

12. Realising universal rights in national jurisdictions

MCBAIN V. STATE OF VICTORIA AND OTHERS FEDERAL COURT OF AUSTRALIA, AUSTRALIA¹

Sundberg J
28 July 2000

Discrimination

Marital status – Restriction on fertility treatment unjustified

The applicant, a gynaecologist specialising in reproductive technology, sought a declaration that section 8 of the Infertility Treatment Act 1995² (Vic) (the State Act) was inoperative on the grounds that it was inconsistent with section 22 of the Sex Discrimination Act 1984 (Cth) (SDA).³

In granting the declaration, it was held that:

1. The word 'services' should be given a liberal meaning within the meaning of sections 4⁴ and 22 of the SDA. In this context 'services' include fertility treatment administered by a medical practitioner. Further, given that different treatments are covered by the same legislative scheme, the State Act, subject to the same eligibility requirements and capable of being provided to both sexes they are not exempted by section 32 SDA.⁵

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1. Source: INTERIGHTS, the International Centre for the Legal Protection of Human Rights.
 2. Section 8(1) provides that: 'A woman who undergoes a treatment procedure must – (a) be married and living with her husband on a genuine domestic basis; or (b) be living with a man in a de facto relationship'.
 3. Section 22 provides *inter alia*: (1) 'It is unlawful for a person who, whether for payment or not, provides goods or services, or makes facilities available, to discriminate against another person on the ground of the other person's sex, marital status, pregnancy or potential pregnancy: (a) by refusing to provide the other person with those goods or services or to make those facilities available to the other person; (b) in the terms or conditions on which the first-mentioned person provides the other person with those goods or services or makes those facilities available to the other person ...'
 4. Section 4(1) provides *inter alia* that: '*services* includes: (d) services of the kind provided by the members of any profession or trade.
 5. Section 32 provides that: 'Nothing in division 1 or 2 applies to or in relation to the provision of services the nature of which is such that they can only be provided to members of one sex'.

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2. Section 8 of the State Act provides that a woman's marital status, namely her status as a married woman or living in a de facto relationship, is an essential requirement for the availability of treatment. In this regard, section 8 treats unmarried women not living in such a de facto relationship less favourably by refusing them fertility treatment contrary to section 22 of the SDA, which makes it unlawful for a person to refuse to provide a service to another on the ground of the latter's marital status. As the two sections are directly inconsistent, section 8 is inoperative by reason of section 109 of the constitution⁶. Moreover, any provisions in the State Act that are, in part, dependent upon the operation of section 8 are also inoperative to the same extent.
3. Nor is section 8 saved by section 7B⁷ of the SDA on the grounds that to deny an unmarried woman such treatment amounts to direct and not indirect discrimination.

FOR THE APPLICANT: A C ARCHIBALD, QC, AND S MOLONEY

FOR THE FIRST AND SECOND RESPONDENTS: P TATE

FOR THE FOURTH RESPONDENT: D F R BEACH

FOR THE AUSTRALIAN CATHOLIC BISHOPS CONFERENCE AND THE AUSTRALIAN EPISCOPAL CONFERENCE OF THE ROMAN CATHOLIC CHURCH AS AMICUS CURIAE: J G SANTAMARIA, QC

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6. Section 109 provides that: 'When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail and the former shall, to the extent of the inconsistency, be invalid'.
 7. Section 7B provides that: '(1) A person does not discriminate against another person by imposing, or proposing to impose, a condition, requirement or practice that has, or is likely to have, the disadvantaging effect mentioned in subsection 5(2), 6(2) or 7(2) if the condition, requirement or practice is reasonable in the circumstances. (2) The matters to be taken into account in deciding whether a condition, requirement or practice is reasonable in the circumstances include: (a) the nature and extent of the disadvantage resulting from the imposition, or proposed imposition, of the condition, requirement or practice; and (b) the feasibility of overcoming or mitigating the disadvantage; and (c) whether the disadvantage is proportionate to the result sought by the person who imposes, or proposes to impose, the condition, requirement or practice'.

WOODALL V. R
COURT OF APPEAL, BARBADOS⁸

Waterman JA

Williams JA

Connell JA (AG)

17 November 2004, 29 November 2005

Criminal law

Trial – Summing-up – Identification – Alibi – Corroboration – Age – Defendant appealing conviction for serious indecency with a minor

The defendant was convicted of committing an act of serious indecency, contrary to Section 12(2) of the Sexual Offences Act, with a 15-year-old boy and was sentenced to 10 years' imprisonment. He appealed both his conviction and sentence. The defendant's defence had been one of alibi. The principal issue for the court was whether it was necessary to direct the jury on identification in circumstances where the complainant and the accused were known to each other and where the defence was one of alibi. The court addressed three of the grounds of appeal **(i) alibi**: whether the trial judge's directions on alibi were adequate; **(ii) identification**: whether the trial judge had erred in law in that his directions on identification were inadequate and confusing and he had failed to tell the jury that an honest and credible witness could be a mistaken witness and to warn the jury about the possible unreliability of the identification evidence; and **(iii) warnings on absence of corroboration and age**: whether the trial judge had failed to warn the jury about the possible unreliability of the evidence of the complainant in view of the absence of corroboration and of his age.

It was held *inter alia* that:

3. The statutory requirement in the Sexual Offences Act to warn the jury that it might be unsafe to find the accused guilty in the absence of corroboration compelled the judge to give a warning where corroboration was absent, even in identity cases. Further, a warning was appropriate, as every element of the charge had to be proved, not only the identity of the offender, but also the ingredients of the offence. For a judge to draw to the jury's attention his or her statutory obligation, without more, as in the instant case, did not constitute giving a proper warning to the jury. The judge, depending on the circumstances, was generally required to go further and to explain the reasons for the warning and the relevance of the warning to the particular facts of the case. The warning in the instant case had not complied with established rules of practice to use clear and simple language that would, without any doubt, convey to the jury that there was a danger of convicting on the complainant's evidence alone. The important consideration was the form of the

8. Source: *The West Indian Reports* (2005) 72 WIR 84

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warning. The aim of any direction to a jury had to be to provide realistic, comprehensible and common sense guidance to enable them to avoid pitfalls and to come to a fair and just conclusion as to the guilt or innocence of the defendant. In the instant case, the judge should have warned the jury that sexual complaints were made for different reasons, and sometimes for no reason at all; that the evidence might be unreliable and of matters that might cause it to be unreliable. He could then have related the evidence to the warning and invited the jury to consider, for example, whether the fact that the complainant was promised a large sum of money, which he did not receive after completion of the test, may have caused him to make false allegations of indecent assault.⁹

FOR THE APPELLANT: A PILGRIM AND A MITCHELL-GITTENS

FOR THE RESPONDENT: MANILA RENEE

9. Per Curiam. In cases where the object of the sexual offence was a woman or girl, some of the older forms of warning on corroboration were disparaging and reinforced false stereotypes. They should no longer be followed and a judge should take into account the provisions of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) ratified by Barbados on 16 October 1980, which sought to eliminate prejudices and practices based on stereotyping the behaviour of women.

**ROCHES V. WADE as and representing the Managing
Authority of Catholic Public Schools
SUPREME COURT, BELIZE**

Conteh CJ

30 April 2004

Discrimination

Unmarried mother – Dismissal from position as teacher violation of constitutional rights

R, an unmarried mother was released from her duties as a teacher, having failed to comply with the terms of an alleged contract made with the 'Toledo Catholic Schools Management' '**...to live according to Jesus' teaching on marriage and sex...**' R challenged the decision before the Supreme Court, arguing that her dismissal constituted a violation of section 16(2)¹⁰ of the Belize constitution, as it discriminated against her on the grounds of gender. In addition, R also argued that the refusal of the respondent to reinstate her to her position as a teacher after being required to do so by the Chief Education Officer of Belize in accordance with the Education Act – Chapter 36 of the Laws of Belize, Revised Edition 2000, and the Rules¹¹ made thereunder was illegal and in breach of its statutory duty and further constituted a violation of section 15(1)¹² of the Belize constitution, as the refusal to reinstate infringed her right to work.

In granting the applications, it was held that:

1. Belize has been a signatory to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) since 7 March 1990 and it ratified same

10. Section 16(2) provides: 'Subject to the provisions of subsections (6), (7) and (8) of this section, no person shall be treated in a discriminatory manner by any person or authority'. Section 16(3) provides: 'In this section, the expression "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by sex, race, place of origin, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description'.

11. The Education Rules 2000 (S.I. No. 92 of 2000), Rule 92(1) provide: 'Managing Authorities shall have the authority to prescribe and to enforce regulations and standards governing the dress and conduct of staff, provided that such regulations: (a) are approved by the relevant Regional Council; (b) do not seek to impose restrictions or requirements outside the parameters of generally acceptable behaviour and standards; (c) are clearly stated and made explicitly known to staff in writing; and (d) are not prejudicial to the fundamental rights of the person'.

12. Article 15(1) provides: 'No person shall be denied the opportunity to gain his living by work which he freely chooses or accepts, whether by pursuing a profession or occupation or by engaging in a trade or business, or otherwise'.

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on 16 May 1990. Article 11, paragraph (2) subparagraph (a) of CEDAW¹³ makes clear that states parties shall *inter alia* take appropriate measures to prohibit dismissal on grounds of pregnancy and discrimination in dismissals on the basis of marital status.

2. Nothing under the Education Act *supra* and its rules conflicts with the provisions of article 11(2)(a) of CEDAW.
3. The refusal of the respondent to reinstate the applicant after being so required to do so by the Chief Education Officer of Belize was in breach of the statutory duties of the respondent and also constituted an infringement of the applicant's constitutional right to work, pursuant to the provisions of section 15(1) of the Belize constitution.

FOR THE APPLICANT: DEAN BARROW WITH MAGALI MARIN YOUNG

FOR THE RESPONDENT: PHILIP ZUNIGA

13. Article 11, paragraph (2)(a) of CEDAW provides: '2. In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, states parties shall take appropriate measures: (a) To prohibit, subject to the imposition of sanctions, dismissal on grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status'.

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**ATTORNEY GENERAL OF BOTSWANA V. UNITY DOW
COURT OF APPEAL, BOTSWANA¹⁴**

Amissah JP, Aguda, Bizos, Schreiner and Puckrin JJA
3 July 1992

Human Rights

Equality and non-discrimination – Right to freedom of movement – Citizenship – Nationality of children – Denial of citizenship of Botswana to children born to citizen mother married to non-citizen father – Whether discrimination on the ground of sex or violation of mother's freedom of movement

The respondent, Ms Dow, was a citizen of Botswana. On 7 March 1984, she married Mr Peter Nathan Dow, a citizen of the United States of America, who had been resident in Botswana for nearly 14 years. Prior to their marriage, one child was born to them on 29 October 1979, and after their marriage two more children were born, on 26 March 1985 and 26 November 1987 respectively. All three children were born in Botswana. The first child was a citizen of Botswana by virtue of section 21 of the constitution, whereas the two children born during the marriage were not citizens of Botswana pursuant to section 4(1) of the Citizenship Act 1984, which provides as follows:

(1) A person born in Botswana shall be a citizen of Botswana by birth and descent if, at the time of his birth: (a) his father was a citizen of Botswana; or (b) in the case of a person born out of wedlock, his mother was a citizen of Botswana.

Therefore, by virtue of section 4 of the Citizenship Act, a child who is born to a citizen mother, who is married to a non-citizen father, cannot be a citizen of Botswana. Similarly, section 5(1), which relates to the citizenship of children born outside Botswana, provides as follows:

5(1) A person born outside Botswana shall be a citizen of Botswana by descent if, at the time of his birth: (a) his father was a citizen of Botswana; or (b) in the case of a person born out of wedlock, his mother was a citizen of Botswana.

On 11 June 1991, Ms Dow made an application to the High Court of Botswana, contending that sections 4 and 5 of the Citizenship Act violated her constitutional

14. Source: Emerton *et al.* (eds.) *International Women's Rights Cases*, Routledge-Cavendish Publishing, p.572.

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rights and freedoms, including the right to equal protection of the law irrespective of sex,¹⁵ personal liberty,¹⁶ protection from being subjected to degrading

15. Section 3: Fundamental rights and freedoms of the individual

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

16. Section 5: Protection of right to personal liberty

- (1) No person shall be deprived of his or her personal liberty save as may be authorized by law in any of the following cases, that is to say – (a) in execution of the sentence or order of a court, whether established for Botswana or some other country, in respect of a criminal offence of which he or she has been convicted; (b) in execution of the order of a court of record punishing him or her for contempt of that or another court; (c) in execution of the order of a court made to secure the fulfilment of any obligation imposed on him or her by law; (d) for the purpose of bringing him or her before a court in execution of the order of a court; (e) upon reasonable suspicion of his or her having committed, or being about to commit, a criminal offence under the law in force in Botswana; (f) under the order of a court or with the consent of his or her parent or guardian, date when he or she attains the age of 18 years; (g) for the purpose of preventing the spread of an infectious or contagious disease; (h) in the case of a person who is, or is reasonably suspected to be, of unsound mind, addicted to drugs or alcohol, or a vagrant, for the purpose of his or her care or treatment or the protection of the community; (i) for the purpose of preventing the unlawful entry of that person into Botswana, or for the purpose of effecting the expulsion, extradition or other lawful removal of that person from Botswana, or for the purpose of restricting that person while he or she is being conveyed through Botswana in the course of his or her extradition or removal as a convicted prisoner from one country to another; (j) to such extent as may be necessary in the execution of a lawful order requiring that person to remain within a specified area within Botswana or prohibiting him or her from being within such an area, or to such extent as may be reasonably justifiable for the taking of proceedings against that person relating to the making of any such order, or to such extent as may be reasonably justifiable for restraining that person during any visit that he or she is permitted to make to any part of Botswana in which, in consequence of any such order, his or her presence would otherwise be unlawful; or (k) for the purpose of ensuring the safety of aircraft in flight.
- (2) Any person who is arrested or detained shall be informed as soon as reasonably practicable, in a language that he or she understands, of the reasons for his or her arrest or detention.

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treatment,¹⁷ freedom of movement,¹⁸ and protection from discrimination on the basis of sex.¹⁹ Horwitz Ag J granted Ms Dow's application, declaring both sections 4 and 5 of

(3) Any person who is arrested or detained – (a) for the purpose of bringing him or her before a court in execution of the order of a court; or (b) upon reasonable suspicion of his or her having committed, or being about to commit, a criminal offence under the law in force in Botswana, and who is not released, shall be brought as soon as is reasonably practicable before a court; and if any person arrested or detained as mentioned in paragraph (b) of this subsection is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him or her, he or she shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he or she appears at a later date for trial or for proceedings preliminary to trial.

(4) Any person who is unlawfully arrested or detained by any other person shall be entitled to compensation therefore from that other person.

17. Section 7: Protection from inhuman treatment

(1) No person shall be subjected to torture or to inhuman or degrading punishment or other treatment.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorizes the infliction of any description of punishment that was lawful in the country immediately before the coming into operation of this Constitution.

18. Section 14: Protection of freedom of movement

(1) No person shall be deprived of his or her freedom of movement, and for the purposes of this section the said freedom means the right to move freely throughout Botswana, the right to reside in any part of Botswana, the right to enter Botswana and immunity from expulsion from Botswana.

(2) Any restriction on a person's freedom of movement that is involved in his or her lawful detention shall not be held to be inconsistent with or in contravention of this section.

(3) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision – (a) for the imposition of restrictions that are reasonably required in the interests of defence, public safety, public order, public morality or public health or the imposition of restrictions on the acquisition or use by any person of land or other property in Botswana and except so far as that provision or, as the case may be, the thing done under the authority thereof, is shown not to be reasonably justifiable in a democratic society; (b) for the imposition of restrictions on the freedom of movement of any person who is not a citizen of Botswana; (c) for the imposition of restrictions on the entry into or residence within defined areas of Botswana of persons who are not Bushmen to the extent that such restrictions are reasonably required for the protection or well-being of Bushmen; (d) for the imposition of restrictions upon the movement or residence within Botswana of public officers; or (e)

(4) If any person whose freedom of movement has been restricted by order under such a provision as is referred to in subsection (3)(a) of this section (other than a restriction which

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is applicable to persons generally or to general classes of persons) so requests at any time during the period of that restriction not earlier than six months after the order was made or six months after he or she last made such request, as the case may be, his or her case shall be reviewed by an independent and impartial tribunal presided over by a person, qualified to be enrolled as an advocate in Botswana, appointed by the Chief Justice.

- (5) On any review by a tribunal in pursuance of this section of the case of a person whose freedom of movement has been restricted, the tribunal may make recommendations, concerning the necessity or expediency of continuing the restriction to the authority by which it was ordered but, unless it is otherwise provided by law, that authority shall not be obliged to act in accordance with any such recommendations.

19. **Section 15: Protection from discrimination on the grounds of race, etc.**

- (1) Subject to the provisions of subsections (4), (5) and (7) of this section, no law shall make any provision that is discriminatory either of itself or in its effect.
- (2) Subject to the provisions of subsections (6), (7) and (8) of this section, no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.
- (3) In this section, the expression 'discriminatory' means affording different treatment to different persons, attributable wholly or mainly to their respective descriptions by race, tribe, place of origin, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.
- (4) Subsection (1) of this section shall not apply to any law so far as that law makes provision – (a) for the appropriation of public revenues or other public funds; (b) with respect to persons who are not citizens of Botswana; (c) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law; (d) for the application in the case of members of a particular race, community or tribe of customary law with respect to any matter whether to the exclusion of any law in respect to that matter which is applicable in the case of other persons or not; or (e) whereby persons of any such description as is mentioned in subsection (3) of this section may be subjected to any disability or restriction or may be accorded any privilege or advantage which, having regard to its nature and to special circumstances pertaining to those persons or to persons of any other such description, is reasonably justifiable in a democratic society.
- (5) Nothing contained in any law shall be held to be inconsistent with or in contravention of subsection (1) of this section to the extent that it makes reasonable provision with respect to qualifications for service as a public officer or as a member of a disciplined force or for the service of a local government authority or a body corporate established directly by any law.
- (6) Subsection (2) of this section shall not apply to anything which is expressly or by necessary implication authorized to be done by any such provision of law as is referred to in subsection (4) or (5) of this section.
- (7) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision whereby persons of any such description as is mentioned in subsection (3) of this section

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the Citizenship Act *ultra vires* the constitution, on the grounds that they were discriminatory against women.

The Attorney General appealed to the Court of Appeal, contending that neither section 4 nor section 5 denied the respondent any of the rights or protections mentioned above. Particular grounds for appeal included that Horwitz Ag J had erred in holding that section 15 of the constitution prohibited discrimination on the grounds of sex and in holding that the definition of discrimination in section 15(3) did not refer to sex and in holding that the respondent had *locus standi* to bring the action.

In dismissing the appeal, subject to a variation of the declaration of the High Court, it was held that:

1. The very nature of a constitution required that a broad and generous approach be adopted in the interpretation of its provisions; that all the relevant provisions bearing on the subject for interpretation be considered together as a whole in order to effect the objective of the constitution; and that where rights and freedoms were conferred on persons by the constitution, derogations from such rights and freedoms should be narrowly or strictly construed.
2. Section 3 of the Constitution of Botswana, which guarantees equal protection of the law irrespective of sex, was not only a substantive provision, but was the key or umbrella provision in Chapter II under which all rights and freedoms protected under the chapter must be subsumed. The rest of the provisions of Chapter II, including section 15, should be construed as expanding on or placing limitations on section 3 and should be construed within the context of that section. A fundamental right or freedom once conferred by the constitution could only be taken away or circumscribed by an express and unambiguous statement in that constitution or by a valid amendment of it. It could not be inferred from the omission of the word 'sex' in the definition of discrimination in section 15(3) that the right to equal protection of the law given in section 3 of the constitution to all persons (irrespective of sex) had, in the case of sex-based differentiation in equality of

may be subjected to any restriction on the rights and freedoms guaranteed by sections 9, 11, 12, 13 and 14 of this Constitution, being such a restriction as is authorized by section 9(2), 11(5), 12(2) 13(2), or 14(3), as the case may be.

- (8) Nothing in subsection (2) of this section shall affect any discretion relating to the institution, conduct or discontinuance of civil or criminal proceedings in any court that is vested in any person by or under this Constitution or any other law.
- (9) Nothing contained in or done under the authority of any law shall be held to be inconsistent with the provisions of this section – (a) if that law was in force immediately before the coming into operation of this Constitution and has continued in force at all times since the coming into operation of this Constitution; or (b) to the extent that the law repeals and re-enacts any provision which has been contained in any written law at all times since immediately before the coming into operation of this Constitution.

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treatment, been taken away. The classes or groups mentioned in the definition in section 15(3) were more by way of example than an exclusive itemisation.

3. As provided by section 24 of the Interpretation Act 1984, relevant international treaties and conventions might be referred to as an aid to interpretation. Unless it was impossible to do otherwise, it would be wrong for Botswana's courts to interpret its legislation in a manner which conflicted with the international obligations Botswana had undertaken. This principle added reinforcement to the view that the intention of the framers of the constitution could not have been to permit discrimination purely on the basis of sex.
4. Custom and tradition should *a fortiori* yield to the Constitution of Botswana. A constitutional guarantee could not be overridden by custom. Custom would as far as possible be read so as to conform with the constitution, but where this was impossible, it was custom not the constitution which had to go.
5. The respondent had *locus standi* with respect to her challenge of section 4 of the Citizenship Act 1984. She had substantiated her allegation that the Act circumscribed her freedom of movement given by section 14 of the constitution, having made a case that as a mother her movements are determined by what happens to her children. However, she did not have *locus standi* with respect to section 5 of the Act, as the situation which that section provided for, namely the citizenship of children born outside Botswana, did not apply to the respondent in any of the cases of her children and the possibility of the respondent giving birth at some future date to children abroad was too remote to form a basis for such a challenge.
6. Section 4 of the Citizenship Act 1984 infringed the fundamental rights and freedoms of the respondent conferred by section 3, section 14 and section 15 of the constitution and was *ultra vires*.

Per **Shreiner and Puckrin JJA (dissenting):**

1. Discrimination on the ground of sex was not prohibited by section 15 of the constitution. The idea that the list of descriptions of persons in section 15(3) was not exhaustive had to be rejected. Section 3 was an introductory or explanatory section which did not, by itself, create substantive rights and freedoms, but was in the nature of a preamble or a recital. Section 3 would only become relevant in interpreting section 15(3) if it could be shown that there was some vagueness or ambiguity in section 15(3). The mere absence of mention of sexual discrimination in section 15(3) did not create any such vagueness or ambiguity and a reference to section 3 in order to create one was not permissible.
2. The general injunctions regarding the interpretation of constitutional statutes should not be relied upon as a licence to a court, even when dealing with rights and freedoms, in effect, to alter a provision to avoid a consequence which it considers is not, in view of its assessment of the position in existing society, socially or morally

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desirable, if the meaning is clear. The special approach to interpretation of a constitution applied only where there is an ambiguity or obscurity. If a human rights code did not outlaw discrimination on the ground of sex, the court had no right to declare that it did because, in its view, such a provision was desirable in the atmosphere of the time; it had to be satisfied from the wording of the provision that the legislature intended to prevent such discrimination.

**FORBANG MICHEAL NDENGE V. CECILIA MANKA AND
OTHERS
HIGH COURT OF MEZAM DIVISION, CAMEROON**

Bikelle J

25 January 2010

The applicant sought to evict the respondents from lands registered in his own name in 2008, but formerly owned by his late brother, one Ndenge Lawrence Nde, who had died intestate in 1977. The applicant was the appointed administrator of his brother's estate. The first-named respondent was formerly married to Ndenge Lawrence Nde. There were three children of the marriage namely – Fru Calystus Ndeh, Bih Erica and Chi Evans, the respective second, third and fourth-named respondents. The late Ndenge Lawrence Nde was buried on the land and the properties on the land were all built by him. Following the death of his brother, the applicant entered into a relationship with the first-named respondent and they had a further three children together. All six children live with their mother on the said lands.

The applicant sought an order to evict the respondents from the lands registered in his name, contending that they were tenants with arrears of unpaid rents. A further order was sought restraining the respondents, their agents and assigns from interfering in the land.

In dismissing the application, it was held that:

- (1) A land certificate is an official certification of a real property right that is unassailable, inviolable and final.
- (2) Until a land certificate is withdrawn by the competent minister, the person in whose name the property is registered possesses a real property right.
- (3) In his capacity as administrator of his late brother's estate, the applicant holds the said property on trust for the benefit of the respondents, who have never been tenants of the said lands.
- (4) Having considered equitable principles and having drawn guidance from the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the court decided that the respondents were entitled to occupy the said lands pending a determination of an application to withdraw the land certificate.

FOR THE APPLICANT: SUH FUH BENJAMIN

FOR THE RESPONDENTS: SHU WALTERS

(UNREPORTED)

**ANUJ GARG AND OTHERS V. HOTEL ASSOCIATION OF INDIA AND OTHERS
SUPREME COURT, INDIA²⁰**

Sinha and Singh Bedi JJ
6 December 2007

Equality

Constitutional law – Fundamental rights – Right to equality before the law – Right to freedom from discrimination – Right to employment – Right to privacy

The first respondent was the Hotel Association of India. A large number of young people were taking hotel management graduation courses and passing their examinations at a very young age. Liquor was served in the hotels, not only in bars but also in restaurants. Liquor was also served in rooms as part of room service. Section 30 of the Punjab Excise Act 1914 provided: 'No person who is licensed to sell any liquor or intoxicating drug for consumption on his premises shall, during the hours in which such premises are kept open for business, employ or permit to be employed either with or without remuneration any man under the age of 25 years or any women in any part of such premises in which such liquor or intoxicating drug is consumed by the public'.

The first respondent, with four others, filed a writ petition before the Delhi High Court questioning the validity of the said provision; the court gave judgment, declaring that Section 30 of the Act was *ultra vires* Articles 14–15 and 19(1)(g) of the Constitution of the Republic of India 1950²¹ to the extent that it prohibited the employment of any woman in any part of such premises in which liquor or intoxicating drugs were consumed by the public.

The appellants, citizens of Delhi, appealed to the Supreme Court against the decision. The first respondent cross-appealed, filing a special leave petition questioning the part of the order whereby restrictions had been put on employment of any man below the age of 25 years. The appellants submitted that as nobody had any fundamental right to deal in liquor, being '*res extra commercium*', the state had the right to make a law and/or continue the old law imposing reasonable restrictions on the nature of employment therein. The appellants also contended that the state was acting under its *parens patriae* power to protect young men and women from vulnerable circumstances. The

20. Source: *Law Reports of the Commonwealth* [2008] 1 LRC 771

21. Under the Constitution, article 14 provided for equality before the law; article 15 prohibited, *inter alia*, discrimination on the basis of gender; article 16 provided for equality of opportunity in matters of public employment and article 19, *inter alia*, protected the right to practise any profession or carry on any occupation.

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appellants highlighted examples of the bad effects caused by the sale and consumption of liquor by young men below the age of 25 years and the vulnerability of women while working in bars under the current legislation.

The Supreme Court had to consider whether Section 30 of the 1914 Act was invalid for violation of the Constitution, with the added consideration, apart from the factors highlighted above, of the right to privacy and the need for security and whether or not such protective discrimination was justified and proportionate.

In confirming the order of constitutional invalidity made by the Delhi High Court, it was held that:

[T]he 1914 Act, as a pre-constitutional piece of legislation, was saved by article 372 of the Constitution, but its invalidity could be challenged on the basis of articles 14-15 and 19. Although a statute could have been held to be valid in view of the societal condition at the time of its enactment, it could be declared invalid in terms of subsequent changes in such condition, in both the domestic and the international arena. Changed social psyche and expectations were important factors to be considered in the continuing application of the law. The classical counter to individual rights was the community orientation of rights. However, in the instant case, the individual rights were challenged by a problem of practical import – of enforcement and security. The important jurisprudential tenet involved in the matter was not the prioritisation of rights inter se, but practical implementation issues competing with a right. When discrimination was sought to be made on the purported ground of classification, such classification had to be founded on a rational criteria. The state could not invoke the doctrine of '*res extra commercium*' in the matter of the appointment of eligible persons. The subject matter of the *parens patriae* power had to be adjudged in terms of its necessity and the assessment of any trade-off or adverse impact. Young men and women knew what would be the best offer for them in the service sector. In the age of the internet, they would know all the pros and cons of a profession. It was their lives, subject to constitutional, statutory and social interdicts and a citizen of India should be allowed to live her life on her own terms. If prohibition in the employment of women and of men below 25 years was to be implemented in its letter and spirit, a large section of young graduates who had spent a lot of time, money and energy in obtaining the degree or diploma in hotel management would be deprived of their right to employment under article 16 of the Constitution. The instant matter involved a fundamental tension, difficult to reconcile, between the right to employment and security. Privacy rights prescribed autonomy to choose a profession, whereas security concerns textured the methodology of delivery of that assurance. But it was a reasonable proposition that the measures to safeguard such a guarantee of autonomy should not be so strong that the essence of the guarantee was lost. Women would be as vulnerable without state protection as they would be by the loss of freedom imposed by the impugned Act. The interference prescribed by the state for pursuing the ends of protection should be proportionate to the legitimate aims. The standard for judging the proportionality should be a standard capable of being called reasonable in a modern democratic society. Instead of putting curbs on women's freedom, empowerment would be a more tenable and socially wise approach. Instead of prohibiting the employment of women in bars

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altogether, the state should focus on factoring in ways through which unequal consequences of sex differences could be eliminated. It was the state's duty to ensure circumstances of safety which inspired confidence in women to discharge the duty freely, in accordance with the requirements of the profession they chose to follow. Any other policy inference (such as the one embodied under Section 30) from societal conditions would be oppressive to women and contrary to their privacy rights. Legislation with pronounced 'protective discrimination' aims, such as Section 30, potentially served as double-edged swords. A strict scrutiny test should be employed while assessing the implications of the various pieces of legislation. Legislation should not be assessed only on the basis of proposed aims but rather on its implications and effects. The impugned legislation suffered from incurable fixations of stereotyped morality and concepts of gender-based roles. When the restrictions were in force, they could not prevent the bad effects of the sale and consumption of liquor highlighted by the Appellants in their submission. If the restriction went, some such incidents might happen again. But the court could not declare *intra vires* a law which was *ex facie ultra vires* merely on a presupposition that there was a possibility of some incident happening. The High Court was correct to declare Section 30 of the Punjab Excise Act *ultra vires* articles 14–15 and 19(1)(g) of the Constitution. In addition, the state restriction on the employment of young men under the age of 25 where liquor was consumed or sold was also a facet of the right to livelihood and did not stand judicial scrutiny.²²

FOR THE APPELLANTS: A JAITLEY

FOR THE RESPONDENTS: R DUTTA

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22. Per curiam. (i) Domestic courts are under an obligation to give due regard to international conventions and norms for construing domestic laws, when there is no inconsistency between them (*Hariharan v. Reserve Bank of India* [2000] 3 LRC 71 applied); (ii) In South Africa, the Constitutional Court has held that the rules and pre-constitutional legislative provisions of succession in customary law had not been given the space to adapt and to keep pace with changing social conditions and values. Instead, they had, over time, become increasingly out of step with the real values and circumstances of the society they were meant to serve. In that case, the court held that the application of the customary law rules of succession, in circumstances vastly different from their traditional setting, caused much hardship. Therefore, it was decided that the exclusion of women from inheritance on the grounds of gender was a clear violation of the constitutional prohibition against unfair discrimination (*Bhe v. Magistrate of Khayelitsha* [2005] 2 LRC 722 considered).

**C MASILAMANI MUDALIAR AND OTHERS V. IDOL OF SRI SWAMINATHASWAMI THIRUKOIL AND OTHERS
SUPREME COURT, INDIA²³**

K Ramaswamy J, S Saghir Ahmad J, G B Pattanaik J
30 January 1996

Discrimination

Widow entitled to full ownership of property left to provide maintenance

A Hindu man bequeathed certain property to his wife S and his cousin's widow J, for whom he was duty-bound to provide maintenance. The property was to be shared equally by S and J, but not sold during their lifetimes. His will further provided that, should one predecease the other, the survivor would have the right to enjoy the property 'in its entirety' and that it should be held in trust after both their deaths for religious and charitable purposes. After J died, a power of attorney holder appointed by S arranged for the property to be sold to the respondents. This was challenged by the beneficiaries of the trust on the basis that, at the time of sale, S had only limited rights to the property under section 14(2)²⁴ of the Hindu Succession Act. The High Court held that S did not have full ownership of the property. The respondents obtained special leave to appeal to the Supreme Court.

In allowing the appeal, it was held that:

- (1) The constitutional right to equality before the law (article 14)²⁵ acts to eliminate previous 'disabilities' suffered by Hindu women regarding property rights. 'Personal laws', which derive from religious scriptures, are constitutionally void if they confer inferior status on women.

23. Source: INTERIGHTS, the International Centre for the Legal Protection of Human Rights.

24. Section 14(1) provides that: 'Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner'. However, section 14(2) provides that, *inter alia*: 'Nothing contained in subsection (1) shall apply to any property acquired by way of gift, Will or other instrument'.

25. Article 14 provides that: 'The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India'.

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- (2) The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) obliges India to prohibit all gender-based discrimination²⁶ and makes specific mention of property issues.²⁷
- (3) The existence of the Protection of Human Rights Act 1993 means that the principles in CEDAW are enforceable in India.
- (4) The state has a constitutional responsibility to take positive measures to ensure that women enjoy economic, social and cultural rights on an equal footing with men.
- (5) Discrimination against women violates the principles of equality and human dignity and is an obstacle to women's participation on equal terms in the political, social, economic and cultural life of India.²⁸
- (6) The Hindu Succession Act is one of a number of Acts designed to eliminate discrimination experienced by women due to the Sastric Law. It must be read in the light of the guarantees of the constitution. Section 14(1) of the Act will transform any limited rights to property of a Hindu woman into full ownership provided such rights accrued under a pre-existing law. This is a question of fact in each case.
- (7) The widow S received her interest in the property in recognition of her pre-existing right to maintenance under Sastric Law, but this was transformed into an absolute right under section 14(1). Accordingly, the exception in section 14(2) of the Act does not apply and the respondents are the absolute owners of the property.

FOR THE APPELLANTS: K R CHOWDHARY, ADVOCATE

FOR THE RESPONDENTS: A V RANGAM, ADVOCATE

26. Article 2 provides that: 'Discrimination against women in all its forms is condemned and the states parties agree to undertake: ... To ensure that public authorities and institutions shall refrain from engaging in any act or practice of discrimination against women. To ensure that all acts of discrimination against women by persons, organisations or enterprises are eliminated'.

27. Article 16(1) provides that: 'States parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: ... h. the same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration'.

28. Valsamma Paul v. Cochin University (1996) 3 SCC 545; [1996] 3 CHRLD 314 applied.

**VISHAKA AND OTHERS V. STATE OF RAJASTHAN AND OTHERS
SUPREME COURT, INDIA²⁹**

Verma CJ, Manohar J, Kirpal J
13 August 1997

Discrimination (sex)

Protection from sexual harassment in the workplace

The petitioners were various social activists and non-governmental organisations concerned with finding suitable methods for the realisation of the true concept of 'gender equality', preventing the sexual harassment of working women in all workplaces through the judicial process and filling the vacuum in existing legislation.

As a result of the brutal gang rape of a publicly employed social worker in a village in Rajasthan, they filed a class action under article 32 of the constitution seeking the court's enforcement of the fundamental rights provisions relating to working women, namely the right to equality,³⁰ the right to practise one's profession³¹ and the right to life.³² Other issues raised by the petition included: the fundamental right to non-discrimination;³³ India's international obligations under articles 11³⁴ and 24³⁵ of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and India's official commitment at the Fourth World Conference on Women in Beijing to, *inter alia*, 'formulate and operationalise a national policy on women which would continuously guide and inform action at every level and in every sector; to set up a Commission for Women's Rights to act as a public defender of women's human rights; [and] to institutionalise a national level mechanism to monitor the implementation of the Platform for Action.'

In disposing of the writ petition with directions, it was held that:

1. The fundamental right to carry on any occupation, trade or profession depends on the availability of a 'safe' working environment. The right to life means life with dignity. The primary responsibility for ensuring such safety and dignity through

29. Source: INTERIGHTS, the International Centre for the Legal Protection of Human Rights.

30. Article 14

31. Article 19 (1)(g)

32. Article 21

33. Article 15

34. 'Take all appropriate measures to eliminate discrimination against women in the field of employment'

35. 'Undertake to adopt all necessary measures at the national level aimed at achieving the full realisation' of the rights recognised in CEDAW.

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suitable legislation and the creation of a mechanism for its enforcement belongs to the legislature and the executive. When, however, instances of sexual harassment resulting in violations of articles 14, 19 and 21 are brought under article 32,³⁶ effective redress requires that some guidelines for the protection of these rights should be laid down to fill the legislative vacuum.

2. In view of the fact that the violation of such fundamental rights is a recurring phenomenon, a writ of *mandamus* needs to be accompanied by directions for prevention if it is to be successful. Any international convention not inconsistent with the fundamental rights guaranteed in the constitution and in harmony with its spirit must be used to construe the meaning and content of the constitutional guarantee and to promote its object; this is now an accepted rule of judicial construction³⁷ and is also implicit from article 51(c)³⁸ and article 253³⁹ read with Entry 14 of the Union List in the seventh Schedule of the constitution.⁴⁰ Article 73 of the constitution also provides that the executive power of the Union is available until parliament enacts legislation to expressly provide measures needed to curb the evil in question.
3. It follows that articles 11 and 24 of CEDAW, relating to sexual harassment in the workplace, and India's commitment at the Fourth World Conference on Women may be relied upon to construe the nature and ambit of the gender equality guarantee and, since the guarantee includes protection from sexual harassment and the right to work with dignity, to formulate preventive guidelines.
4. Both the power of the court under article 32 and the executive power of the Union have to meet the challenge of protecting working women from sexual harassment and making their fundamental rights meaningful. Governance of society by the rule of law mandates this requirement as a logical concomitant of the constitutional scheme.

36. **'Remedies for enforcement of rights conferred by this Part –** (1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.'

37. *Minister of Immigration and Ethnic Affairs v. Teoh* (1995) 128 ALR 353; [1996] 1 CHRLD 67 (Aus HC) applied and *Nilabati Behera v. State of Orissa* (1993) 2 SCC 746 (Indian SC) followed.

38. **'Promotion of international peace and security –** The State shall endeavour to – foster respect for international law and treaty obligations in the dealings of organized peoples with one another' ...

39. 'Notwithstanding anything in the foregoing provisions of this Chapter, parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body.'

40. 'Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries.'

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5. In the absence of legislation, the obligation of the court under article 32 must be viewed along with the role of the judiciary envisaged in the 1995 Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA region, principle 10 of which requires the judiciary: (a) to ensure that all persons are able to live securely under the rule of law; (b) to promote, within the proper limits of the judicial function, the observance and the attainment of human rights; and (c) to administer the law impartially among persons and between persons and the state. These principles were accepted by the Chief Justices of Asia and the Pacific as representing the minimum standards necessary to be observed in order to maintain the independence and effective functioning of the judiciary.⁴¹

FOR THE PETITIONERS: MS MEENAKSHI ARORA AND MRS NAINA KAPUR

FOR THE RESPONDENTS: THE SOLICITOR GENERAL

AMICUS CURIAE: SHRI FALI S NARIMAN

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41. The following guidelines and norms are, therefore, to be observed at all workplaces or other institutions for the preservation and enforcement of the right to gender equality of working women:
- The employer or other responsible persons in the workplace or other institution is under a duty to prevent or deter the commission of acts of sexual harassment and to provide procedures for the resolution, settlement or prosecution of such acts by taking all steps required.
 - The definition of sexual harassment includes unwelcome sexually determined behaviour (whether directly or by implication) such as:
 - physical contact and advances,
 - a demand or request for sexual favours,
 - sexually-coloured remarks,
 - showing pornography,
 - any other unwelcome physical, verbal or non-verbal conduct of a sexual nature.
 - All employers or persons in charge of any workplace, whether in the public or private sector, should take appropriate steps to prevent sexual harassment. Without prejudice to the generality of this obligation, they should take the following steps:
 - express prohibition of sexual harassment at the workplace should be notified, published and circulated in appropriate ways,
 - the rules/regulations of government and public sector bodies relating to conduct and discipline should include rules/regulations prohibiting sexual harassment and provide for appropriate penalties in such rules against the offender,
 - as regards private employers, steps should be taken to include these prohibitions in the standing orders under the Industrial employment (Standing Orders) Act 1946,

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- appropriate work conditions should be provided in respect of work, leisure, health and hygiene to further ensure that there is no hostile environment towards women at workplaces and no woman employee should have reasonable grounds to believe that she is disadvantaged in connection with her employment.
- Where such conduct amounts to a specific offence under the Indian Penal Code or under any law, the employer shall initiate appropriate action in accordance with law by making a complaint with the appropriate authority. In particular, it should ensure that victims or witnesses are not victimised or discriminated against while dealing with complaints of sexual harassment. The victims of sexual harassment should have the option to seek transfer of the perpetrator or their own transfer.
- Where such conduct amounts to misconduct in employment as defined by the relevant service rules, appropriate disciplinary action should be initiated by the employer in accordance with those rules.
- Whether or not such conduct constitutes an offence under law or a breach of the service rules, an appropriate complaint mechanism should be created in the employer's organisation for the redress of the complaint. Such a complaint mechanism should ensure timely treatment of complaints.
- The above complaint mechanism should be adequate to provide, where necessary, a Complaints Committee, a special counsellor or other support service, including the maintenance of confidentiality. The Complaints Committee should be headed by a woman and not less than half of its members should be women. Further, to prevent the possibility of any undue pressure or influence from senior levels, the Complaints Committee must make an annual report to the government department concerned of the complaints and action taken by them. The employers and person-in-charge will also report on the compliance with these guidelines, including reports of the Complaints Committee, to the government department.
- Employees should be allowed to raise issues of sexual harassment at workers' meetings and in other appropriate fora and it should be affirmatively discussed in employer-employee meetings.
- Awareness of the rights of female employees in this regard should be created in particular by prominently notifying the guidelines (and appropriate legislation, when enacted on the subject) in a suitable manner.
- Where sexual harassment occurs as a result of an act or omission by any third party or outsider, the employer and person-in-charge will take all steps necessary and reasonable to assist the affected person in terms of support and preventive action.
- The central/state government should consider adopting suitable measures, including legislation, to ensure that these guidelines are also observed by employers in the private sector.
- The court stated that the guidelines are to be treated as law declared by it in accordance with article 141 of the Constitution until the enactment of appropriate legislation and that the guidelines do not prejudice any rights available under the Protection of Human Rights Act 1993.

**MUOJEKWO AND OTHERS V. EJIKEME AND OTHERS
COURT OF APPEAL (ENUGU), NIGERIA⁴²**

Tobi JC, Olagunju, Fabiyi JJCA
9 December 1999

Inheritance

Customary law affecting rights of female family members inequitable

R died intestate in 1996 without any surviving children. The appellants were R's two great grandsons and his granddaughter, the third appellant. The granddaughter was born to R's daughter V and the great grandsons were born to V's two daughters. The appellants claimed that the Nnewe custom of Nrachi had been performed for V, and accordingly the appellants were entitled to inherit R's property. The Nrachi custom enabled a man to keep one of his daughters perpetually unmarried under his roof in order to raise children, especially males, to succeed him. Any such daughter took the position of a man in the father's house and was entitled to inherit her father's property and any children born to the woman would automatically be part of the father's household and accordingly entitled to inherit. A different custom, Ili-Ekpe, provided that where a man has no surviving male issue, including the daughter in respect of whom Nrachi was performed and her children, the man's brother or his male issue are entitled to inherit.

The respondents, five male members of R's brother's family, claimed that Nrachi was performed for V's sister C, who had died childless, and not V. They contended that when C died, R's family lineage became extinct and they, rather than the appellants, should inherit R's property. The legal action began when the respondents, without the appellants' permission, entered the compound once belonging to R. The appellants laid claim to a statutory right of occupancy over R's estate and requested an injunction restraining the respondents from trespassing.

In allowing the appeal, it was held that:

1. The Nrachi custom compromises the basic tenets of family life, is inequitable and judicially unenforceable. Accordingly, a female child does not need the performance of Nrachi in order to inherit her deceased father's estate.
2. The custom is also repugnant to natural justice, because the children born to a daughter in respect of whom the ceremony is performed are denied the paternity of the natural father.⁴³ The custom of Ili-Ekpe also discriminates against women.⁴⁴

42. Source: INTERRIGHTS, the International Centre for the Legal Protection of Human Rights.

43. *Edet v. Essien* (1932) 11 NLR 47 (Nig. DC).

44. *Mojekwu v. Mojekwu* (1979) 7 NWLR (Pt. 512) 283, 304–305 (Nig. CA).

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3. The fact that the appellants were born out of wedlock was immaterial since Section 39(2) of the 1979 constitution prohibits discrimination on the grounds of circumstances of birth. In this case, the acceptance into R's family of the third appellant and her sister was sufficient acknowledgement of the two daughters by their grandparents to entitle them to full rights of succession to the estate of their grandfather. The appellants had been in possession of R's estate for many years and it would be inequitable to evict them.
4. In determining whether a customary law is repugnant to natural justice or incompatible with any written law, the court applies a standard not derived from principles of English law, but from Nigerian jurisprudence. Lineage refers to a line of descent and one can only talk of its extinction when the line is extinguished. When there are children or grandchildren still alive it is wrong to hold that the lineage is extinct.

FOR THE APPELLANTS: B S NWANKWO

FOR THE RESPONDENTS: O R ULASI

**HUMAIRA MEHMOOD V. SHO NORTH CANTT LAHORE
AND OTHERS
HIGH COURT, PAKISTAN⁴⁵**

Tassaduq Hussain Jilani J

18 February 1999

Human rights – Right to family life – Right to marry – Right to freely choose a spouse and to enter into marriage only with free and full consent – Validity of marriage – Consent requirement

Meaning of consent – Determination of validity of marriage in case of conflicting marriage certificates

Humaira Mehmood secretly married Mehmood Butt on 16 May 1997 and the marriage was registered the same day. Her parents, who had promised her in marriage to her cousin, Moazzam Ghayas Khokhar, when she was a child, were strongly opposed to her marrying Mehmood. When they discovered that the marriage had taken place, they went to extreme lengths to enforce their will on their daughter. Humaira Mehmood was beaten, tortured and taken to a hospital where she was tightly bandaged to immobilise her and detained there for a month. On 3 July 1998 she was forcibly married to her cousin. The marriage was backdated in the marriage register as having taken place on 14 April 1997. In November 1998, Humaira and Mehmood fled to Karachi, where Humaira sought protection in a shelter for women and Mehmood went into hiding. On 4 November 1998 a report was registered with the police claiming that Mehmood had abducted Humaira. This complaint was later cancelled by the police, when it was found to be false. On the basis of a further false complaint, the Punjab police raided the shelter and turned Humaira over to her brother's custody. After a women's rights activist intervened, Humaira was released and the matter was taken up before the Sindh High Court, Karachi, which ordered the police not to arrest Humaira on any charges.

On 25 December 1998, Moazzam Ghayas filed a case with the police that his alleged wife had been abducted by Mehmood and that she had committed adultery with Mehmood. In January 1999, despite the earlier Sindh High Court order, Punjab police arrested Humaira, Mehmood and his mother at Karachi airport, beat them, restrained them and detained them at separate police stations. Their arrests did not appear in the police case diary. Humaira brought a petition before the Lahore High Court, refuting the fact that she had been abducted and requesting the court to quash the charges against herself, her husband and her mother-in-law, which had been brought by Moazzam Ghayas.

45. Source: Emerton *et al.* (eds.) *International Women's Rights Cases*, Routledge-Cavendish, p.184.

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In allowing the petitions it was held that:

1. The court had ample powers in the constitutional jurisdiction to interfere in an investigation where there was material on record to show that the investigation involved malice in law or fact. The High Court would not have ordinarily exercised jurisdiction under article 199 of the constitution to quash the criminal proceedings initiated pursuant to registration of the case but in the face of the bias and the *mala fides* shown by police officials who handled this case, any restraint at this stage from the High Court would not only be unjust but would be tantamount to abdication of the powers vested in the High Court to put a check on state functionaries who abuse their lawful duty to help a particular individual and promote their personal interests.
2. Articles 4 and 25 of the constitution guarantee that everybody shall be treated strictly in accordance with the law and article 35 provides that the state shall protect the marriage, the family, the mother and the child. The court had also to respect the international human rights instruments to which Pakistan was a party. These included the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), article 16 of which requires state parties to take appropriate measures to eliminate discrimination against women in all matters relating to marriage, including *inter alia* the right freely to choose a spouse and to enter into marriage only with their free and full consent. It was also a party to the Cairo Declaration on Human Rights in Islam, which calls for the protection of marriage and the family.
3. It was a settled proposition of law that in Islam a *sui juris* woman can contract *Nikah* (marriage) of her own free will and *Nikah* performed under coercion is no *Nikah* in law. Where consent to a marriage is in dispute and a challenge made to a *Nikah Nama* (marriage certificate) which relates to a man and a woman who claim to be husband and wife, then the presumption of truth attaches to the *Nikah Nama* which is acknowledged by spouses and not by the intervener. Marriage with a woman during the subsistence of her earlier marriage with some other man is illegal and void. *Prima facie* the *Nikah* of Humaira with Mehmood was valid and no prosecution under the Hudood laws could be initiated without a conclusive finding of a Family Court against the *Nikah* in question. The case registered and proceedings initiated pursuant to it reflected *mala fides*, had no legal effect and were quashed.

FOR THE PETITIONER: MS HINA JILANI

FOR THE RESPONDENT, MALIK MOAZZAM GHAYAS: CH MUHAMMAD HUSSAIN
CHHACHHAR

FOR THE RESPONDENT, MALIK ABBAS KHOKHAR: CH ALI MUHAMMAD

GUMEDE V. PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS
CONSTITUTIONAL COURT, SOUTH AFRICA⁴⁶

Langa CJ, Moseneke DCJ, Madala J, Mokgoro J, Ngcobo J, O'Regan J, Sachs J, Skweyiya J, Yacoob J, Van Der Westhuizen J
11 September, 8 December 2008

Equality

Constitutional law – Fundamental rights – Right to equality – Freedom from discrimination – Gender – Customary law – Customary marriage

In 1968, the applicant and the fifth respondent, H, entered into a customary marriage. During the marriage H worked and the applicant maintained the family household and was the primary caregiver to the children of the marriage. The applicant, unlike H, had no means to contribute towards the purchase of the common home.

On 15 November 2000 the Recognition of Customary Marriages Act 1998 came into force. It provided that customary marriages concluded after its commencement ('new' marriages) were ordinarily marriages in community of property (Section 7(1)). The marriage of the applicant and her husband, having been concluded before 15 November 2000, was governed by customary law. In KwaZulu-Natal, where the applicant and her husband were domiciled, customary law was codified in the KwaZulu Act on the Code of Zulu Law 1985 and the Natal Code of Zulu Law. Section 20 of both the 1985 Act and the Natal Code provided that in a customary marriage, the husband was the family head and owner of all family property, which he might use in his exclusive discretion. Section 22 of the Natal Code provided that 'inmates of a *kraal* were in respect of all family matters under the control of and owed obedience to the family head'. In terms of codified customary law in KwaZulu-Natal, a wife in an 'old' customary marriage had no claim to the family property during or upon dissolution of the marriage.

The applicant's marriage to H broke down irretrievably and in January 2003, H instituted court proceedings to end the marriage. H received an occupational pension. The applicant lived off a government pension and occasional financial support received from her children. She received no maintenance contribution from H.

Before a divorce was granted, the applicant approached the High Court with a view to procuring an order invalidating the statutory provisions that regulated the proprietary

46. Source: Law Reports of the Commonwealth [2009] 4 LRC 351.

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consequences of her marriage. She sought to pre-empt the divorce court from relying on legislation she considered unfairly discriminatory to customary law wives. The High Court made an order of constitutional invalidity in relation to Section 7(1) and (2) of the 1998 Act, Section 20 of the 1985 Act and Sections 20 and 22 of the Natal Code. The applicant sought confirmation of the order of constitutional invalidity in terms of Section 167 of the Constitution of the Republic of South Africa 1996. The Women's Legal Centre Trust was admitted as *amicus curiae* and supported the confirmation of the order of constitutional invalidity.

In confirming the order of constitutional invalidity made by the High Court, it was held that:

- (1) The impugned provisions were discriminatory as between wife and husband. Only women in a customary marriage were subject to the unequal proprietary consequences. That discrimination was on the listed ground of gender.
- (2) Within the class of women married under customary law, the legislation differentiated between a woman who was party to an 'old' or pre-recognition customary marriage as against a woman who was a party to a 'new' or post-recognition customary marriage. That differentiation was unfairly discriminatory.
- (3) The consequence of the discrimination created by the 1998 Act was to subject the applicant and other women in KwaZulu-Natal similarly situated, to the proprietary system governed by customary law as codified in the 1985 Act and the Natal Code. The impact of that legal arrangement was that the affected wives in customary marriages were considered incapable or unfit to hold or manage property. They were expressly excluded from meaningful economic activity in the face of an active redefinition of gender roles in relation to income and property.
- (4) The marital property system contemplated by the 1985 Act and the Natal Code struck at the very heart of the protection of equality and dignity, which the Constitution affords to all and to women in particular. That marital property system rendered women extremely vulnerable by not only denuding them of their dignity but also rendering them poor and dependent. That was unfair.
- (5) The Constitution itself placed a particular premium on gender equality by providing in Section 9(5) that discrimination based on gender, one of the grounds listed in Section 9(3), was presumed to be unfair. The government bore the burden of justifying the limitation that had been found to exist on the right to equality afforded to the Applicant by the Bill of Rights. It had failed however to furnish justification

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to save the unfair discrimination spawned by the impugned provisions. Accordingly, the provisions concerned were inconsistent with the Constitution and invalid.⁴⁷

FOR THE APPLICANT: G BUDLENDER and E van HUYSSTEEN

FOR THE KWAZULU-NATAL MEMBER OF THE EXECUTIVE COUNCIL FOR TRADITIONAL AND LOCAL GOVERNMENT AFFAIRS AND THE MINISTER OF HOME AFFAIRS: V SONI SC

FOR THE AMICUS CURIAE: S COWEN AND N MANGCULOCKWOOD

47. Per curiam. The adaptation of customary law serves a number of important constitutional purposes. First, this process would ensure that customary law, like statutory law or the common law, is brought into harmony with the supreme law and its values and brought into line with international human rights standards. Second, the adaptation would salvage and free customary law from its stunted and deprived past. And lastly, it would fulfil and reaffirm the historically plural character of the legal system, which now sits under the umbrella of one controlling law – the Constitution. In its desire to find social cohesion, the Constitution protects and celebrates difference. It goes far in guaranteeing cultural, religious and language practices in generous terms, provided that they are not inconsistent with any right in the Bill of Rights. It is a legitimate object to have a flourishing and constitutionally compliant customary law that lives side by side with the common law and legislation.

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EPHRAHIM V. PASTORY AND KAIZILEGE

HIGH COURT, TANZANIA⁴⁸

Mwalusanya J

22 February 1990

Human Rights

Equality and non-discrimination – Sex discrimination – Rights of women to inherit and sell land – Customary law

The first respondent, Holario d/o Pastory, inherited clan land from her father by a valid will. On 24 August 1988, she sold the land to Gervaz s/o Kaizilege, a man who was not a member of her clan. The next day the appellant, Bernard s/o Ephrahim, a nephew of the first respondent, filed a suit in the Kashasha Primary Court seeking a declaration that the sale of the clan land by Ms Pastory to Mr Kaizilege was void under Haya customary law.⁴⁹ Pursuant to Haya customary law, a woman has no power to sell clan land. In general, a woman can inherit clan land only in *usufruct*, that is to say she cannot inherit full ownership of clan land, but only the right to use it during her lifetime according to the Rules Governing the Inheritance of Holdings by Female Heirs (1994) made by the Bukoba Native Authority.⁵⁰ Only if there is no male clan member can she inherit full ownership rights.

The Primary Court held that the sale was void and ordered Ms Pastory to refund the purchase price to Mr Kaizilege. The District Court overturned this decision on appeal, holding that the Bill of Rights 1987, which prohibits discrimination on the grounds of sex, grants equal rights to female and male clan members. The nephew, Mr Ephrahim, appealed to the High Court.

In dismissing the appeal, it was held that:

1. The Constitution of Tanzania, which incorporates the Tanzanian Bill of Rights and the Universal Declaration of Human Rights, prohibits discrimination on the ground of sex. Tanzania had also ratified the Convention on the Elimination of All Forms of Discrimination against Women, the African Charter on Human and Peoples' Rights and the International Covenant on Civil and Political Rights, all of which prohibit discrimination on the ground of sex. Haya customary law relating to women's property rights to clan land clearly discriminated against women on the

48. Source: Emerton *et al.* (eds.) *International Women's Rights Cases*, Routledge-Cavendish, p.538.

49. As stated in section 20 of the Rules of Inheritance GN No. 436/1963 of the Declaration of Customary Law ('1963 Rules of Inheritance').

50. 'Bukoba Inheritance Rules'.

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ground of sex. This flew in the face of the Bill of Rights, as well as the international conventions to which Tanzania was signatory.

2. Section 5(1) of the Constitution (Consequential, Transitional and Temporary Provisions) Act 1984, provides that with effect from March 1988, the courts will construe the existing law, including customary law **'with such modifications, adoptions, qualifications and exceptions as may be necessary to bring it into conformity with the [Bill of Rights]'**. In enacting this provision, there could be no doubt that parliament wanted to do away with all oppressive and unjust laws of the past. It wanted the courts to modify by construction those existing laws that were inconsistent with the Bill of Rights, such that they were in line with the new era.
3. Section 20 of the 1963 Rules of Inheritance barring women from selling clan land was inconsistent with article 13(4) of the Bill of Rights of the Constitution, which bars discrimination on the ground of sex. In accordance with section 5(1) of the Constitution (Consequential, Transitional and Temporary Provisions) Act 1984, this provision was now taken to be modified and qualified such that males and females would have equal rights to inherit and sell clan land. Likewise the rules under the Bukoba Inheritance Rules entitling a woman to only usufructuary rights with no power to sell inherited clan land were equally void and of no effect.

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TEPULOLO V. POU
HIGH COURT, TUVALU⁵¹

Ward CJ

24 January 2005

Discrimination

T, an unmarried mother, was denied custody of her child in accordance with section 3 of the Custody of Children Ordinance⁵² ('the Children Ordinance') and section 20 of the Native Lands Ordinance⁵³ ('the Lands Ordinance'). T challenged the decision before the High Court, arguing that the impugned provisions breached section 27⁵⁴ of the constitution on the grounds that, even though gender was not included as a ground of discrimination given that the word 'people' was referred to, the protection should apply to men and women. In addition, T also argued that the impugned provisions, in so far as they discriminated against women on the grounds of gender, also breached

51. Source: *Commonwealth Human Rights Law Digest* [2005] TVHC 1, Case No. 17 of 2003.

52. Section 3 provides: '(1) A court may on application by or on behalf of any person make such order regarding: (a) the custody of any child; and (b) the right of access to the child of his mother or father, as the court thinks fit having regard to the welfare of the child and to the conduct and wishes of the mother and father. (2) Before making a custody order the court shall make full enquiry into all the circumstances and shall call for any evidence or report it may in the interests of justice consider necessary. (3) In exercising jurisdiction under this section the court shall regard the welfare of the child as the first and paramount consideration and shall not take into consideration whether from any other point of view the claim of the father is superior to that of the mother or the claim of the mother is superior to that of the father. (4) A court may at any time on application by or on behalf of any person make an order discharging or varying a custody order. (5) This section is subject to the Native Lands Ordinance'.

53. Section 20 provides *inter alia*: '(1) If in any island a single woman is delivered of a child, the court may summon before it that woman and all other such natives as it may think fit and may enquire into the paternity of the child. (2) Subject to anything to the contrary in the native customary law, the court may make an order regarding the paternity of the child and its future support in one of the following ways – (i) If the father being a native accepts the child as being his, such child shall after reaching the age of two reside with the father or his relations and shall in accordance with native customary law inherit land and property from his father in the same way as the father's legitimate children...'

54. Section 27 defines discrimination as: 'The treatment of different people in different ways wholly or mainly because of their different races, places of origin, political opinions, colours or religious beliefs, in such a way that one such person is for some such reason given more favourable treatment or less favourable treatment than another such person'.

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articles 1,⁵⁵ 2,⁵⁶ 5(a)⁵⁷ and 16(1)(d)⁵⁸ of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and article 3(1)⁵⁹ of the Convention on the Rights of the Child (CRC) and that these international conventions were applicable in domestic law where the existing law was in contravention of any of these conventions and the court made a declaratory order to that effect, or where the meaning of a statute or provision was silent or ambiguous. She also sought a declaration that the proper test to be applied in assessing custody pursuant to the Ordinance was what was in the best interests of the child in accordance with the CRC, irrespective of the gender of the parent.

In refusing, dismissing or declining each declaration, it was held that:

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55. Article 1 provides: 'For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field'.
 56. Article 2 provides: 'States parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake: (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realisation of this principle; (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women; (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination; (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation; (e) To take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise; (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women; (g) To repeal all national penal provisions which constitute discrimination against women'.
 57. Article 5(a) provides: 'States parties shall take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of inferiority or the superiority of either of the sexes or on stereotyped roles for men and women'.
 58. Article 16(1)(d) provides: 'States parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women, the same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount'.
 59. Article 3(1) provides: 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'.

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- (1) Section 11⁶⁰ of the constitution makes clear that everyone, whatever their gender, is entitled to the same constitutional fundamental human rights and freedoms contained in the constitution, including freedom from discrimination. However, unequal treatment on the basis of gender is not included in the specific definition of discrimination in section 27 of the constitution. Consequently, since gender does not fall within the scope of section 27, the relevant legislative provisions cannot be in breach for that reason.
- (2) While states parties have obligations to amend their laws where there is conflict with the aims of international conventions, courts do not have the power to correct or amend existing legislation to bring it into line with treaty obligations, nor does the act of accession to an international treaty by the executive change domestic law until parliament passes a law to bring the treaty obligations into effect. International conventions are inapplicable unless laws are passed to implement their provisions. To hold otherwise would give the executive the power to make laws that it does not have. In this instance, the state ratified the CRC on 14 July 1995 and acceded to CEDAW on 4 October 1999. No laws have, it appears, been passed or even considered by parliament specifically to give effect to the obligations placed on the states parties by either convention.
- (3) The aims of an international convention may, however, be relevant in the interpretation of an existing domestic law, but only where there is difficulty in interpretation which requires the court to determine the true construction of the law. Such interpretative difficulties are not present in this case, since there is no conflict between section 3(5) of the Children Ordinance and section 20(2) of the Lands Ordinance and the former is subject to the latter. There is no doubt that section 20 is concerned with the inheritance of native land. Thus, it gives the court power to enquire into the paternity of a child born to an unmarried woman and the purpose of such enquiry is to ensure the child's inheritance is secured. However, it must be borne in mind that, by section 2 of the Lands Ordinance, 'court' means a Lands Court established under section 6 of the Lands Ordinance and so the power to enquire and determine the paternity of the child under section 20 is only given to the Lands Court. It is a special procedure given only to that court to initiate an enquiry into the paternity of a child born out of wedlock and make any necessary provisions for his or her upkeep. However, as in the case of courts implementing the Children Ordinance, the Lands Court must act in the best interests of the child when making an order under section 20 of the Lands Ordinance in relation to inheritance rights.

FOR THE PLAINTIFF: A SEKULA
FOR THE DEFENDANT: E APINELA

60. Section 11 provides: 'Every person in Tuvalu, whatever his race, place of origin, political opinions, colour, religious beliefs or sex is entitled the fundamental human rights and freedoms listed in the subsection and to other rights and freedoms set out in Part II which include freedom from discrimination'.

JOLI V. JOLI
COURT OF APPEAL, VANUATU⁶¹

Lunabek C J, Robertson J, Von Doussa J, Fatiaki J, Saksak, Treston
7 November 2003

Matrimonial jurisdiction

Following a divorce granted to the parties in a magistrate's court, the case was transferred to the Supreme Court on foot of a notice of motion filed by the respondent, including claims in respect of custody and access to children of the marriage and maintenance. Thereafter the parties entered into discussions about a property settlement. A dispute arose over which of their assets should be taken into account. A date was set by the Supreme Court to 'define what are the matrimonial assets for the purposes of a settlement'. The parties sought this ruling so that their negotiation could go forward.

The parties identified particular assets which were the stumbling block in negotiations. Those assets, which included three businesses, two leasehold titles and shares in certain companies, were claimed by the appellant to be his sole assets. All these items of property were in his name alone. He contended that the Supreme Court lacked power to make any order that had the effect of transferring any part of his interest, legal or equitable, to the respondent.

The matter came before the Court of Appeal by way of an appeal against an interlocutory ruling made by Coventry J on 25 March 2003. The Court of Appeal maintained that the issues raised by the appeal were important and in the public interest.

The subject of the appeal is constituted in the following passage taken from the ruling by Coventry J:

'In my judgment there is presumption that all such assets are beneficially owned jointly, no matter whose name they are in or who in fact paid for them, made them or acquired them. That presumption can be rebutted concerning any asset by showing that it was the intention of the parties that at the time of its acquisition or subsequently both intended it should be the sole property of one.'

Coventry J based his finding on concepts of equality between the sexes, which he drew from Article 5⁶² and Article 1 (k)⁶³ of the Constitution of the Republic of Vanuatu and

61. Sources: Constitution of Vanuatu and [2003] VUCA 27; Civil Appeal Case 11 of 2003 (7 November 2003).
62. '...all persons are entitled to the following fundamental rights and freedoms of the individual without discrimination on the grounds of ... sex ...'.
63. Article 1 (k) guarantees 'equal treatment under the law or administrative action, except that no law shall be inconsistent with this sub-paragraph in so far as it makes provision for the special benefit, welfare, protection or advancement of females, children and young persons ...'.

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from the provisions of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).⁶⁴

The appellant complained to the Court of Appeal that the ruling of Coventry J purported to establish in Vanuatu a matrimonial property regime to fill a void in the law, and that however well intentioned the ruling may have been, it is for parliament, not the court, to make new laws of this kind.

The Court of Appeal enquired as to what if any law was to be applied in Vanuatu concerning matrimonial property and to determine if in reality there is a void which the ruling under appeal sought to fill.⁶⁵ Due to the relevant course of legal history in Vanuatu, both parties accepted the application of the 1973 English Act⁶⁶ following

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64. Under the Convention, article 5(1) requires state parties to take all appropriate measures: 'to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and other practices which are based on the idea of the inferiority or superiority of either of the sexes or on stereotyped roles of men and women'. Article 16 of the Convention states: '1. States parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: ... (c) The same rights and responsibilities during marriage and its dissolution ... (h) The same rights for both spouses in respect of ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration'.
65. Immediately before the Day of Independence on 30 July 1980, laws which applied in Vanuatu included statutes of general application in force in England on 1 January 1976 as well as the principles of the English common law and equity. Under the terms of the Anglo French Protocol of 1914, those laws would not have applied to French citizens and 'optants' to the French legal system. Their rights were governed by French law under the parallel legal system then in force. At independence, laws in force immediately beforehand were continued in operation by Article 95 of the Constitution, which provides: '(1) Until otherwise provided by Parliament, all Joint Regulations and subsidiary legislation made thereunder in force immediately before the Day of Independence shall continue in operation on and after that day as if they had been made in pursuance of the Constitution and shall be construed with such adaptations as may be necessary to bring them into conformity with the Constitution. (2) Until otherwise provided by Parliament, the British and French laws in force or applied in Vanuatu immediately before the Day of Independence shall on and after that day continue to apply to the extent that they are not expressly revoked or incompatible with the independent status of Vanuatu and wherever possible taking due account of custom. (3) Custom law shall continue to have effect as part of the law of the Republic of Vanuatu'.
66. Part II of the 1973 English Act contains provisions dealing with financial relief for both parties to a marriage and for any children of the family. The provisions empower the court to make property adjustment orders in connection with divorce proceedings. Property adjustment orders are defined in Section 21 as orders dealing with the property rights available under Section 24 for the purpose of adjusting the financial position of the parties to a marriage

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independence. However, Counsel for the appellant contended that the 1973 English Act ceased to have any application in Vanuatu after the Matrimonial Causes Act [CAP 192] came into force on 15 September 1986, pursuant to the provisions of Article 95 (2) and within the meaning of 'otherwise provided'. The respondent contended however that the enactment of CAP 192 only rendered inapplicable those provisions in the 1973 English Act that dealt specifically with the aspects of matrimonial law covered by CAP 192.⁶⁷

In allowing the appeal, it was held that:

- (1) Parts I and II of CAP 192 make comprehensive provision for decrees of nullity of marriage and divorce which replace Part I of the 1973 English Act as the Law of Vanuatu.

and any children of the family on or after the grant of a decree of divorce, nullity of marriage or judicial separation. Section 24 provides: '(1) on granting a decree of divorce, a decree of nullity of marriage or a decree of judicial separation or at any time thereafter (whether, in the case of a decree of divorce or of nullity of marriage, before or after the decree is made absolute), the court may make any one or more of the following orders, that is to say – (a) an order that a party to the marriage shall transfer to the other party, to any child of the family or to such person as may be specified in the order for the benefit of such a child, such property as may be so specified, being property to which the first-mentioned party is entitled, either in possession or reversion; (b) an order that a settlement of such property as may be so specified, being property to which the first-mentioned party is entitled, either in possession or reversion; (c) an order varying for the benefit of the parties to the marriage and of the children of the family or either or any of them any antenuptial or post-nuptial settlement (including such a settlement made by will or codicil) made on the parties to the marriage; (d) an order extinguishing or reducing the interest of either of the parties to the marriage under such settlement; subject however, in the case of an order under paragraph (a) above, to the restrictions imposed by Section 29 (1) and (3) below on the making of orders for a transfer of property in favour of children who have attained the age of eighteen. (2) The court may make an order under subsection (1)(c) above notwithstanding that there are no children of the family. (3) Without prejudice to the power to give a direction under Section 30 below for the settlement of an instrument by conveyancing counsel, where an order is made under this section on or after granting a decree of divorce or nullity of marriage, neither the order nor any settlement made in pursuance of the order shall take effect unless the decree has been made absolute.'

67. The scope of the provisions in CAP 192 are more restricted. Part I deals with nullity of marriage. Part II provides for the dissolution of marriage. Part III makes provisions for alimony and maintenance in the case of divorce and nullity of marriage and for the custody and maintenance of children. Part IV contains supplementary provisions which empower the court to award damages to a Petitioner in a divorce on the ground of adultery.

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- (2) Part III of CAP 192 replaces all those provisions of the 1973 English Act which deal with topics addressed in Sections 14⁶⁸ and 15⁶⁹.
- (3) Section 14 cannot be construed as containing a power to adjust proprietary interests as part of a property settlement, as it does not operate as a comprehensive code for all ancillary property matters that arise in connection with decrees of nullity or dissolution of the marriage under Parts I and II of the 1973 English Act to bring about a division or settlement of property between the parties to the former marriage.
- (4) The 1973 English Act, save in so far as its application has been overtaken by the provisions of CAP 192, is a law which applies in Vanuatu in accordance with the provisions of Article 95 (2)⁷⁰ and will continue to be so until Parliament otherwise provides.
- (5) The Supreme Court had the power to make an order to adjust the proprietary interest of the husband in the assets which were identified as his sole property.
- (6) A law applied in Vanuatu already makes provision for the manner in which the power to adjust proprietary interests between the parties is to be exercised.⁷¹

68. Section 14 makes broad provision for the payment of weekly, monthly or annual sums for maintenance and support of a wife, yet does not purport to deal with the division of property between the parties of the former marriage.

69. Under Section 15 of CAP 192 the court may from time to time, either before or after the final decree, make such provision as appears just with respect to the custody, maintenance and education of the children of the marriage.

70. See note 65, *supra*.

71. Section 25(1) of the 1973 English Act provides as follows: 'It shall be the duty of the court in deciding whether to exercise its powers under Section 23(1) (a), (b) or (c) or 24 above in relation to a party to the marriage and if so, in what manner, to have regard to all circumstances of the case including the following matters, that is to say – (a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future; (b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future; (c) the standard of living enjoyed by the family before the breakdown of the marriage; (d) the age of each party to the marriage and the duration of the marriage; (e) any physical or mental disability of either of the parties to the marriage; (f) the contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family; (g) in the case of proceedings for divorce or nullity of marriage, the value to either of the parties to the marriage of any benefit (for example, a pension) which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring; and so to exercise those powers as to place the parties, so far as it is practicable and having regard to their conduct, and just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other'.

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- (7) There is no presumption of law in Vanuatu that matrimonial assets are beneficially owned jointly, no matter whose name they are in and who paid for them.

FOR THE APPELLANT: JURIS OZOLS

FOR THE RESPONDENT: GARY BLAKE

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**LONGWE V. INTERCONTINENTAL HOTELS
HIGH COURT, ZAMBIA⁷²**

Musumali J
4 November 1992

Discrimination

Sex discrimination

Freedom of movement

Freedom of association – Whether rule barring unaccompanied women from a public place a violation of freedom of movement or association

L was refused entry to a hotel bar on the grounds that no unaccompanied women could be permitted entry. The hotel management had introduced this rule in an attempt to stop frequent disturbances, which they claimed were caused by women not accompanied by men and which instigated a series of complaints by hotel residents and male patrons alike, alleging that women were soliciting. Unaccompanied women were allowed in all other areas of the hotel.

L instituted proceedings, claiming that the hotel's refusal to allow her to enter the bar, a public place, was a violation of her right to freedom of movement and her right to be free from sex and marital status discrimination under articles 22⁷³ and 23⁷⁴ of the

72. Source: Emerton *et al.* (eds.) *International Women's Rights and Cases*, Routledge-Cavendish Publishing, 2005.

73. Article 22(1) provides: 'Subject to the other provisions of this article and except in accordance with any other written law, no citizen shall be deprived of his freedom of movement, and for the purposes of this article freedom of movement means – (a) the right to move freely throughout Zambia...'

74. Article 23 provides: (1) Subject to clauses (4) (5) and (7), no law shall make any provision that is discriminatory either of itself or in its effect. (2) Subject to clauses (6), (7) and (8), no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority. (3) In this article the expression 'discriminatory' means, affording different treatment to different persons attributable, wholly or mainly to their respective descriptions by ... sex ... marital status ... whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description. (4) Clause (1) shall not apply to any law so far as that law makes provision – ... (e) whereby persons of any such description as is mentioned in clause (3) may be subjected to any disability or restriction or may be accorded any privilege or advantage which, having regard to its nature and the special circumstances pertaining to those persons or to persons of any other description, is reasonably justifiable in a democratic society ... (6) Clause (2) shall not apply to anything which is expressly or by necessary implication

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Constitution of Zambia. The court also considered her case under article 21⁷⁵ (freedom of association). L argued that, even if the hotel were to be considered private premises, it was still required to observe these constitutional provisions. L claimed that her constitutional rights were also reinforced by Zambia's international obligations under the Convention on the Elimination of All Forms of Discrimination against Women⁷⁶ (CEDAW) and the African Charter on Human Rights and People's Rights⁷⁷, as well as the 1988 Bangalore Principles⁷⁸.

authorised to be done by any such provision or law as is referred to in clause (4) or (5). (7) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this article to the extent that it is shown that the law in question makes provision whereby persons of any such description as is mentioned in Clause (3) may be subjected to any restriction on the rights and freedoms guaranteed by articles 21 and 22, being such a restriction as is authorised by clause (2) of article 21 or clause (3) of article 22, as the case may be ...'.

75. Article 21 provides: (1) 'Except with his own consent, no person shall be hindered in the enjoyment of his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons ... (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this article to the extent that it is shown that the law in question makes provision: (a) that is reasonably required in the interests of ... public morality ... (b) that is reasonably required for the purpose of protecting the rights or freedoms of other persons ... and except so far as that provision or, the thing done under the authority thereof as the case may be, is shown not to be reasonably justifiable in a democratic society'.
76. Article 1 provides: 'Discrimination is any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field'. Article 2 provides that: 'Discrimination against women in all its forms is condemned and the states parties agree to undertake: ... To ensure that public authorities and institutions shall refrain from engaging in any act or practice of discrimination against women. To ensure that all acts of discrimination against women by persons, organisations or enterprises are eliminated'.
77. Article 2 provides that: 'Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as ... sex ... or other status'. Article 3 provides that: '1. Every individual shall be equal before the law, 2. Every individual shall be entitled to equal protection of the law'.
78. Section 1 provides that: 'Fundamental human rights and freedoms are inherent in all humankind and find expression in constitutions and legal systems throughout the world and in the international human rights instruments'. Section 2 provides that: 'These international human rights instruments provide important guidance in cases concerning fundamental human rights and freedoms'. Section 3 provides that: 'There is an impressive body of jurisprudence, both international and national, concerning the interpretation of particular human rights and freedoms and their application. This body of jurisprudence is of practical relevance and value to the judges and lawyers generally'.

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In granting the applications, it was held that:

- (1) Article 11 of the constitution⁷⁹ confers on every resident of Zambia, whether a citizen or not, a right to be protected by the law. Therefore a person who felt that his or her rights had been infringed was entitled to seek an appropriate order before the courts.
- (2) The provisions of the constitution were intended to apply to everybody, public and private, unless the context dictated otherwise.
- (3) L was discriminated against because she was a female who was not accompanied by a male. A male who was not accompanied by a female could move around the hotel freely and enter the bar. This constituted blatant discrimination against females on the basis of their sex by the hotel.
- (4) Article 23 of the constitution allows derogations from its provisions in respect of acts authorised by an act of parliament or principles of law or delegated legislation. The discriminatory rule in question was not such an act of parliament, statutory instrument or a rule of law. Therefore none of the permitted derogations applied and the discrimination in question did not fall under article 23. The hotel's rule breached article 21 concerning freedom of assembly and association and article 22 concerning freedom of movement. The rule denied women the freedom to go wherever and to associate with whomever they wished.
- (5) The ratification of international treaties and conventions by a nation state without reservations is a clear testimony of the willingness by the state to be bound by the provisions of those documents. Judicial notice should be taken of such willingness when formulating its decision.
- (6) The Bangalore Principles should not, as a general rule, be accorded the same status as international human rights instruments.

FOR THE PETITIONER: MRS MUSHOTA

FOR THE RESPONDENT: MR MALILA

79. Article 11 provides that: 'It is recognised and declared that every person in Zambia has been and shall continue to be entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed, sex or marital status, but subject to the limitations contained in this part, to each and all of the following, namely: (a) ... the protection of the law, (b) freedom of ... assembly movement and association ... and the provisions of this article shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in this part, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest'.

