the opportunity to examine all relevant factors surrounding the case. In some cases, however, under order 3, rule 7(2) of the 1960 Sharia Court of Appeal Law, cases may be retried, in whole or in part, in order to enhance the record of the court. In this case, the court rightly decided to call additional witnesses to ensure that justice was done.

All legitimate heirs deserve the right to inherit the deceased's property. The appellant failed to establish the invalidity of the respondent's marriage to the deceased. The Trial Court's division of property was thus satisfactory.

Conclusion

The Sharia Court of Appeal did not err in hearing new evidence. Nor did the Court err in finding that the respondent is an heir to the deceased.

SOUTH AFRICA

Bhe v. Magistrate, Khayelitsha and Others

(South Africa, Constitutional Court, [2004], Case No. 49/03)

Court Holding

The rule of male primogeniture as applied to inheritance in African customary law violates constitutional guarantees to dignity and equality.

Summary of Facts

Under the system of intestate succession in place, the plaintiff's two minor female children did not qualify as heirs to their deceased father's estate. The plaintiff challenged the appointment of the deceased's father (the children's grandfather) as heir according to section 23 of the Black

Administration Act. The plaintiff argued that the impugned provision violated the constitutional rights to human dignity and equality, as well as the constitutional rights of children. The defendant made no submissions to the court.

Issues

- (1) Is the rule of primogeniture, as applied to the customary law of succession, constitutional?
- (2) Is section 23 of Black Administration Act constitutional?

Discussion

The rule of primogeniture is discriminatory in terms of gender, and birth order and legitimacy, because it precludes widows, daughters, younger sons, and extramarital children from inheritance. Exclusion of women from inheritance because of gender entrenches past patriarchy and violates the rights of women to equal treatment and human dignity.

By creating a parallel system of succession for black Africans, section 23 of the Black Administration Act is inconsistent with the South African Constitution and therefore invalid. The section was crafted as part of a comprehensive exclusionary system imposed on Africans. Rather than protecting a pluralistic society, the effect of section 23 is to “ossify customary law.”

Conclusion

The exclusion of women from intestate succession is a remnant of a patriarchal culture, where women were treated as perpetual minors. Indigenous law is not a stagnant body, and must evolve to meet newly shaped communities. The rights violated through the application of section 23 of the Black Administration Act assume particular importance in light of South Africa’s history of apartheid.

In the future, estates of the deceased, which would previously have been administered by magistrates per the terms stipulated in the Black Administration Act, must now be administered by the Master of the Supreme Court. Special provision is made for polygamous unions.

Mthembu v. Letsela and Another

(South Africa, Supreme Court of Appeal, [2000] (3) SA 867 (SCA))

Court Holding

Customary law that excludes children born outside of wedlock from the rights of inheritance and succession does not contravene the nondiscrimination provisions of the interim constitution.

Summary of Facts

In 1988, the applicant and the deceased had a child. In 1992, they married in accordance with African customary law. In 1993, the father of the child died intestate, before completing the conditions for marriage under customary law, namely the payment of the *lobola* balance. The

applicant applied to the court for a declaration that African customary law denying women the right to inheritance is unconstitutional, and that her daughter is the sole heir of the deceased's property. The applicant argued that according to section 35(3) of the constitution, when applying customary law, a court should consider the spirit, purpose, and objects of chapter 3 of the interim constitution. Chapter 3 encompasses two basic underlying principles, namely the principle of equality, and the principle of tolerance and accommodation.

The respondent is the deceased's father. He challenged the applicant's claim on the basis that the deceased and the applicant were not considered married under African customary law. Accordingly, the respondent, and not the deceased's child, is the only heir to the deceased's property. If a man and a woman are not married under customary law, the woman retains the membership of her family, but the child born to the man and woman is considered illegitimate.

In accordance with customary law, the heir assumes control of the property and the responsibility of the family. The widow lives in the *kral* of the deceased.

The High Court held that customary law was not inconsistent with the fundamental rights contained in chapter 3 of the interim constitution. Moreover, the applicant was not a victim of gender discrimination, because any illegitimate child of the deceased would have been disinherited.

Issue

Is a customary law that excludes women and children born outside of wedlock from the rights of inheritance and succession unconstitutional?

Discussion

The present case is not such that recognizing and respecting previously acquired rights would be so grossly unjust and abhorrent, in light of the present constitutional order, that they could not be countenanced; nor was it appropriate to entertain an invitation to develop the rule. Such development should be left to the legislature after a process of full investigation and consultation. To strike down the rule would be to dismiss an African institution without examining its essential purpose and content.

Conclusion

The holding of the High Court that the present case did not constitute discrimination under the interim constitution is upheld.

ZIMBABWE

Magaya v. Magaya

(Zimbabwe, Supreme Court, [1999] (3) LRC 35; [1999] (2) CHRLD 414)

Court Holding

A customary law that favors men over women in matters of succession and inheritance conforms to section 23 of the Constitution of Zimbabwe.

Summary of Facts

A father died leaving behind four children. The appellant, Vernia Magaya, is the daughter of the father and his first wife. The remaining three children were born to the father's second wife, one of whom is the respondent and the father's only male child. A community court previously granted the appellant succession to the deceased's property. The court did not, however, provide notice of the hearing to the respondent.

Upon an application submitted by the respondent, the community court reheard the case, and awarded the respondent succession. The court explained that according to customary law, as a female the appellant could not inherit her father's property. The appellant appealed to the Supreme Court, challenging the decision on the basis that it violated section 23(1) of the constitution, which prohibits gender-based discrimination.

Issue

Does a customary law that favors men over women in matters of succession and inheritance discriminate against women, and therefore violate section 23(1) of the constitution?

Discussion

Section 23(1) of the Constitution of Zimbabwe generally prohibits discrimination. The court held that in its opinion, section 23(1) does not forbid discrimination based on sex. However, the court reasoned, even if the law were construed to prohibit sex discrimination on the ground of Zimbabwe's adherence to international human rights instruments, the present case still would not fall within the ambit of section 23(1) because, pursuant to section 23(3), section 23(1) is inapplicable to succession and the application of customary law. The court had previously decided that while Shona tribal customary succession law discriminates against women, this gender discrimination is permitted under section 23(3), and thus is not unconstitutional (*Mwazozo v. Mwazozo* S-121-94). Concomitant with the right to inherit property, the male heir assumes responsibility for supporting his family (*Chihowa v. Mangwende* [1987] (1) ZLR 228 [S], 230 E-231 E, considered).

The court further held that it was unwilling to distort the essence of customary law and grant new rights of inheritance to women. Rather, it chose to leave law reform to the legislature. The courts can apply customary law only in accordance with the purpose of the law. They should not delve into the complex factors that inform customary law, which regulates the day-to-day lives of the majority of the population.

Couples that voluntarily opt to marry according to customary law accept and are thus bound by the African customary laws of succession and inheritance. Gender inequalities persisting in customary law should be remedied in a gradual and pragmatic manner, rather than through judicial decree.

The court also examined the Legal Age of Majority Act and concluded that while the act wanted to emancipate women by giving them *locus standi* and "competencies" in all matters generally, it did not contemplate granting women additional rights that interfered with and distorted aspects of customary law.

Conclusion

The Shona customary law that favors men over women in matters of succession and inheritance does not violate section 23(1) of the constitution. The appeal is dismissed.

B. WOMEN'S RIGHTS TO IMMIGRATION AND CITIZENSHIP

Discrimination against women in the context of immigration and citizenship may take the form of denying citizenship, or entry from abroad, to spouses or children of female citizens. Generally, the courts appear to hold that laws that deny citizenship rights to children born to citizen mothers, or laws that refuse residence status to heterosexual spouses of women citizens, are discriminatory and unconstitutional.

There is less clarity regarding the ability of a homosexual partner or spouse to obtain citizenship or a residency permit. Thus, for example, a Namibia court found lack of discrimination in a law that allowed heterosexual but not homosexual partners to obtain permanent residence permits. On the other hand, a South African court found that an immigration act that defined “spouse” as referring only to heterosexual relationships is discriminatory and unconstitutional.

BOTSWANA

Attorney General of the Republic of Botswana v. Unity Dow

(Botswana, Court of Appeal, [1994] (6) BCLR 1; [1991] LR Commonwealth [Const.] 574; Unity Dow, *The Citizenship Case: The Attorney General of the Republic of Botswana v. Unity Dow* (Gaborone, Lentswe La Lesedi (Pty), [1995])

Court Holding

Immigration law that denies citizenship rights to children born to a citizen mother and an alien father is unconstitutional.

Summary of Facts

In 1984, the applicant, Unity Dow married Peter Nathan Dow, an American citizen. The couple established a home in Botswana for 13 years, and had three children. According to sections 4, 5, and 13 of the Citizenship (Amendment) Act of 1984, a person is considered to be a citizen of Botswana if at the time of birth, his or her father was a citizen. A child born to a citizen mother and an alien father therefore acquired citizenship only if born outside of wedlock. The applicant challenged the law as discriminatory, alleging that because she was married to a noncitizen, she could not pass her citizenship to her children. The act renders her children aliens in their home country and land of birth. She also argued that such discriminatory treatment relegated women’s legal status to that of a child. Sections 4, 5, and 13 of the act thus contravened section 7 of the constitution, which prohibits degrading treatment toward persons. The applicant further contended that the act discriminates between women married to foreign husbands and men married to foreign wives. This treatment contravenes section 3(a) of the

constitution, which prohibits discrimination on various stated grounds; neither sex nor gender is one of the stated grounds. However, a separate provision of the constitution provides that every person in Botswana is entitled to fundamental rights and freedoms, regardless of race, place of origin, color, creed, or sex. The High Court decided in favor of the applicant. It held that the immigration law was discriminatory and degrading. The Attorney General appealed against the High Court's decision.

Issue

Is the act, which denies citizenship rights to children born to a citizen mother married to a foreign father, unconstitutional?

Discussion

Under the existing law, the children, as a consequence of their minority, were registered as part of their father's residence permit. If the father failed to renew his permit, the children would be obliged to leave Botswana. Moreover, as aliens, the children could not enjoy citizenship benefits, such as a free university education. When the family left the country, the children could only travel with their father's passport, and as a result, the applicant could not return to Botswana with her children in the absence of their father. In light of these considerations, the court decided that the law was discriminatory and thus unconstitutional. In its reasoning, the High Court drew particular attention to the fact that by granting citizenship to children born outside of wedlock to a citizen mother and noncitizen father, the law compelled women "to live and bear children outside of wedlock."

The Appellate Court agreed with the decision of the High Court and stated that, notwithstanding the absence of discrimination on the ground of sex, the definition had to be read as if such discrimination were expressly mentioned therein. It concluded that reference to "sex" or "gender" must have been omitted in error.

Two justices dissented, taking issue with the majority's interpretation of the constitution.

Conclusion

The Appellate Court decided that the High Court did not err. It thus dismissed the appeal. It affirmed that the act, which denied citizenship rights to children born to a citizen mother married to a foreign father, is unconstitutional.

NAMIBIA

Chairperson of the Immigration Selection Board v. Frank and Another

(Namibia, Supreme Court, Case No. SA 8/99 [unreported]; 5 [2001] CHRLD 179–182)

Court Holding

The Constitution of Namibia and international human rights treaties do not expressly recognize same-sex and heterosexual relationships as equal. Nevertheless, the Immigration Selection Board is obligated to provide reasons for rejecting residence permits to same-sex partners.

Summary of Facts

The applicant, a German citizen, is a long-term lesbian partner of a Namibian citizen. She applied to the Immigration Selection Board for a permanent residence permit, under section 26 of the Immigration Control Act, Act No. 7 of 1993. The board rejected the application without reason. The applicant appealed to the High Court. She argued that the board's decision contradicted article 18 of the Namibian Constitution, which requires administrative bodies to act fairly and reasonably. Moreover, the board may have been biased in its decision because of the applicant's lesbian relationship. She thus specifically argued that the decision violated her constitutional rights to nondiscrimination (article 10), privacy (article 13[1]), and protection of the family (article 14). The High Court set aside the decision of the board, and directed the issuance of a residence permit. The board, alleging a lack of unjust discrimination, appealed the High Court's decision to the Supreme Court.

Issues

- (1) Did the board act unjustly in its failure to provide reasons for its decision?
- (2) Was the board's decision based on the applicant's sexual orientation, and thus discriminatory (under the constitution)?
- (3) Did the decision violate the applicant's right to privacy?

Discussion

The High Court found that by failing to lay down the policies and reasons for its decision, the board did not observe one of the principles of administrative justice, namely the *audi alteram partem* rule (the right to know and respond to a levied charge). Article 14 of the Constitution of Namibia, however, does not expressly protect homosexual relationships as part of the natural family unit. Articles 16 and 18 of the African Charter on Human and Peoples' Rights, and article 23 of the International Covenant on Civil and Political Rights likewise do not unequivocally recognize homosexual relationships.

There is no other legal ground for mandating the equal treatment of homosexuals and heterosexuals. Same-sex partners are thus legitimately denied the same protection as heterosexual partners (*Muller v. President of the Republic of Namibia and Another*, [2000] (6) BCLR 655 [Nm S] applied). The failure to include lesbian relationships within various governmental obligations under section 26(3)(g) of the act thus does not amount to discrimination.

Conclusion

The board must redecide the case. In doing so, it must respect the *audi alteram partem* rule and provide reasons for its decision. The refusal to provide the applicant with a permanent residence permit does not violate any provisions of the constitution or international treaties.

SOUTH AFRICA

National Coalition for Gay and Lesbian Equality and Others v. Minister of Home Affairs and Others

(South Africa, High Court, Cape Provincial Decision, Case No. 3988/98; [1999] (3) SA 173–191)

Court Holding

The Aliens Control Act 96 of 1991 that defines “spouse” as referring only to a partner in a heterosexual relationship is discriminatory and hence unconstitutional.

Summary of Facts

The applicant is a coalition that represents gay, lesbian, bisexual, and transgendered persons in South Africa. According to the Aliens Control Act 96 of 1991, as amended, certain criteria must be fulfilled before an alien is granted entry to the country or a residence permit. Spouses of citizens or permanent residents of South Africa, however, can be exempted from such criteria. Section 25(5) of the act limits the definition of “spouse” to a partner in a heterosexual relationship.

The applicant argued that this definition is unconstitutionally narrow. By excluding same-sex spouses, the provision violates section 9 of the South African Constitution, which prohibits discrimination based on sexual orientation.

Issue

Is the definition of spouse provided in section 25(5) of the act discriminatory, and thus contrary to section 9 of the constitution?

Discussion

The court holds that section 9 entails a two-step analysis: (i) determining whether the law differentiates between people or categories of people and, if so, (ii) whether the differentiation bears a rational connection to a legitimate government purpose. If such differentiation occurs in circumstances where there is no rational connection to a legitimate government purpose, there has been a violation of section 9(1). Notwithstanding a rational connection, the law may amount to discrimination, in which case two further questions need to be asked: (i) does the differentiation amount to discrimination? And if so, (ii) does it amount to unfair discrimination? It is presumed under the terms of section 9(5) that discrimination on the ground of sexual orientation is unfair unless it is established otherwise.

The court determined that the act favors certain types of life partnerships, specifically heterosexual partnerships. It therefore grants legal recognition and protection only to spouses of the opposite sex. Such different treatment is contrary to the basic principles of the constitution,

which include respect and protection for the diversity of identity in a pluralistic society. By failing to provide the same protection to same-sex partners, section 25(5) contravenes the constitution. That failure also promotes discriminatory stereotyping and prejudice against homosexuals.

Conclusion

Section 25(5) of the act is unconstitutional.

ZIMBABWE

Rattigan and Others v. Chief Immigration Officer and Others

(Zimbabwe, Supreme Court, [1995] (1) BCLR 1–5 at 2D and 4J; [1995] (2) SA 182 (ZSC))

Court Holding

It is a violation of the constitution for the government to refuse permanent residence status to alien husbands of women who are citizens of Zimbabwe.

Summary of Facts

The applicants are Zimbabwean women married to alien husbands. Their husbands are all subject to renewal of residence permits and deportation. As a consequence, the applicants' families cannot freely establish a permanent and stable family life in Zimbabwe. The applicants therefore sought relief from the High Court. They claimed that the refusal to grant their husbands permanent residence violated the constitution. Section 22(1) prohibits the deprivation of freedom of movement. The women argued that by denying their husbands permission to permanently live in Zimbabwe, the state equally denied the women's right to establish a place of residence. The immigration law thus indirectly restricted women's freedom of movement, as they were required to follow their husbands in order to secure their family bond.

Issue

Does an immigration law that refuses permanent residence to citizens' alien husbands violate citizens' constitutional right to freedom of movement?

Discussion

The court decided that by prohibiting alien husbands from living in Zimbabwe, the state was effectively restricting the applicants' freedom of movement. The very nature of a matrimonial relationship is the partners' capacity "to found a home, to cohabit, to have children and to live together as a family unit." The court based its decision on the reasoning provided in *Dow v. Attorney General*. It also was heavily influenced by the jurisprudence under article 8(1) of the European Convention on Human Rights. This provision establishes the importance of legal respect for the family bond.

NOTE: The *Rattigan* decision was subsequently reinforced in *Salem v. Chief Immigration Officer and Others* (1994) (2) ZLR 287 (S). In that case, the court held that if a wife was obliged to follow her husband in order to secure the family's livelihood,

her constitutional freedom of movement would be violated. The court also held that the immigration law adversely affected only those wives partially or wholly dependent on their alien husbands for support. The law was therefore discriminatory.

Conclusion

It is a violation of citizens' right to freedom of movement, as guaranteed under section 22(1) of the constitution, for an immigration law to refuse permanent residence to citizens' alien husbands.

C. SEXUAL ORIENTATION

In the context of immigration, adoption, custody, and parental rights, the courts in the region generally hold that discrimination based on sexual orientation is unconstitutional. There is, however, no unanimity among the courts on issues of the criminalization of sodomy. For example, the South African Constitutional Court ruled that the common law offense of sodomy is unconstitutional. On the other hand, the Zimbabwean Supreme Court found that the criminalization of sodomy did not contravene the nondiscrimination provision of Zimbabwe's constitution and was, in any event, reasonably justifiable given the prevailing conservative social norms.

1. Immigration

NAMIBIA

See Right to Immigration and Citizenship—Namibia: *Chairperson of the Immigration Selection Board v. Frank and Another*.

SOUTH AFRICA

See Right to Immigration and Citizenship—South Africa: *National Coalition for Gay and Lesbian Equality and Others v. Minister of Home Affairs*.

ZIMBABWE

See Right to Immigration and Citizenship—Zimbabwe: *Rattigan and Others v. Chief Immigration Officer*.

2. Adoption, Child Custody, and Parental Rights

SOUTH AFRICA

Du Toit and Another v. Minister of Welfare and Population Development and Others
(South Africa, Constitutional Court, [2003] (2) SA 198 (CC); [2002] (10) BCLR 1006 (CC))

Court Holding

An act that discriminates between heterosexual and same-sex couples in the adoption process is unconstitutional.

Summary of Facts

The applicants are same-sex life partners who plan to jointly adopt two children, a brother and sister. The Pretoria Children's Court, however, declined to approve the adoption. In its decision, the court cited sections 17(a), 17(c), and 20(1) of the Child Care Act 74 of 1983, and section 1(2) of the Guardianship Act 192 of 1993, which limit the right to jointly adopt a child to married couples. The applicants then challenged the constitutionality of these provisions before the Pretoria High Court. The applicants argued that the provisions violated section 9(3) of the South African Constitution because they discriminated against the applicants on the basis of sexual orientation. Following the withdrawal of the respondents from the case, the High Court ruled that the named provisions of the Child Care Act and the Guardianship Act violated constitutional rights of equality. The court thus ordered that these sections be read to include the right of same-sex partners to jointly adopt a child. The applicants applied to the Constitutional Court for confirmation of the High Court's judgment.

Issue

Should the decision of the High Court, which held the acts' provisions unconstitutional, be confirmed?

Discussion

By permitting only married couples to jointly adopt a child, the Guardianship Act assumes that same-sex life partners are incapable or should not jointly assume guardianship of children. The same assumption is deduced from section 17 of the Child Care Act. Excluding competent same-sex partners from the adoption of children solely on the basis of their sexual orientation contravenes section 28(2) of the constitution, which requires the law to consider a child's best interests. The acts deprive children of the possibility for family affection and love. By failing to recognize the applicants as parents, the acts also diminish the applicants' dignity. More broadly, prohibiting same-sex couples from jointly adopting children discriminates against the applicants on the basis of their sexual orientation and marital status.

Conclusion

The High Court's decision is confirmed. The acts should grant same-sex partners the right to jointly adopt children.

J and B v. Director General, Department of Home Affairs and Others

(South Africa, Constitutional Court, CCT46/02; [2003] (5) BCLR 463; [2003] ZACC 3)

Court Holding

It is unconstitutional to discriminate between heterosexual spouses and same-sex partners in the granting of parental rights to a child conceived through artificial insemination.

Summary of Facts

The applicants are long-term same-sex partners who conceived a child through artificial insemination. The second applicant accepted sperm from an anonymous donor and ova from the first applicant; carried the fetuses; and gave birth to twins in August 2001. The applicants were prohibited, however, from jointly registering as parents of the child.

Under the Children's Status Act of 1987, only the second applicant is permitted to register as a birth mother. Section 5 of the act establishes that a child conceived through artificial insemination is considered the legitimate child of a heterosexual married couple, even if they use the sperm or ovum of a third person. This definition expressly applies to heterosexual married couples only. The applicants therefore challenged section 5 before the Durban High Court. They contended that it discriminated on the basis of sexual orientation and thus contravened section 9(3) of the constitution, which prohibits discrimination based on sexual orientation. The High Court ordered that the act be read so as to give same-sex partners the same parental status enjoyed by heterosexual couples. The applicants asked the Constitutional Court to affirm this holding. The respondents did not oppose the holding.

Issue

Should the Constitutional Court affirm the holding of the High Court that section 5 of the act is discriminatory, and therefore violates section 9(3) of the constitution?

Discussion

Section 5 recognizes only heterosexual married couples as legitimate parents of a child conceived through artificial insemination. As a consequence, same-sex partners do not enjoy the same rights as heterosexual couples. Moreover, the differential treatment is based solely on the sexual orientation of the couple. While section 9(3) of the constitution prohibits discriminatory treatment based on sexual orientation, section 36 permits "reasonable and justifiable" limitations to constitutional rights. In this case, however, the respondents failed to submit any justification for restricting same-sex partners' constitutional right to nondiscrimination. There was no reasonable and justifiable reason for precluding same-sex couples from being recognized as parents of a child conceived through artificial insemination. The court therefore found section 5 of the act in violation of the constitution. The court ordered that section 5 be read so as to give same-sex partners the same parental status enjoyed by heterosexual couples.

Conclusion

Section 5 of the act contravenes section 9(3) of the constitution.

V v. V

(South Africa, High Court, Cape Provincial Division, [1998] (4) SA 169)

Court Holding

A mother's sexual orientation should not bar her right to joint custody.

Summary of Facts

The plaintiff and defendant were married with two children. The plaintiff applied to the court for a decree of divorce, child custody, and other ancillary relief. He claimed that because the defendant was lesbian, the court should prohibit the defendant from sharing the same bedroom or floor with any person during unsupervised visits with their children. He was concerned that if his children learned that their mother lived with a lesbian partner, they would be influenced by and therefore develop homosexual attitudes and practices. The defendant requested that the court grant a decree for joint custody. For the past two years, both parties had informally shared custody of their children.

Issue

Is the sexual orientation of a mother a legitimate ground for limiting her right to child custody?

Discussion

The court received expert testimony that the defendant's sexual orientation was an irrelevant consideration for child custody. According to the South African Constitution, namely its provision against discrimination based on sexual orientation, the law cannot regard homosexuality as abnormal. Nevertheless, the court held that the plaintiff is entitled to be concerned about harm to his children. The question is whether the plaintiff's fear is reasonable.

In child custody disputes, the child's best interest is the paramount consideration. The mother's right to nondiscrimination may thus be limited if the court determines that a custody arrangement is likely to pose any risk to the child. While the court recognized that lesbian relationships are not inherently wrong or abnormal, it nevertheless must consider the social stigma that a child might suffer from his or her peers and society in general. As a consequence, in certain circumstances, the state may be justified in discriminating against a lesbian mother in child custody decisions.

In the present case, however, the limitation of the defendant's right to nondiscrimination is unjustified. There is no legitimate reason to deny her custody of her children on the basis of her sexual orientation. This is true despite concerns that the children will come to recognize the social stigma under which their mother lives.

Conclusion

It is unfair to limit the defendant's right to custody of her children on the basis of her sexual orientation. Joint custody of children is thus declared.

3. Law of Sodomy

SOUTH AFRICA

National Coalition for Gay and Lesbian Equality and Another v. Minister of Justice and Others

(South Africa, Constitutional Court, Case No. CCT 11/98; [1999] (1) SA 6 – 70)

Court Holding

The common law offense of sodomy is unconstitutional.

Summary of Facts

The High Court declared the common law offense of sodomy and unnatural sexual acts between men unconstitutional. Under section 172(2)(a) of the constitution, the Minister of Justice brought the case before the Constitutional Court for confirmation of the High Court's declaration.

Issue

Did the High Court correctly declare the common law offense of sodomy to be unconstitutional?

Discussion

Section 9(3) of the constitution prohibits unfair discrimination based on sexual orientation, unless the government can demonstrate that the discrimination is fair. Gay men constitute a minority of South African society, and suffer severe disadvantages on the basis of their sexual orientation. The purpose of the common law offense of sodomy is to criminalize conduct that does not conform to the moral and religious values of a particular social group. The offense therefore stigmatizes all gay men as criminals, and subjects them to hostile social reactions. The court decided that this form of discrimination is not justifiable under section 9 of the constitution.

The court held that the common law offense also violates the dignity and privacy of gay men, as protected respectively by sections 10 and 14 of the constitution. At the heart of the right to privacy is the right to establish intimate human relationships without interference by the state or society. This includes the right to establish sexual relationships between two consenting adult men.

The desire to respect the moral views of a particular section of the community is not a legitimate justification for the limitation of a person's fundamental constitutional rights.

Conclusion

The High Court correctly declared that the common law offense of sodomy is unconstitutional.

ZIMBABWE

Banana v. State

(Zimbabwe, Supreme Court, [2000] (4) LRC 621; [2000] (8) BHRC 345; 3 [2001] CHRLD 43–44)

Court Holding

The common law offense of sodomy is not contrary to section 23 of the Constitution of Zimbabwe.

Summary of Facts

Mr. Banana, the appellant, challenged the constitutionality of the common law offense of sodomy, which criminalizes consensual anal intercourse between adult men. He argued that the law discriminates against gay men on the basis of their sexual orientation. He then claimed that discrimination based on sexual orientation was contrary to section 23 of the constitution, which prohibits discrimination on various grounds.

Issue

Does the offense of sodomy violate the right to equality, as protected under section 23 of the constitution?

Discussion

The court held that the common law offense of sodomy differentiates between gay and heterosexual men on the ground of sexual orientation. It does not distinguish between men and women. The law does not prohibit anal intercourse between men and women. As a consequence, the law is not contrary to section 23 of the constitution, as it does not discriminate on the basis of a specifically prohibited ground (in this case, gender). Moreover, the law in question would survive the constitutional test of whether it was “not shown to be reasonably justifiable in a democratic society.” Given the prevailing conservative social norms and values against homosexual behavior, it is not appropriate for the undemocratically appointed court to liberally interpret the constitution (*dicta* of Gubbay CJ in *Smyth v. Ushewokunze* [1997] (2) ZLR 544 [S], 553, [1997] (2) CHRLD 248 [Zim SC]).

Conclusion

The common law offense of sodomy is not contrary to section 23 of the constitution.

Dissent

The law against sodomy discriminates on the ground of gender because it solely criminalizes actions engaged in by two men, but not by a man and a woman. In considering whether the law has been shown to not be reasonably justifiable in a democratic society, the court must consider whether (1) the legislative objective that the limitation is designed to promote is sufficiently important to justify overriding the fundamental right concerned; (2) the measures designed or framed to meet the legislative objective are rationally connected to it and are not arbitrary,

unfair, or based on irrational considerations; and (3) the means used to impair the right or freedom are no more than is necessary to accomplish the objective. With respect to the first consideration, Justice Gubbay stated that he was not persuaded that in a democratic society it is reasonably justifiable to make an activity criminal because a segment, maybe a majority, of the citizenry consider it to be unacceptable. Moreover, he did not consider enforcing the private moral opinions of a section of the community to be a valid objective. He stated that the courts cannot be dictated to by public opinion, and that public opinion cannot replace the courts' duty to interpret the constitution and enforce its mandates. With respect to the second requirement, Justice Gubbay opined that it is irrational to criminalize anal sexual intercourse between consenting male adults, and yet recognize that it is not an offense if committed between a man and a woman. Finally, with respect to the third requirement, Justice Gubbay stated that the impact of discriminatory criminal sanctions on homosexuals is very severe and tends to increase already existing societal prejudices. Thus, in his opinion, the criminalization of anal sexual intercourse between consenting male adults in private is far outweighed by the harmful and prejudicial impact doing so has on gay men.

WEBSITE RESOURCES

AFRICA ACTION

<http://www.africaaction.org/action/women.htm>
Africa Action is a U.S.-based organization that works for political, economic, and social justice in Africa. This Web site provides a rich collection of documents on and links to activities concerning women's rights in various African countries. It also has links to other relevant Web sites.

AFRICAN HUMAN RIGHTS RESOURCES CENTER

<http://www1.umn.edu/humanrts/africa>
This Web site provides a collection of human rights resources specially related to Africa. These include, for example, various international human rights instruments and sites relevant to the African Commission on Human and Peoples' Rights, and Africa-related non-governmental organizations.

AFRICAN LAW ASSOCIATION

<http://www.uni-bayreuth.de/departments/afrikarecht/kencas.html>
This Web site contains a collection of Kenyan court decisions.

AFRICAN RIGHTS

<http://africa.oneworld.net>
This Web site addresses African issues from an African perspective. Among others, it includes articles on women and family life, women and access to education, and obstacles to justice.

CONSTITUTIONAL COURT OF SOUTH AFRICA

This Web site contains full text and summarized judgments, court records, and forthcoming hearings of the Constitutional Court of South Africa.

INTERNATIONAL CENTRE FOR THE LEGAL PROTECTION OF HUMAN RIGHTS (INTERIGHTS)

<http://www.interights.org>
This Web site contains case summaries of decisions by Commonwealth Courts and international tribunals.

LAWAFRICA

<http://www.lawafrica.com>
This Web site contains summaries of the latest cases from East Africa (e.g., Kenya, Tanzania, and Uganda). Subscriptions to LawAfrica Reports, and to East Africa Law Reports are available through this Web site.

LEGAL ASSISTANCE CENTRE (WINDHOEK)

<http://www.lac.org.na>
This is a public interest law center committed to creating a human rights culture and promoting access to justice in Namibia. The Web site contains full text decisions of cases concerning HIV/AIDS, gender, land, and the environment.

NIGERIA INTERNET LAW REPORTS

<http://www.nigeria-law.org/LawReporting.htm>
This Web site contains selected judgments of the Supreme Court of Nigeria.

SUPREME COURT OF APPEAL OF SOUTH AFRICA

<http://wwwserver.law.wits.ac.za/sca/index.php>
This Web site contains the decisions of the Supreme Court of Appeal of South Africa.

WEST AFRICA REVIEW

<http://www.westafricareview.com/war/vol2.1/>
<http://www.westafricareview.com/war/vol2.1/2.1war.htm>
This is an e-journal published by the Africa

Resource Centre and is devoted to the promotion of research and scholarship of importance to the global African community and friends of Africa.

**WESTLEY—ELECTRONIC JOURNAL OF
AFRICANA BIBLIOGRAPHY**

<http://www.lib.uiowa.edu/proj/ejab/4/index.html>

This is an online journal of bibliographies concerning all aspects of Africa. Its citations reference over 500 journal articles and chapters from various secondary sources. The site also has a Country and Ethnic Group Index.

CASES AVAILABLE IN FULL TEXT

- Akande v. Oyewole*, (Nigeria, Court of Appeal, Ibadan Division, [2003] 6 W.R.N. 36-53).
- Ashipa v. Ashipa*, (Nigeria, High Court of Lagos State, [2002] 3 L.H.C.R. 60-84).
- Attorney General of the Republic of Botswana v. Unity Dow*, (Botswana, Court of Appeal, 1994 (6) BCLR 1; [1991] L.R. Commonwealth (Const.) 574; Unity Dow, *The Citizenship Case: The Attorney General of the Republic of Botswana v. Unity Dow* (Gaborone, Lentswe La Lesedi (Pty), 1995).
- Banana v. State*, (Zimbabwe, Supreme Court, 2000 4 LRC 621; 2000 8 BHRC 345; 3 (2001) CHRLD pp. 43-44).
- Bhe v. Magistrate, Khayelitsha and Others*, (South Africa, Constitutional Court, 2004, Case No. 49/03).
- Case and Another v. Minister of Safety and Security and Others; Curtis v Minister of Safety and Security and Others*, (South Africa, Constitutional Court, 1996 (3) SA 617 (CC); 1996 (5) BCLR 609 (CC); (1996) 1 BHRC 541).
- Christian Lawyers' Association v. National Minister of Health and Others*, (South Africa, High Court, Transvaal Provincial Division, 2004, Case No. 7728/2000).
- Christian Lawyers' Association of South Africa and Others v. Minister of Health and Others*, (South Africa, High Court, Transvaal Provincial Division, Case No. 1629/97; 1998(1) BCLR 1434 (T); [1999] 3 LRC 203).
- De Reuck v. Director of Public Prosecution, Witwaters and Local Division and Others*, (South Africa, Constitutional Court, 2003 (12) BCLR 1333).
- Du Toit and Another v. Minister of Welfare and Population Development and Others*, (South Africa, Constitutional Court, 2003 (2) SA 198 (CC); 2002 (10) BCLR 1006 (CC)).
- Folami v. Cole*, (Nigeria, Supreme Court, [1990] 2 NWLR 445-457).
- Fourie v. The Minister of Home Affairs*, (South Africa, Constitutional Court (CCT 25/03)).
- Hoffmann v. South African Airways*, (South Africa, Constitutional Court, 2001 (10) BHRC 571; 3 CHRLD pp. 146-148; 2002 (2) SA 628).
- Ibe-Lamberts v. Ibe-Lamberts*, (Nigeria, High Co8
- Irvin and Johnson v. Trawler and Line Fishing Union and Others*, (South Africa, Labour Court, Case No. C1126/2002 (Unreported)).
- J and B v. Director General, Department of Home Affairs and Others*, (South Africa, Constitutional Court, CCT46/02; 2003 (5) BCLR 463; [2003] ZACC 3).
- Krugel v. Krugel*, (South Africa, High Court, Transvaal Provincial Division, 2003 (6) SA 220; Case No. 29567/2002).
- Lloyd Chaduka and Morgenster College v. Enita Mandizvidza*, (Zimbabwe, Supreme Court, Judgment No. S.C. 114/2001, Civil Appeal No. 298/2000).
- Mabuza v. Mbatha*, (South Africa, High Court, Cape of Good Hope Provincial Division, 2003

(4) SA 218; 2003 (7) BCLR 743 (C)).
Magaya v. Magaya, (Zimbabwe, Supreme Court, [1999] 3 LRC 35; (1999) 2 CHRLD 414).

Mfolo and Others v. Minister of Education, (South Africa, Supreme Court, Bophuthatswana and General Division, 1992(3) L.R.C 181; 1994 BCLR 136).

Mthembu v. Letsela and Another, (South Africa, Supreme Court of Appeal, 2000 (3) SA 867 (SCA)).

National Coalition for Gay and Lesbian Equality and Others v. Minister of Home Affairs and Others, (South Africa, High Court, Cape Provincial Decision, Case No. 3988/98; 1999 (3) SA 173-191).

National Coalition for Gay and Lesbian Equality and Another v. Minister of Justice and Others, (South Africa, Constitutional Court, Case No. CCT 11/98; 1999 (1) SA 6-70).

Nyumbani Childrens Home v. The Ministry for Education and The Attorney General, (Kenya, High Court at Nairobi; Application No. 1521 of 2003 (O.S.)).

PFG Building Glass (Pty) Ltd v. Chemical Engineering Pulp Paper Wood and Allied Workers' Union (CEPPWAWU) and Others, (South Africa, Labour Court, (2003) 24 ILJ 974 (LC); Case No. J90/03).

Pinion v. Pinion, (South Africa, High Court, Durban and Coast Local Division, 1994 (2) SA 725; Case No. 7575/93).

President of the Republic of South Africa and

another v. Hugo, (South Africa, Constitutional Court, 1997 (6) BCLR 708; 1997 (4) SA 1; [1997] ZACC 4).

Prinsloo v. RCP Media Ltd (t/a Rapport), (South Africa, High Court, 2003 (4) SA 456; Case No. 32983/2002).

Prior v. Battle and Others, (South Africa, High Court, Transkei Division, 1999(2) SA 850, Case No. 0405/98).

Rattigan and Others v. Chief Immigration Officer and Others, (Zimbabwe, Supreme Court, 1995(1) BCLR 1-5 at 2D and 4J; 1995 (2) SA 182 (ZSC)).

Ryland v. Edros, (South Africa, High Court, Cape Provincial Division, 1997(2) SA 690, Case No. 16993/92).

S v. Baloyi, (South Africa, Constitutional Court, 2000 (2) SA 425, Case No. 29/99).

S v. J, (South Africa, Supreme Court of Appeal, 1998(2) SA 984, Case No. 35/97).

S v. Jordan and Others, (South Africa, Constitutional Court, 2002 (6) SA 642 (CC); 2002 (11) BCLR 1117 (CC)).

Satchwell v. President of The Republic of South Africa, (South Africa, Constitutional Court, 2003(4) SA 266 (CC); Case No. CCT 48/2002).

Setto v. Motsibbe and Another, (Nigeria, Court of Appeal, Kaduna Division, [2002] 5 NWLR 121, [2002] F.W.L.R. 263).

Sharu v. Umma, (Nigeria, Court of Appeal, Kaduna Division, [2002] F.W.L.R. 766).

Student Representative Council of Molepolole College of Education v. Attorney General, (Botswana, Court of Appeal, [1995] 3 LRC 447).
Treatment Action Campaign, Dr. Haroon Saloojee, Children's Rights Centre v. Minister of Health and Others, (South Africa, High Court, Transvaal Provincial Division, CCT 8/02, Case No. 21182/2001).

Upahar v. State, (Nigeria, Court of Appeal, Jos Division, [2003] F.W.L.R. 1513).

V v. V, (South Africa, High Court, Cape Provincial Division, 1998 (4) SA 169).

Van Den Berg v. Van Den Berg, (South Africa, High Court, Transvaal Provincial Division, 2003 (6) SA 229; Case No. 22004/2001).

ENDNOTES

- 1 The compilation is restricted to African Commonwealth countries and Zimbabwe due to language and accessibility constraints.
- 2 Among the articles addressing women's reproductive and sexual rights is article 14, which provides that women have the right to control their fertility; the right to decide whether to have children, as well as the number and spacing of children; the right to choose any method of contraception; the right to self-protection and to be protected against sexually transmissible infections, including HIV/AIDS; the right to be informed about one's health status and the health of one's partner; and the right to have family planning education.
- 3 The Women's Rights Protocol has thus far been ratified by five African states: Comoros, Libya, Lesotho, Namibia, and Rwanda. Pursuant to article 29, it will enter into force 30 days after the deposit of the fifteenth instrument of ratification.
- 4 The Protocol to the African Charter on Human and Peoples' Rights Establishing an African Court on Human and Peoples' Rights entered into force after Comoros became the fifteenth state to ratify this protocol on December 26, 2003. According to article 34(3) of the protocol, "the Protocol shall come into force thirty days after fifteen instruments of ratification or accession have been deposited." The ratification by Comoros thus paved the way for the entry into force of the protocol on January 25, 2004, and for the establishment of the court. To date, the other ratifying states are: Algeria, Burkina Faso, Burundi, Côte d'Ivoire, Gabon, Gambia, Lesotho, Libya, Mali, Mozambique, Mauritius, Niger, Nigeria, Rwanda, Senegal, South Africa, Togo, and Uganda. Once established, the court will consider cases of human rights violations referred to it by the African Commission on Human and Peoples' Rights (African Commission), established pursuant to the African Charter on Human and Peoples' Rights (African Charter) and states parties to the protocol, and, where a state party accepts such a jurisdiction, by individuals and non-governmental organizations. Unlike the African Commission, the African Court will have the authority to issue a binding and enforceable decision on cases brought before it.
- 5 To make searches for cases as convenient as possible, the compilation maintains the original citation formats of the cases.
- 6 *Ministry of Safety and Security and Another v. Carmichele*, (South Africa, Supreme Court of Appeal, [2004] (2) BCLR 133 (SCA)).
- 7 Alan Guttmacher Institute, *Sharing Responsibility: Women, Society and Abortion Worldwide* (New York: 1999), 35, <http://www.agi-usa.org/pubs/sharing.pdf> (accessed November 11, 2004).
- 8 Alan Guttmacher Institute, *Sharing Responsibility*, 25, chart 4.2.
- 9 Center for Reproductive Rights, *The World's Abortion Laws* (New York: 2004), http://www.reproductiverights.org/pub_fac_abortion_laws.html (accessed November 11, 2004).
- 10 See Alan Guttmacher Institute, *Sharing Responsibility*, 20 and 22.
- 11 *Id.*
- 12 Joint United Nations Programme on HIV/AIDS (UNAIDS) and World Health Organization, *AIDS Epidemic Update: December 2004*, UNAIDS/04.45E (Geneva: 2004), 19 and 24, http://www.unaids.org/wad2004/EPI_1204_pdf_en/EpiUpdate04_en.pdf (accessed January 13, 2005).
- 13 Center for Reproductive Rights, *Reproductive Rights 2000: Moving Forward* (New York: 2000), 33, 59, and 62, http://www.reproductiverights.org/pub_bo_rr2k.html (accessed January 13, 2005).
- 14 Center for Reproductive Rights, *HIV/AIDS: Reproductive Rights on the Line* (New York: 2002), http://www.reproductiverights.org/pub_bp_hiv.html (accessed November 12, 2004).
- 15 Committee on Economic, Social and Cultural Rights, *General Comment 3: The Nature of States Parties Obligations (Art. 2 para. 1)*, para. 10, <http://www.ohchr.org/english/bodies/cescr/comments.htm> (accessed November 12, 2004).
- 16 Human Rights Watch, *Policy Paralysis: A Call for Action on HIV/AIDS-Related Human Rights Abuses Against Women and Girls in Africa* (New York: 2003), <http://www.hrw.org/reports/2003/africa1203/index.htm> (accessed June 18, 2004).

