Brooklyn Journal of International Law

Volume 48 | Issue 2 Article 2

8-30-2023

African Courts and International Human Rights Law

John Mukum Mbaku

AFRICAN COURTS AND INTERNATIONAL HUMAN RIGHTS LAW

*John Mukum Mbaku**

---

* *John Mukum Mbaku* is an Attorney and Counselor at Law (licensed in the State of Utah) and Brady Presidential Distinguished Professor of Economics & John S. Hinckley Research Fellow at Weber State University (Ogden, Utah, USA). He is also a Nonresident Senior Fellow at the Brookings Institution, Washington, D.C. He received the J.D. degree and Graduate Certificate in Environmental and Natural Resources Law from the S.J. Quinney College of Law, University of Utah, where he was Managing Editor of the *Utah Environmental Law Review*, and the Ph.D. (economics) from the University of Georgia. This article reflects only the present considerations and views of the author, which should not be attributed to either Weber State University or the Brookings Institution.

INTRODUCTION

Since the end of World War II, international human rights law has formed the foundation and minimum standard for the recognition and protection of human rights around the world.[1] The founding of the United Nations (UN) in San Francisco, California on October 24, 1945, represented an important development in the global effort to recognize and protect human rights.[2] That the maintenance of a post-war global political and economic order in which human rights would be recognized, respected, and protected was the impetus for the founding of the United Nations, is evident it its founding document—the UN Charter.[3] Expert in international human rights Professor Catherine Renshaw has noted that "[t]he failures of the League of Nations, most spectacularly the League's failure to protect Europe's minorities in the lead-up to World War II, provided the impetus for the creation of a new human rights-focused

1. *See* UN, *Universal Declaration of Human Rights: The Foundation of International Human Rights Law*, UN.ORG, https://www.un.org/en/about-us/udhr/foundation-of-international-human-rights-law (last visited Feb. 17, 2023) (stating that the UDHR is the "foundation of international human rights law").

2. *See generally* STEPHEN C. SCHLESINGER, ACT OF CREATION: THE FOUNDING OF THE UNITED NATIONS (2003) (providing an overview of the events leading to the founding of the United Nations in 1945); THE OXFORD HANDBOOK OF THE UNITED NATIONS (Sam Daws & Thomas G. Weiss eds., 2d ed. 2018) (providing a series of essays that examines the functioning of the United Nations).

3. UN SECRETARY-GENERAL, OUR COMMON AGENDA: REPORT OF THE SECRETARY-GENERAL 1 (2021) (noting that the UN was founded to "save succeeding generations from the scourge of war" and "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small"). *See also* Charter of the United Nations and Statute of the International Court of Justice, Oct. 24, 1945, 1 U.N.T.S. 16 [hereinafter UN Charter].

international world order."[4] In addition, noted Professor Renshaw, "[t]he United Nations Charter committed the United Nations to promoting universal respect for, and observance of, human rights and fundamental freedoms."[5]

When writing the UN Charter's Preamble, the nations that assembled in 1945 declared that they were determined to "reaffirm faith in *fundamental human rights*" and in the "equal rights of men and women."[6] They also pledged to "establish conditions under which justice and *respect for the obligations arising from treaties and other sources of international law can be maintained*."[7]

The UN's desire to promote the global protection of human rights is made more explicit in its purposes, which are elaborated in Article 1 of its Charter.[8] According to Article 1, the purposes of the UN include maintaining peace and security; taking effective measures through collective efforts to prevent and eliminate "threats to peace," as well as using peaceful means to resolve other global problems.[9] Additionally, the UN was also expected to develop friendly relations among its member states and promote and encourage the recognition, respect, and protection of human rights and fundamental freedoms of all human beings.[10]

On December 10, 1948, the UN General Assembly adopted the Universal Declaration of Human Rights (UDHR) at the Palais de Chaillot in Paris through Resolution 217.[11] The UDHR was specifically designed to enshrine the rights and freedoms of all human beings.[12] Legal scholars see the adoption of the UDHR as

---

4. Catherine Renshaw, *Human rights: the regional and global dynamics of change*, *in* HANDBOOK ON GLOBAL GOVERNANCE AND REGIONALISM 419, 423 (Jürgen Rüland & Astrid Carrapatoso eds., 2022).

5. Renshaw, *supra* note 4, at 423. *See also* Charter of the United Nations and Statute of the International Court of Justice, Oct. 24, 1945, 1 U.N.T.S. 16 [hereinafter UN Charter].

6. *Id.* at pmbl. (emphasis added).

7. *Id.*

8. *Id.* at art 1.

9. *Id.* at art 1.

10. *Id.* (emphasis added).

11. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

12. This is evident in the UDHR's preamble, where it is stated that the UN General Assembly "[p]roclaims this Universal Declaration of Human Rights as a common standard of achievement for *all peoples and all nations*." G.A. Res. 217 (III) A, *supra* note 11, a pmbl. Emphasis added.

"the beginning of the modern struggle to [recognize and] protect human rights."[13] It has been argued, however, that the origins of the movement to protect human rights can be found in "early philosophical and religious ideas as well as legal theories of the 'natural law'—a law higher than the 'positive law' of states (such as legislation)."'[14] According to these theories, "positive laws must either be derived from or reflect 'natural law' because individuals have certain immutable rights as human beings."[15]

The UDHR, which is generally considered to be an important foundational text in the history of human rights, consists of thirty articles, which detail the individual's basic rights and fundamental freedoms.[16] In the Preamble to the UDHR, Member States of the UN recognize "the inherent dignity of the equal and inalienable rights of all members of the human family [as the] foundation of freedom, justice and peace in the world."[17] The UDHR also notes that although "disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind," however, "the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people."[18]

The UDHR makes reference to the UN Charter and notes that the "peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom" and that Member States of the UN have "pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms."[19]

Although there are many ways to read the UDHR, one relatively effective way is to put its articles in groups that address similar issues. For example, Articles 1–2 establish the basic

13. DAVID WEISSBRODT & CONNIE DE LA VEGA, INTERNATIONAL HUMAN RIGHTS LAW: AN INTRODUCTION 3 (2007).

14. *Id.*

15. *Id.*

16. G.A. Res. 217(III) A, *supra* note 11.

17. *Id.* at pmbl.

18. *Id.*

19. *Id.*

concepts of dignity, liberty, and equality.[20] Articles 3–5 establish individual rights, including the "right to life, liberty and the security of person"; the right not to be "held in slavery or servitude"; and the right not to "be subjected to torture, cruel, inhuman or degrading treatment or punishment."[21] Articles 6–11 deal with the rights of individuals to equal recognition before, and equal protection of, the law.[22] For example, Article 6 states that "[e]veryone has the right to recognition everywhere as a person before the law."[23]

Articles 12–17 elaborate the rights that are concerned with "the liberties of people as they live and interact with one another in civil and political society."[24] For example, Article 12 provides that "[n]o one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks."[25] Articles 18–21 guarantee certain important liberties, including, for example, the right to "freedom of thought, conscience and religion," as well as "the right to freedom of opinion and expression" and "the right to freedom of peaceful assembly and association."[26]

Articles 22–27 guarantee economic, social, and cultural rights including the right to "social security," the "right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment," and the right to "a standard of living adequate for the health and well-being of himself and of his family."[27]

Articles 28–30 provide for the legal means through which these rights can be exercised, as well as those areas where these enumerated rights cannot be exercised or applied, and the duty

---

20. *See id.* at arts. 1–2. According to Article 1, "[a]ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood." *Id.* at art. 1.

21. *Id.* at arts. 3–5.

22. *Id.* at arts. 6–11.

23. *Id.* at art. 6.

24. Mary Ann Glendon, *The Rule of Law in the Universal Declaration of Human Rights*, 2 NW. J. INT'L HUM. RTS. 1, 6 (2004). *See also* G.A. Res. 217(III)A, at arts. 12–17.

25. G.A. Res. 217(III)A, at art. 12.

26. *Id.* at arts. 18–19.

27. *Id.* at arts. 22–25.

of the individual to society.[28] For example, Article 28 states that "[e]veryone is entitled to a social and international order in which the rights and freedoms set forth in [the UDHR] can be fully realized."[29] Additionally, Article 29 states that "[t]hese rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations."[30]

The UDHR is usually considered "a hortatory declaration of principles and aspirations" and hence, it "does not have the legal status of a treaty."[31] Others have argued that the UDHR is "hortatory and aspirational, recommendatory rather than, in a formal case, binding."[32] Experts in international law, however, have noted that "the years have further blurred the threshold contrast between 'binding' and 'hortatory' instruments."[33] Although it does not have the legal status of a treaty, the UDHR's "position in international law has changed significantly, and it has received favorable treatment in many domestic legal systems since it was adopted by the UN General Assembly on December 10, 1948."[34] Perhaps, more importantly, over the years, several international legal scholars have advanced arguments that "all or parts of [the UDHR should be viewed] as legally binding, either as a matter of customary international law or as an authoritative interpretation of the UN Charter."[35]

UN General Assembly Resolution 217 (III), which adopted the UDHR in 1948, was named the International Bill of Human Rights.[36] Today, the International Bill of Human Rights consists

---

28. *See id.* at arts. 28–30.

29. *Id.* at art. 28.

30. *Id.* at art. 29.

31. Mirna E. Adjami, *African Courts, International Law, and Comparative Case Law: Chimera or Emerging Human Rights Jurisprudence?*, 24 MICH. J. INT'L L. 103, 110 (2002).

32. HENRY J. STEINER, PHILIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 152 (2008).

33. *Id*. at 152.

34. John Mukum Mbaku, *Protecting Human Rights in African Countries: International Law, Domestic Constitutional Interpretation, the Responsibility to Protect, and Presidential Immunities*, 16 S. C. J. INT'L L. & BUS. 1, 21 (2019) [hereinafter Mbaku, *Protecting Human Rights*]. *See also* STEINER, ET AL., *supra* note 32, at 152, 160–61.

35. STEINER, ET AL., *supra* note 32, at 152.

36. UN, *Universal Declaration of Human Rights: History of the Declaration*, UN.ORG https://www.un.org/en/about-us/udhr/history-of-the-declaration#:~:text=By%20its%20resolution%20217%20A,the%20vote%20but%20none%20dissenting (last visited Feb.

of the UDHR and two international human rights treaties established by the UN and accompanying protocols: the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), Optional Protocol to the International Covenant on Civil and Political Rights, and the Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty.[37] Unlike the UDHR, the ICCPR, the ICESCR, and their protocols are binding treaties.[38]

African treaties that deal specifically with human rights include the African Charter on Human and Peoples' Rights ("Banjul Charter"), which entered into force on October 21, 1982.[39] According to Article 1 of the Banjul Charter, "[t]he Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them."[40] In producing the Banjul Charter, the African States, members of the Organization of African Unity (OAU), gave "due regard to the Charter of the United Nations and the Universal Declaration of Human Rights."[41]

17, 2023) (noting that the preliminary draft from which the UDHR was developed was named "International Bill of Human Rights").

37. UN Centre for Hum. Rts., *Fact Sheet No. 2 (Rev. 1), The International Bill of Human Rights*, ST/HR(05)/H8/No/2(Rev.l) (June 1996), https://digitallibrary.un.org/record/236856?ln=en.

38. A treaty is only binding on the States Parties to the treaty. The international law principle of *pacta sunt servanda* is the basis for the binding effect of treaties. This principle is codified in Article 26 of the *Vienna Convention on the Law of Treaties* and reads as follows: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." Vienna Convention on the Law of Treaties, art. 26, May 23, 1969, 1155 U.N.T.S. 331.

39. African Charter on Human and Peoples' Rights, Oct. 21, 1982, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 [hereinafter Banjul Charter]. Other regional instruments include the African Charter on the Rights and Welfare of the Child, July 11, 1990, OAU Doc. CAB/LEG/24.9/49 [hereinafter African Child Charter]; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, July 11, 2003 [hereinafter Maputo Protocol]; and Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa, January 29, 2018 [hereinafter African Disabilities Protocol].

40. *Id.* at art. 1. It is obvious from Article 1 that the treaty is binding on States Parties.

41. *Id.* at pmbl. The African Union (AU) was founded on July 9, 2002 in Durban, South Africa and officially took over the duties and responsibilities of the Organization of African Unity (OAU)—the OAU was effectively disbanded

Both the OAU and its successor, the African Union (AU), considered "the need to give effect to the [Banjul] Charter's provisions in States Parties' municipal law so important that, besides the obligations created by Article 1, they found it necessary to impose additional requirements on States Parties through Article 62."[42] Through Article 62, OAU Member States imposed an obligation on States Parties to submit, every two years after the Charter had come into force, reports indicating the legislative and other measures that had been taken to give effect to the rights and freedoms guaranteed and elaborated in the Charter.[43]

Another African human rights instrument is the African Charter on the Rights of the Child (African Child Charter).[44] The African Child Charter is the first regional treaty that deals specifically with the rights and fundamental freedoms of children.[45] In 1979, the OAU adopted the Declaration on the Rights and Welfare of the Child, which eventually served as the blueprint for the African Child Charter.[46] While the African Child Charter uses the African Child Declaration as a blueprint, most of the former's provisions "are modeled after those of the [UN Convention on the Rights of the Child]."[47]

According to Wendy Zeldin, a senior legal research analyst at the Library of Congress in Washington, D.C., the primary difference between the African Child Charter and the UN Convention on the Rights of the Child is that the former contains provisions

---

at the same time that the AU came into being. *See generally* MUHAMMAD I. S. GASSAMA, FROM THE OAU TO THE AU: THE ODYSSEY OF A CONTINENTAL ORGANIZATION (2014) (providing an overview of the founding of the OAU, its demise and the emergence of the AU).

42. Mbaku, *Protecting Human Rights*, *supra* note 34, at 22.

43. Banjul Charter, *supra* note 39, at art. 62.

44. African Union, *African Charter on the Rights and Welfare of the Child*, OAU Doc. CAB/LEG/24.9/49 (July 11, 1990) [hereinafter African Child Charter].

45. Amanda Lloyd, *A theoretical analysis of the reality of children's rights in Africa: An introduction to the African Charter on the Rights and Welfare of the Child*, 2 AFR. HUM. RTS. L. J. 11, 13 (2002) (noting that the "OAU is the first regional organization to adopt a binding regional instrument concerned with children's rights"). *See also* Zeldin, *infra* note 47, at 5 (noting that the African Child Charter is "the first regional treaty on children's rights").

46. Organization of African Unity (OAU), *Declaration on the Rights and Welfare of the Child*, OAU Doc. AHG/St. 4 (XVI) Rev. 1 (1979).

47. WENDY ZELDIN, LAW LIBRARY OF CONGRESS, INTERNATIONAL LAWS: CHILDREN'S RIGHTS 5 (2007), https://tile.loc.gov/storage-services/service/ll/llglrd/2018298966/2018298966.pdf.

defining children's duties towards their families and communities,[48] and these provisions are in line with the approach to human rights adopted by the Banjul Charter.[49] In its Preamble, the African Child Charter notes that "the child occupies a unique and privileged position in the African society" and "requires legal protection in conditions of freedom, dignity and security," as well as "particular care with regard to health, physical, mental, moral and social development."[50] The African Child Charter then defines a child as "every human being below the age of 18 years."[51]

The African Child Charter sets forth several important principles for the treatment of children generally and the protection of their rights in particular.[52] These include "non-discrimination,"[53] the "best interests of the child,"[54] and "survival and development."[55] Other principles elaborated in the African Child Charter include the right of the child to: a name and nationality,[56] freedom of expression,[57] freedom of association,[58] freedom

48. *Id.* According to Article 31 of the African Child Charter, "[e]very child shall have responsibilities towards his family and society, the State and other legally recognized communities and the international community. The child, subject to his age and ability, and such limitations as may be contained in the present Charter, shall have the duty: (a) to work for the cohesion of the family, to respect his parents, superiors and elders at all times and to assist them in case of need[.]" African Child Charter, *supra* note 44, at art. 31(a).

49. ZELDIN, *supra* note 47, at 5.

50. African Child Charter, *supra* note 44, at pmbl.

51. *Id.* at art. 2.

52. *Id.* at pmbl.

53. *Id.* at art. 3.

54. *Id.* at art. 4. According to Article 4, "[i]n all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration." *Id.* at art. 4(1). Article 4 also deals with the rights of a child during judicial or administrative proceedings. It states that "[i]n all judicial or administrative proceedings affecting a child who is capable of communicating his/her own views, an opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings, and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate law." *Id.* at art. 4(2).

55. *Id.* at arts. 3–5.

56. *Id.* at art. 6 ("Every child shall have the right from his [or her] birth to a name.").

57. *Id.* at art. 7.

58. *Id.* at art. 8.

of thought, conscience and religion,[59] privacy,[60] education,[61] and leisure, recreation, and cultural activities.[62]

The African Child Charter also provides special protections for handicapped children.[63] Article 13 states as follows: "Every child who is mentally or physically disabled shall have the right to special measures of protection in keeping with his physical and moral needs and under conditions which ensure his dignity, promote his self-reliance and active participation in the community."[64]

African children are also guaranteed "the right to enjoy the best attainable state of physical, mental and spiritual health."[65] Article 15 elaborates various protections for children in the economic sphere and mandates that "[e]very child shall be protected from all forms of economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's physical, mental, spiritual, moral, or social development."[66]

According to the African Child Charter, the child must also be protected against abuse and torture,[67] harmful social, traditional and cultural practices,[68] as well as against all forms of sexual exploitation.[69] The African Child Charter also protects children from the harmful and damaging effects of narcotics and illicit drugs,[70] as well as from trafficking and abduction.[71] The African Child Charter then imposes an obligation on all States Parties "to take appropriate measures to prevent: (a) the abduction, the sale of, or traffic in children for any purpose or in any form, by any person including parents or legal guardians of the child; [and] (b) the use of children in all of forms of begging."[72]

Another African treaty that protects human rights, particularly the rights of women, is the Protocol to the African Charter

59. *Id.* at art. 9.
60. *Id.* at art. 10.
61. *Id.* at art. 11.
62. *Id.* at art. 12(1).
63. *Id.* at art. 13.
64. *Id.* at art. 13(1).
65. *Id.* at art. 14(1).
66. *Id.* at art. 15(1).
67. *Id.* at art. 16.
68. *Id.* at art. 21.
69. *Id.* at art. 27.
70. *Id.* at art. 28.
71. *Id.* at art. 29.
72. *Id.*

on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol).[73] The Maputo Protocol was adopted by the 2nd Ordinary Session of the Assembly of Heads of State and Government of the African Union at Maputo, Mozambique, July 11, 2003, and entered into force on November 25, 2005.[74]

In adopting the Maputo Protocol, participants at the 2nd Ordinary Session of the Assembly of the African Union (AU) in July 2003 made reference to Article 66 of the Banjul Charter.[75] Article 66 permits the AU to adopt special protocols or agreements, when and if necessary, to supplement provisions of the Banjul Charter.[76] Earlier at its Thirty-first Ordinary Session in Addis Ababa, Ethiopia, in June 1995, the Assembly of Heads of State and Government of the OAU had endorsed the "recommendation of the African Human Rights Commission on Human and Peoples' Rights to elaborate a Protocol on the Rights of Women in Africa."[77]

The delegates at the Maputo Assembly also considered Article 2 of the Banjul Charter,[78] which "enshrines the principle of non-discrimination on the grounds of race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status."[79] They then made

---

73. African Union, *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, AU Doc. CAB/LEG/66.6 (July 13, 2003) [hereinafter Maputo Protocol].

74. *Id.* at pmbl. As of May 20, 2019, 55 African countries had ratified the Maputo Protocol. *Id.* at 23.

75. Article 66 of the Banjul Charter states as follows: "Special protocols or agreements may, if necessary, supplement the provisions of the present Charter." Banjul Charter, *supra* note 39, at art. 66.

76. Maputo Protocol, *supra* note 73, at pmbl.

77. *Id. See also* African Commission on Human Rights, Resolution on the African Commission on Human and Peoples' Rights, AHG/Res. 240 (XXXI) (1995), https://archives.au.int/bitstream/handle/123456789/742/AHG%20Res%20240%20%28XXXI%29%20_E.pdf?sequence=1&isAllowed=y.

78. Article 2 of the Banjul Charter states as follows: "Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status." Banjul Charter, *supra* note 39, at art. 2.

79. Maputo Protocol, *supra* note 73, at pmbl.

reference to Article 18 of the Banjul Charter,[80] which calls on "all States Parties to eliminate every discrimination against women and to ensure the protection of the rights of women as stipulated in international declarations and conventions."[81]

The Maputo Assembly delegates also noted "that Articles 60 and 61 of the [Banjul Charter][82] recognise regional and international human rights . . . norms on human and peoples' rights as being important reference points for the application and interpretation of the [Banjul Charter]."[83] In addition, they recalled that international human rights instruments, including the UDHR, ICCPR, ICESCR, CEDAW, as well as several regional human rights instruments, have recognized and guaranteed women's rights as "being inalienable, interdependent and indivisible human rights."[84]

Finally, the delegates at the Maputo Assembly expressed concern that although the majority of the Member States of the OAU [AU] had ratified the Banjul Charter and other international human rights instruments, and were committed to eliminating "all forms of discrimination and harmful practices against women," African women continue to be subjected to various forms of discrimination and harmful practices.[85]

The Maputo Protocol was designed to guarantee a comprehensive set of rights for African women.[86] Specifically, the protocol sought to eliminate discrimination against women[87] and guarantee women the right to: dignity,[88] life, integrity and security of person,[89] participation in the political and decision-making process,[90] peace,[91] education and training,[92] food security,[93]

80. Article 18(3) states as follows: "The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of woman and the child as stipulated in international declarations and conventions." Banjul Charter, *supra* note 39, at art. 18.

81. Maputo Protocol, *supra* note 73, at pmbl.

82. *See* Banjul Charter, *supra* note 39, at arts. 60, 61.

83. Maputo Protocol, *supra* note 73, at pmbl.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at art. II.

88. *Id.* at art. III.

89. *Id.* at art. IV.

90. *Id.* at art. IX.

91. *Id.* at art. X.

92. *Id.* at art. XII.

93. *Id.* at art. XV.

adequate housing,[94] positive cultural context,[95] healthy and sustainable environment,[96] sustainable development,[97] and inheritance.[98]

The Maputo Protocol also imposed an obligation on States Parties to: (1) eliminate all forms of practices that harm women like female genital mutilation (FGM) and the medicalization and para-medicalization of FGM;[99] (2) ensure that "[n]o marriage shall take place without the free and full consent of both parties" and that "the minimum age of marriage for women shall be 18 years."[100] Additionally, the Maputo Protocol required States Parties to:

- enact appropriate legislation to ensure that women and men enjoy the same rights in case of separation, divorce or annulment of marriage;
- ensure effective access by women to judicial and legal services, including legal aid;
- respect and ensure respect for the rules of international humanitarian law applicable in armed conflict situations, which affect the population, particularly women;
- adopt and enforce legislative and other measures to guarantee women equal opportunities in work and career advancement and other economic opportunities;
- ensure that the right to health of women, including sexual and reproductive health is respected and promoted;
- take appropriate legal measures to ensure that widows enjoy all human rights;
- provide protection to elderly women and take specific measures commensurate with their physical, economic and social needs as well as their access to employment and professional training;
- ensure the protection of women with disabilities; [and

94. *Id.* at art. XVI.
95. *Id.* at art. XVII.
96. *Id.* at art. XVIII.
97. *Id.* at art. XIX.
98. *Id.* at art. XX.
99. *Id.* at art. V.
100. *Id.* at art. VI.

- ensure the protection of poor women and women heads of families including women from marginalized population groups.[101]

In addition to these regional human rights instruments, most African countries are also parties to the majority of international human rights instruments.[102] This includes, for example, the ICCPR, ICESCR, and the Convention on the Elimination of All Forms of Discrimination Against Women.[103] Although only four African countries[104] were among the fifty-one Founding Members of the UN in 1945, today, all African countries are members of the UN system and participate in its various activities.[105] According to Article 4 of the UN Charter, "[m]embership in the United Nations is open to all . . . peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations."[106] The obligations contained in the UN Charter include achieving "international cooperation in solving international problems of an economic, social, cultural, or humanitarian character," and "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."[107] Hence, any country that joins the UN effectively imposes on itself the obligation to

---

101. *Id.* at arts. VI, VII, VIII, XI, XXII, XXIII, XIV, XX, XXIV.

102. For example, all African countries, except Comoros, have ratified the ICCPR. *See* UN Human Rights Treaty Bodies, *Ratification Status for CCPR: International Covenant on Civil and Political Rights*, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CCPR&Lang=en (last visited Feb. 13, 2023). In addition, all African countries, except Somalia and Comoros, have ratified the CEDAW. UN Human Rights Treaty Bodies*, Ratification Status for CEDAW: Convention on the Elimination of All Forms of Discrimination against Women*, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CEDAW&Lang=en (Feb. 13, 2023).

103. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].

104. These were Egypt, Ethiopia, Liberia and the minority-ruled Union of South Africa. *See Founding Member States*, UN, https://research.un.org/en/unmembers/founders (last visited Nov. 15, 2021).

105. *Regional Groups of Member States*, UN, https://www.un.org/dgacm/en/content/regional-groups (last visited Nov. 15, 2021).

106. UN Charter, at art. 4.

107. *Id.* at art. 1.

promote international cooperation and work towards the recognition and protection of human rights.[108]

According to the UN High Commissioner for Human Rights (UNHCHR), "[h]uman rights are rights we have simply because we exist as human beings—they are not granted by any state."[109] The UNHCHR notes further that "[t]hese universal rights are *inherent* to us all, regardless of nationality, sex, national or ethnic origin, color, religion, language, or any other status" and that human rights "range from the most fundamental—the right to life—to those that make life worth living, such as the rights to food, education, work, health, and liberty."[110] According to the UNHCHR, the UDHR "was the first legal document to set out the fundamental human rights to be universally protected."[111] The UDHR turned seventy in 2018 and continues to form the foundation for all international human rights law and its "30 articles provide the principles and building blocks of current and future human rights conventions, treaties and other legal instruments."[112]

The UNHCHR notes that "[t]he principle of universality of human rights is the cornerstone of international human rights law" and this means that "we are all equally entitled to our human rights."[113] Additionally, the UN High Commissioner for Human Rights states that the principle of universality of human rights, which was first mentioned in the UDHR, runs through "many international human rights conventions, declarations, and resolutions."[114]

Human rights are not just universal, they are also inalienable.[115] This means that "they should not be taken away, except in specific situations and according to due process."[116] If an

---

108. *See* UN Charter, at art. 4.

109. *What Are Human Rights?*, UN HUM. RTS. OFF. OF THE HIGH COMM'R, https://www.ohchr.org/en/what-are-human-rights (last visited Nov. 17, 2021). *See also* DANIEL TAGLIARINA & CORRINE M. TAGLIARINA, BRINGING HUMAN RIGHTS BACK: EMBRACING HUMAN RIGHTS AS A MECHANISM FOR ADDRESSING GAPS IN UNITED STATES LAW 11 (2020) (noting that human rights are the rights that we have by virtue of the fact that we are human).

110. *What Are Human Rights?*, *supra* note 109 (emphasis in original).

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

individual is convicted by a legally constituted court of law, his right to liberty may be restricted.[117] The UNHCHR also notes that human rights are indivisible and interdependent, which means that "one set of rights cannot be enjoyed fully without the other."[118] As an example, the UNHCHR states that "making progress in civil and political rights makes it easier to exercise economic, social and cultural rights" and that "violating economic, social and cultural rights can negatively affect many other rights."[119]

Human rights are also characterized by equality and non-discrimination.[120] As stated in Article 1 of the UDHR, "[a]ll human beings are born free and equal in dignity and rights."[121] Freedom from discrimination, which ensures equality, is elaborated in Article 2 of the UDHR and provides the foundation for two important human rights instruments: (1) the Convention on the Elimination of All Forms of Racial Discrimination[122] and (2) the CEDAW.[123]

There are nine core international human rights instruments and all Member States of the UN have ratified at least one of them.[124] In ratifying any international human rights

117. *See id.*
118. *Id.*
119. *Id.*
120. *See id.*
121. *Id.*
122. International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195.
123. CEDAW, *supra* note 103.
124. These core human rights treaties and their complementary protocols are (1) International Convention on the Elimination of All Forms of Racial Discrimination; (2) International Covenant on Civil and Political Rights; (3) International Covenant on Economic, Social and Cultural Rights; (4) Convention on the Elimination of All Forms of Discrimination Against Women; (5) Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; (6) Convention on the Rights of the Child; (7) International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; (8) International Convention for the Protection of All Persons from Enforced Disappearance; (9) Convention on the Rights of Persons with Disabilities; (10) Optional Protocol to the covenant on Economic, Social and Cultural Rights; (11) Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the Death Penalty; (12) Optional Protocol to the Convention on the Elimination of Discrimination Against Women; (13) Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict; (14) Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child

instruments, States Parties understand that they "have obligations and duties under international law to respect, protect and fulfill human rights."[125] Some of these include the obligation to: "respect," which "means that States must refrain from interfering with or curtailing the enjoyment of human rights";[126] "protect," which "requires States to protect individuals and groups against human rights abuses";[127] and "fulfill," which means that "States must take positive action to facilitate the enjoyment of basic human rights."[128]

In exercising his or her human rights, the individual must "respect and stand up for the human rights of others."[129] This is very important, especially when the person whose rights are being violated is a member of a vulnerable group, such as women and children, religious and ethnic minorities, and other historically marginalized groups.[130] Throughout Africa, for example, the rights of women and girls are being trampled upon by both state and non-state actors.[131] In addition to the fact that customs

---

Prostitution and child Pornography; (15) Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure; (16) Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment; (17) Optional Protocol to the Convention on the Rights of Persons with Disabilities. *See The Core International Human Rights Instruments and Their Monitoring Bodies*, UN HUM. RTS. OFF. OF THE HIGH COMM'R, https://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx (last visited Nov. 17, 2021) [hereinafter UNHCHR, The Core Human Rights Instruments].

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *See, e.g.*, John Mukum Mbaku, *The Rule of Law and the Exploitation of Children in Africa*, 42 HASTINGS INT'L & COMP. L. REV. 287 (2019) (examining customary and traditional practices that harm children in Africa) [hereinafter Mbaku, *Exploitation*]. *See also* John Mukum Mbaku, *International Law and Child Marriage in Africa*, 7 INDONESIAN J. INT'L & COMP. L. 103 (2020) (examining the nature of forced and child marriage in Africa) [hereinafter Mbaku, *Child Marriage*].

131. Human Rights Watch, *Africa: Conflicts, Violence Threaten Rights*, HUMAN RIGHTS WATCH, Jan. 12, 2023, https://www.hrw.org/news/2023/01/12/africa-conflicts-violence-threaten-rights (last visited on April 21, 2023) (noting that African governments are failing "to tackle widespread abuses against civilians by state security forces and non-

and traditions in many African countries force girls to marry before they reach the age of majority, many of them are also subjected to FGM and denied the opportunity to attend school so that they can develop the skills and competencies needed to evolve into productive and contributing members of their societies.[132]

National governments are actually the ones responsible for recognizing and protecting human rights within their jurisdictions.[133] In order for each Member State of the UN to do so, they must make sure that they sign and ratify the relevant regional and international human rights instruments and then fully domesticate them to create rights that are justiciable in domestic courts.[134] In the following section, this Article will examine the concept of domestication of international treaties and how it impacts the recognition and protection of human rights in Africa.

I. DOMESTICATING INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

A. Introduction

Today, most African countries have constitutional provisions, particularly those "recognizing and protecting human rights," that "have been substantially influenced by international human rights instruments and standards."[135] For example, the Constitution of the Republic of Cameroon states as follows:

> We, the people of Cameroon,

---

state armed groups and insufficiently prioritized justice efforts for victims of atrocities across the continent").

132. Mbaku, *Exploitation of Children*, *supra* note 130 (examining the subjection of children to FGM). *See also* Mbaku, *Child Marriage*, *supra* note 130 (providing an overview of child marriage in Africa).

133. UN, *International Human Rights Law*, https://www.ohchr.org/en/instruments-and-mechanisms/international-human-rights-law#:~:text=The%20Office%20of%20the%20High,human%20rights%20for%20all%20people (last visited Feb. 17, 2023) (noting that "[i]nternational human rights law lays down obligations which States are bound to respect" and that "[b]y becoming parties to international treaties, States assume obligations and duties under international law to respect, to protect and fulfil human rights").

134. *See, e.g.*, Charles Manga Fombad, *Internationalization of Constitutional Law and Constitutionalism in Africa*, 60 AM. J. COMP. L. 439 (2012) (examining the process of domesticating international human rights instruments) [hereinafter Fombad, *Internationalization of Constitutional Law*].

135. *Id.* at 445.

> Declare that the human person, without distinction as to race, sex or belief, possesses inalienable and sacred rights;
>
> Affirm our attachment to the fundamental freedoms enshrined in the Universal Declaration of Human Rights, the Charter of [the] United Nations and the African Charter on Human and Peoples' Rights, and all duly ratified international conventions relating thereto, in particular.[136]

If, however, Cameroon only affirms the rights contained in international human rights instruments, that would not render these rights justiciable in its domestic courts or in those of other African countries that have similar constitutional affirmations.[137] As argued by constitutional expert Professor Charles Manga Fombad, these constitutional affirmations do not "render any of those instruments part of national law nor can they be invoked on this basis alone in the interpretation of the constitution."[138]

International human rights instruments do not automatically confer justiciable rights,[139] which are rights that can be directly invoked in domestic courts in the African countries.[140] Instead, each African country must domesticate these treaties and create domestically justiciable rights.[141] As has been done in Kenya, a country can render the rights contained in international human

---

136. CONSTITUTION OF THE REPUBLIC OF CAMEROON, 1972 (with amendments through 2008). The constitution's official name is LAW NO. 96–06 OF 18 JANUARY 1996 TO AMEND THE CONSTITUTION OF 2 JUNE 1972 (LOI NO 96–06 DU 18 JANVIER 1996 PORTANT RÉVISION DE LA CONSTITUTION DU 02 JUIN 1972).

137. Adjani, *supra* note 31, at 108 (noting that in order "for a municipal legal system to give effect to international law, national legislatures must incorporate international law into domestic law, thereby creating rights suitable for enforcement by domestic courts").

138. Fombad, *Internationalization of Constitutional Law*, *supra* note 134, at 445.

139. Justiciability "refers to the ability to claim a remedy before an independent and impartial body when a violation of a right has occurred or is likely to occur." INTERNATIONAL COMMISSION OF JURISTS (ICJ), COURTS AND THE LEGAL ENFORCEMENT OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS: COMPARATIVE EXPERIENCES OF JUSTICIABILITY 6 (2008). A justiciable right grants the holder of the right "a legal course of action to enforce [the right], whenever the duty-bearer does not comply with his or her duties." *Id*. at 6.

140. Adjami, *supra* note 31, at 108.

141. John Mukum Mbaku, *International Law, Corruption and the Rights of Children in Africa*, 23 SAN DIEGO INT'L L. J. 195, 312–313 (2022) (detailing the ways in which African countries can make provisions of international human rights instruments justiciable in their domestic courts).

rights instruments directly justiciable in its domestic courts by having a provision in its national constitution in the following manner: "Any treaty or convention ratified by Kenya *shall form part of the law of Kenya under this Constitution*."[142]

Several African countries have constitutions that make direct reference to international human rights instruments or their provisions.[143] In 2010, Kenya adopted a new constitution, which introduced a separation of powers with checks and balances.[144] It made specific references to international law, which, of course, includes international human rights instruments.[145] According to Article 2(6) of the Constitution of Kenya, "[a]ny treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution."[146] The Kenyan Constitution also states that "[t]he general rules of international law shall form part of the law of Kenya."[147] These constitutional provisions make certain that the rights guaranteed by customary international law and the provisions of international human rights instruments that Kenya has ratified are directly justiciable in the country's domestic courts.[148]

In 1990, Benin adopted a new constitution in which it changed its name from the People's Republic of Benin (*République populaire du Bénin*) to the Republic of Benin (*République du Bénin*) and reaffirmed the people's "attachment to the principles of

142. CONSTITUTION OF THE REPUBLIC OF KENYA, 2010, at art. 2(6). Emphasis added.

143. *See, e.g.*, CONSTITUTION OF THE REPUBLIC OF BENIN, 1990, at art. 7 (stating that "[t]he rights and duties proclaimed and guaranteed by the African Charter on Human and Peoples' Rights adopted in 1981 by the Organization of African Unity and ratified by Bénin on January 20, 1986 shall be an integral part of the present Constitution and of Bénisese law"); *see also* CONSTITUTION OF THE REPUBLIC OF ANGOLA, 2010, at art. 26(3) (stating that "[i]n any consideration by Angolan courts of disputes concerning fundamental rights, the international instruments referred to in the previous point shall be applied, even if not invoked by the parties concerned").

144. DANA ZARTNER, COURTS, CODES, AND CUSTOM: LEGAL TRADITION AND STATE POLICY TOWARD INTERNATIONAL HUMAN RIGHTS AND ENVIRONMENTAL LAW 196 (2014) (noting that Kenya's 2010 Constitution created a system of government with separation of powers).

145. CONSTITUTION OF KENYA, 2010, at art. 2(6).

146. I*d.*

147. *Id.* at art. 2(5).

148. *Id*. at art. 2(5) & (6).

democracy and human rights."[149] In the Constitution's Preamble, it is stated as follows:

> WE, THE BÉNINESE PEOPLE, [r]eaffirm our attachment to the principles of democracy and human rights as they have been defined by the *Charter of the United Nations of 1945* and the *Universal Declaration of Human Rights of 1948*, by the *African Charter on Human and Peoples' Rights* adopted in 1981 by the Organization of African Unity and ratified by Bénin on January 20, 1986 and *whose provisions make up an integral part of this present Constitution and of Béninese law and have a value superior to the internal law*.[150]

Thus, through its constitution, Benin has made the provisions of the Banjul Charter "an integral part" of the national constitution, as well as, of "Béninese law."[151] In doing so, Benin's constitution has effectively created, out of the provisions of the Banjul Charter, rights that are justiciable in the country's domestic courts.[152] Additionally, Article 7 of the same constitution specifically and explicitly reaffirms what is contained in the Preamble.[153] According to Article 7, "[t]he rights and duties proclaimed and guaranteed by the African Charter on Human and Peoples' Rights adopted in 1981 by the Organization of African Unity and ratified by Bénin on January 20, 1986 *shall be an integral part of the present Constitution and of Béninese law*."[154] In the next section, this Article will specifically address the issue of how effect is given in domestic courts to international treaties.

B. Giving Effect in Domestic Courts to International Treaties

In order for a treaty to have binding effect on a State, the appropriate authorities within that State must sign and ratify the treaty.[155] For example, Benin signed the CEDAW on November

149. CONSTITUTION OF THE REPUBLIC OF BENIN (1990), pmbl.
150. *Id.* (emphasis added).
151. *Id.*
152. John Mukum Mbaku, *Protecting Human Rights in African Countries: International Law, Domestic Constitution Interpretation, the Responsibility to Protect, and Presidential Immunities*, 16 S. C. J. INT'L L. & BUS. 1, 6–7 (2019) (noting that Benin's "constitutional designers have directly incorporated provisions of various international human rights instruments into their national constitution).
153. CONSTITUTION OF THE REPUBLIC OF BENIN (1990), at art. 7.
154. I*d.* Emphasis added.
155. *Id.* at pmbl.

11, 1981, and ratified it on March 12, 1992.[156] Similarly, Côte d'Ivoire signed the CEDAW on July 17, 1980, and ratified it on December 18, 1995.[157] While the act of ratification renders the treaty binding on the State, that act alone does not create out of the treaty rights that are justiciable in the affected State's domestic courts.[158]

Once an international human rights instrument has been signed and ratified by a country, how it is effectuated in the country's domestic courts is determined by the approach to international law that has been adopted by the country.[159] There exist two well-established approaches to determining effectuation:[160] the "monist" approach[161] and the "dualist" approach.[162] The monist approach to international law has been adopted in most Francophone and Lusophone African countries, as well as, in other countries that follow "the civil law tradition derived from Roman law and include such nations as: Austria, Belgium, Luxembourg, France, and Germany."[163]

In countries that follow the monist approach to international law, domestic law and international law function as a single legal system "with international law superior to national law."[164] It is important to note, however, that "[w]hile no country perfectly conforms to either [the dualist or monist models], the two approaches do help in conceptualizing the way treaties are

156. *Chapter IV: Human Rights, Convention on the Elimination of All Forms of Discrimination against Women*, U.N. TREATY COLLECTION, https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-8&chapter=4&clang=_en (last visited Nov. 18, 2021).

157. *Id.*

158. The general principle is that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith." *Vienna Convention on the Law of Treaties*, art. 26, May 23, 1969, 1155 U.N.T.S. 331.

159. Jonathan Turley, *Dualistic Values in the Age of International Jurisprudence*, 44 HASTINGS L. J. 185 (1993) (providing an overview of two approaches to giving effect to international in domestic legal systems—dualism and monism).

160. John Mukum Mbaku, *The Role of International Human Rights Law in the Adjudication of Economic, Social, and Cultural Rights in Africa*, 8 PENN ST. J. L. & INT'L AFF. 579, 584 (2020) [hereinafter Mbaku, *The Role of International Human Rights Law*]

161. Fombad, *Internationalization of Constitutional Law*, *supra* note 134, at 447.

162. *Id.*

163. WEISSBRODT & DE LA VEGA, *supra* note 13, at 4.

164. Adjami, *supra* note 31, at 108–09.

incorporated within the national legal order."[165] For example, although the Netherlands and the Czech Republic have adopted the monist approach, they, nevertheless, have also "given priority to some treaties (such as human rights conventions) over their own constitutions and statutes."[166]

Thus, in those African countries that follow the monist approach, "once an international treaty has been signed and ratified by the country, it is not necessary for national authorities to domesticate the treaty and create rights that are justiciable in national courts."[167] This is due to the fact that "the act of ratification alone automatically incorporates that international instrument into national law and hence, creates rights that are justiciable in municipal courts."[168] Consequently, "national courts must give effect to principles of international law over superseding or conflicting rules of domestic laws."[169]

In dualist countries, the domestic or national legal system may consider "international law as binding between governments."[170] International law, however, "may not be asserted by individual residents of the country in national courts unless the legislature or other branch of government makes it national law or regulation."[171] In countries that have adopted the dualist theory, "international law and municipal law form two separate and independent legal systems."[172] While international law "prevails in regulating the relations between sovereign States in the international system, . . . municipal law takes precedence in governing national legal systems."[173] According to the dualist theory, in order for a municipal legal system to give effect to international law, "national legislatures must incorporate international law into domestic law, thereby creating justiciable rights suitable for enforcement by domestic courts."[174]

With respect to the binding status of international law in domestic legal systems, international legal scholars usually

165. WEISSBRODT & DE LA VEGA, *supra* note 13, at 343.
166. *Id.* at 344.
167. Mbaku, *The Role of International Human Rights Law*, *supra* note 160, at 585.
168. *Id.* at 585.
169. Adjami, *supra* note 31, at 109.
170. WEISSBRODT & DE LA VEGA, *supra* note 13, at 5.
171. *Id.*
172. Adjami, *supra* note 31, at 109.
173. *Id.*
174. *Id.*

"distinguish between the types and sources of international law."[175] These scholars consider "[i]nternational norms that have attained the status of international customary law . . . to be part of municipal law under both the monist and dualist theories, and therefore prevail over national law even in domestic courts."[176] In order for an international law principle or norm to reach or attain the status of customary international law, it must meet the definition of Article 38(1)(b) of the Statute of the International Court of Justice, which refers to "international custom, as evidence of a general practice accepted as law."[177] If a treaty or convention has not yet attained the status of international customary law, its status in a municipal legal system depends on whether the State in question has adopted the dualist or monist model to international law.[178]

Most of today's African States inherited their legal systems and approaches to international law from the European countries that colonized them.[179] For example, most Francophone countries[180] in Africa have legal systems that are based on French civil law while those that were formerly colonized by Britain base their legal systems on the common law of England and Wales. South Africa, which at one time was colonized by Great Britain, has a mixed legal system, consisting of English common law and Roman-Dutch civilian law.[181]

---

175. *Id.*

176. *Id.*

177. Statute of the International Court of Justice, art. 38(1)(b), June 26, 1945, 59 Stat. 1055, T.S. No. 993.

178. Adjami, *supra* note 31, at 109.

179. *Id*. at 109 (noting that "African States inherited the international law frameworks of their colonial powers").

180. These are countries that were colonized by France and Belgium. Note, however, that some former French and Belgium colonies were not legally colonies, although they were treated as such. These were actually UN Trust Territories for which France and Belgium were administering powers. These include the UN Trust Territory of Cameroons under French administration, which gained independence on January 1, 1960; UN Trust Territory of Togoland under French administration, which gained independence on April 27, 1960; the UN Trust Territory of Ruanda-Urundi, which gained independence in 1962 and produced two independent countries—Burundi and Rwanda. *See generally* THE UNITED NATIONS AND DECOLONIZATION (Nicole Eggers, Jessica Lynne Pearson & Aurora Almada e Santos eds., 2020) (examining the role of the United Nations in the decolonization process).

181. *See* The University of Melbourne, *The South African Legal System*, https://unimelb.libguides.com/c.php?g=929734&p=6718215 (last visited on

How international law affects a domestic legal system "hinges on the properties of international instruments themselves."[182] As mentioned earlier in this Article, the UDHR is "hortatory and aspirational, recommendatory rather than, in a formal case, binding."[183] However, international jurists have argued that "the years have further blurred the threshold contrast between 'binding' and 'hortatory' instruments."[184] Although "the UDHR does not have the legal status of a treaty, its position in international law has changed significantly, and it has received favorable treatment in many domestic legal systems since it was adopted by the UN General Assembly on December 10, 1948."[185] In addition, over the years, there has developed, arguments that favor viewing "all or parts of [the UDHR] as legally binding, either as a matter of customary international law or as an authoritative interpretation of the UN Charter."[186]

As discussed earlier in this Article, several African countries, such as Benin, have specific provisions in their national constitutions that directly address or define the role of international law in their municipal legal systems.[187] For example, the Constitution of the Republic of Angola makes specific reference to the applicability of international law to the interpretation of the country's constitution.[188] Article 26 of Angola's Constitution, which is titled *Scope of Fundamental Rights*, is quite telling and reads as follows:

> 1. The fundamental rights established in this Constitution shall not exclude others contained in the laws and applicable rules of international law.

April 21, 2023) (noting that "South Africa has a mixed legal system—a hybrid of Roman Dutch civilian law, English common law, customary law and religious personal law").

182. *Id.* at 110.

183. HENRY J. STEINER ET AL., INTERNATIONAL HUMAN RIGHTS LAW IN CONTEXT: LAW, POLITICS, MORALS 152 (2008).

184. I*d.*

185. Mbaku, *Protecting Human Rights, supra* note 152, at 21.

186. STEINER ET AL., *supra* note 183, at 152.

187. For example, Article 7 of the Constitution of the Republic of Benin states as follows: "The rights and duties proclaimed and guaranteed by the African Charter on Human and Peoples' Rights adopted in 1981 by the Organization of African Unity and ratified by Bénin on January 20, 1986 shall be an integral part of the present Constitution and of Béninese law." CONSTITUTION OF THE REPUBLIC OF BENIN, 1990, at art. 7.

188. *See generally* CONSTITUTION OF THE REPUBLIC OF ANGOLA (2010).

> 2. Constitutional and legal precepts relating to fundamental rights must be interpreted and incorporated in accordance with the Universal Declaration of [Human Rights], the African Charter on [Human and Peoples' Rights] and international treaties on the subject ratified by the Republic of Angola.
>
> 3. In any consideration by the Angolan courts of disputes concerning fundamental rights, the international instruments referred to in the previous point shall be applied, even if not invoked by the parties concerned.[189]

Article 27 of Angola's Constitution provides additional support to the applicability of international law in its domestic courts.[190] According to Article 27, "[t]he principles set out in this chapter shall apply to the rights, freedoms and guarantees and to fundamental rights of a similar nature that are established in the Constitution or are enshrined in law or international conventions."[191] Unlike Benin and Angola, many other African countries do not make the provisions of international law instruments—whether it is international human rights law or international humanitarian law—directly justiciable in their domestic or national courts.[192] For example, although the Constitution of the Republic of South Africa "acknowledges and makes reference to international law, it does not make any provision for the latter to be directly justiciable in the courts of South Africa."[193]

The South African Constitution imposes an obligation on South Africa's domestic courts to "consider international law" when interpreting the Bill of Rights.[194] According to Article 39(1), which is titled "Interpretation of Bill Rights," "[w]hen interpreting the Bill of Rights, a court, tribunal or forum—*(b) must* consider international law; and *(c) may* consider foreign law."[195] The Constitution of Cabo Verde states that "[c]onstitutional and legal rules with respect to fundamental rights must be

189. *Id.* at art. 26(1)–(3) (emphasis added).

190. *See id.* at art. 27.

191. *Id.*

192. *See, e.g.*, S. AFR. CONST., art. 231(4) (stating that "[a]ny international agreement becomes law in the Republic [of South Africa] when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.").

193. Mbaku, *Protecting Human Rights*, *supra* note 152, at 8. *See also* S. AFR. CONST., 1996.

194. S. AFR. CONST., 1996, art. 39.

195. *Id.* at art. 39 (emphasis added).

interpreted and integrated in accordance with the Universal Declaration of Human Rights."[196] Although the Constitution of Ghana imposes an obligation on the government to "promote respect for international law, treaty obligations and the settlement of international disputes by peaceful means," it does not make any provisions for international law to be directly justiciable in the country's domestic courts.[197]

During most of the post-independence period, many African countries have struggled with recognizing and enforcing human rights, especially those of vulnerable groups, such as women, children, and ethnic and religious minorities. For example, in 2005, the International Court of Justice (ICJ) rendered its judgment in the case, *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, finding that "massive human rights violations and grave breaches of international humanitarian law were committed by the [Uganda People's Defense Force] on the territory of the [Democratic Republic of Congo (DRC)]."[198]

In the case *Democratic Republic of Congo v. Burundi, Rwanda, Uganda*, the African Commission on Human and Peoples' Rights (ACHPR) described the activities of the respondent States as constituting "flagrant violations" of human rights.[199] The ACHPR also found

> the killings, massacres, rapes, mutilations and other grave human rights abuses committed while the Respondent States' armed forces were still in effective occupation of the eastern provinces of the Complainant State reprehensible and also

196. *See* CONSTITUTION OF THE REPUBLIC OF CABO VERDE 1992 (amended in 1995 & 1999), art. 16(3).

197. CONSTITUTION OF THE REPUBLIC OF GHANA, 1992 (with amendments through 1996), art. 40(c).

198. Armed Activities on the Territory of the Congo (Dem. Rep. of Congo v. Uganda), Judgment, 2005, I.C.J. Rep. 168, ¶ 207 (Dec. 19) (UPDF is Uganda People's Defense Force). *See also* HUM. RTS. WATCH, "GET THE GUN": HUMAN RIGHTS VIOLATIONS BY UGANDA'S NATIONAL ARMY IN LAW ENFORCEMENT OPERATIONS IN KARAMOJA REGION 74 (2007), https://www.google.com/books/edition/Get_the_Gun/kcN-VEq5QLEsC?hl=en&gbpv=1&dq=UPDF,+uganda&printsec=frontcover (noting human rights violations committed by Uganda's national army in law enforcement operations in the country's Karamoja Region).

199. Democratic Republic of Congo v. Burundi, Rwanda, Uganda, 227/99, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶ 68 (May 29, 2003).

> inconsistent with their obligations under Part III of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 1949 and Protocol 1 of the Geneva Convention.[200]

Both the ICJ and the ACHPR in their rulings, however, did not define what they meant by "massive violation" or "flagrant violation" of human rights. In addition, these tribunals did not clearly elaborate the criteria that they used to determine that the activities or actions of the Respondent States in the DRC constituted "massive" and "flagrant" violations of human rights, as opposed to "regular violations" of human rights. It has been argued that the terms gross, grave, flagrant, serious, or massive, as they relate to human rights, "are often interchangeably or cumulatively used by both international legal documents and quasi-judicial bodies in order to refer to a violation of the same gravity."[201]

The subject matter of this Article is the violation of human rights, whether these are civil and political rights or economic, social and cultural rights, and whether such violations are committed by state- and non-state actors in the African countries. Legal scholars who study human rights violations have argued that "the seriousness of violations is assessed on the basis of several factors, including: the type of violated rights and the character of the violation, the quantity of victims, the repeated occurrence of the violation and its planning, and the failure of the government to appropriate measures to prevent and punish the violation."[202]

As argued by the UN, human rights "range from the most fundamental—the right to life—to those that make life worth living, such as the rights to food, education, work, health, and liberty."[203] Perhaps, more important is that "human rights are indivisible and interdependent," which means "that one set of rights cannot be enjoyed fully without the other."[204] The UN further notes that "making progress in civil and political rights makes it easier to exercise economic, social and cultural rights,"

---

200. *Id.* ¶ 79.

201. Roger-Claude Liwanga, *The Meaning of Gross Violation of Human Rights: A Focus on International Tribunals' Decisions over the DRC Conflicts*, 44 DENV. J. INT'L L. & POL'Y 67, 68 (2015).

202. *Id.* at 81.

203. *What Are Human Rights?*, *supra* note 109.

204. *Id.*

and that "violating economic, social and cultural rights can negatively affect many other rights."[205]

II. The State of the Protection of Human Rights in African Countries

A. Introduction

Given the fact that a lot of countries in Africa have not yet domesticated international human rights instruments, "there is a limitation on the ability of international law to positively impact the protection of human rights" in the continent.[206] This is especially critical in at least two areas: (1) when there is a conflict between international human rights law and domestic or national legislation; and (2) when customary law and traditional practices (e.g., FGM and child marriage) conflict with international human rights instruments or customary international law.[207]

The most effective solution for African legal systems that have not yet created, from international human rights instruments, rights that are justiciable in domestic courts, is for each of these countries to sign and ratify the relevant international human rights treaties and then domesticate them. Through domestication of international human rights instruments, each country can create rights that are justiciable in domestic courts.[208] In the meantime, however, each country's judiciary, especially if there is a system of separation of powers that provides for an independent judiciary, can provide a cure for this problem.[209] Within such a system, the independent judiciary can "use its

---

205. *Id.*

206. Mbaku, *Protecting Human Rights*, *supra* note 152, at 34.

207. *Id.* at 35.

208. John Mukum Mbaku, *International Law, Corruption and the Rights of Children in Africa*, 23 San Diego Int'l L. J. 195, 212 (2022) (noting that in order for international law to create rights that are justiciable in domestic courts, "the national legislature or some other authority must incorporate, through explicit legislation, the provisions of international instruments into domestic law.") [hereinafter Mbaku, *International Law and Rights of Children*].

209. Mbaku, *Protecting Human Rights*, *supra* note 152, at 35 (noting that independent judiciaries can "use their interpretive powers to interpret national laws in light of international human rights norms").

interpretive powers to interpret national laws in light of international human rights norms."[210]

These African countries should provide themselves with a governing process characterized or undergirded by the separation of powers with checks and balances. The checks and balances should include, at the minimum, (1) a bicameral legislature, which consists of two competing chambers with different duties but with the same level of legislative competence; (2) an independent and competent executive; and (3) an independent judiciary. It is also important that each country should have a robust and politically active civil society, as well as independent civil society organizations, such as a free press. In addition, the government should not monopolize the various mechanisms for the dissemination of information. Fully functioning independent media are critical in helping civil society check on the exercise of government power. In many cases, it is the independent media, working with non-governmental organizations, that alert the government about human rights violations, whether committed by state or non-state actors.[211] For example, independent newspapers, such as *The Guardian* (UK), have been very critical in reporting about the atrocities committed against Cameroon's Anglophone peoples and their villages by the central government in Yaoundé since late 2016.[212]

In several countries, independent and progressive judiciaries "are already taking advantage of their ability and right to interpret the constitution and determine the constitutionality of all the country's laws, including customary laws, to strike down laws that they determine are not in line with the national constitution or international human rights norms."[213] For example, in the case *Ephrahim v. Pastory and Another*,[214] the High Court of Tanzania at Mwanza was called upon to resolve a conflict

---

210. *Id.*

211. *Id.* at 197 (noting the important role played by independent media in uncovering the corruption of the regime of South African President Jacob Zuma).

212. *See, e.g.*, Peter Zongo, *'This is a genocide': villages burn as war rages in blood-soaked Cameroon*, THE GUARDIAN (UK), May 30, 2018, https://www.theguardian.com/global-development/2018/may/30/cameroon-killings-escalate-anglophone-crisis (last visited on November 20, 2021).

213. Mbaku, *Protecting Human Rights*, *supra* note 152, at 35.

214. *Ephrahim v. Pastory and Another*, 87 I.L.R. 106, 110 (Tanz. High Ct. 1990).

between customary law and Tanzania's Bill of Rights.[215] After establishing Tanzania's commitment to international human rights norms, Justice Mwalusanya, writing for the High Court, held as follows:

> The [international human rights] principles enunciated in the above-named documents are a standard below which any civilized nation will be ashamed to fall. It is clear from what I have discussed that the customary law under discussion flies in the face of our Bill of Rights as well as the international conventions to which we are signatories.[216]

Using their interpretive powers, courts in the African countries can give effect to international and regional human rights instruments even if the provisions in these instruments have not yet been incorporated into the national constitution—that is, even if the countries in question have not domesticated the various international human rights instruments. This is very important in countries in which various ethnic and religious groups or communities engage in practices (e.g., child and forced marriage, FGM, domestic and sexual slavery, and forced street begging) that violate the rights of children. In the struggle to recognize and protect human rights, then, judiciaries have an important part to play. Judges can help bring "life to the rights guarantees enshrined in national constitutions."[217]

Unfortunately, the judiciaries of many African countries have been accused of being complicit "in the undermining of the rule of law" in their respective jurisdictions.[218] In some countries, domestic courts are known to have actively engaged in helping "incumbent governments undermine the rule of law and commit atrocities against some subcultures, notably religious and ethnic minorities."[219] It has been argued that many of the countries that emerged from European colonialism in the 1950s, 1960s and 1970s, did not fully transform the critical domains—that is, the political, administrative, and judicial foundations of the state—and create institutions capable of adequately constraining the state and minimizing government impunity, including

215. *Id*.
216. *Id*.
217. Adjami, *supra* note 31, at 124.
218. *Id.*
219. Mbaku, *Protecting Human Rights*, *supra* note 152, at 36.

the abuse of the judicial function.[220] For example, according to Abuja, Nigerian-based human rights lawyer, legal scholar and activist, Chidi Odinkalu:

> [T]he judiciaries in Common Law African countries must take substantial responsibility for the collapse of constitutional government. . . . [T]he judiciary in many of these countries deliberately and knowingly abdicated its constitutional role to protect human rights and, in many cases, actively connived in the subversion of constitutional rule and constitutional rights by the executive arm of government.[221]

Judiciaries in countries, such as Algeria, Cameroon, Chad, Comoros, Republic of Congo, Burundi, Gabon, Niger, Rwanda, Togo, and Uganda, to name a few, have stood by and allowed their presidents to opportunistically change their constitutions in order to extend their mandates, as well as punish their political opponents.[222] In Cameroon, the judiciary has evolved into a tool used by its president to impose his will on the people and enhance his ability to continue to maintain a monopoly on power.[223] As argued by Professor Charles M. Fombad, an expert on constitutional law in Cameroon, the national judiciary "has been reduced to allies and partners of the executive in enjoying the spoils of power."[224]

The judiciary in Cameroon plays a very important role in national elections, including certifying the results of presidential

---

220. *Id.* at 158.

221. Adjami, *supra* note 31, at 124 (quoting Chidi Anselm Odinkalu, *The Judiciary and the Legal Protection of Human Rights in Common Law Africa: Allocating Responsibility for the Failure of Post-Independence Bills of Rights*, 8 AFR. SOC. INT'L & COMP. L. PROC. 124, 124 (1996).

222. *See, e.g.*, *Changing the Constitution to Remain in Power*, FRANCE 24 (Oct. 23, 2009, updated Dec. 20, 2013), https://www.france24.com/en/20091023-changing-constitution-remain-power. *See also* Reuters Staff, *What Limits? How African leaders cling to power for decades*, REUTERS (Oct. 18, 2019), https://www.reuters.com/article/us-africa-leaders-democracy-factbox/what-limits-how-african-leaders-cling-to-power-for-decades-idUSKBN1WX1KP.

223. *See, e.g.*, Charles Manga Fombad, *Endemic Corruption in Cameroon: Insights on Consequences and Control*, *in* CORRUPTION AND DEVELOPMENT IN AFRICA: LESSONS FROM COUNTRY CASE STUDIES 234 (Kempe Ronald Hope, Sr. & Bornwell C. Chikulo eds., 2000) (examining the abuse of presidential powers in Cameroon under Paul Biya) [hereinafter Fombad, *Endemic Corruption in Cameroon*].

224. *Id.* at 247.

elections.[225] During each election, judges perform a supervisory function over the counting of votes and the determination of who has won the contest. Fombad notes that

> [t]o ensure [the judiciary's] loyalty, and as part of the preparations for the 1996 and 1997 elections, [incumbent President Paul Biya issued] a presidential decree [which] doubled [judicial] salaries, and in the case of the Supreme Court judges, the increase of almost 200 per cent came with numerous perks and privileges.[226]

Fombad added that "[t]here was nothing fortuitous" in the President's decision to raise the salaries of judicial officers just before elections.[227] In Cameroon, "[j]udges preside over the divisional election supervisory and vote-counting commissions which tabulate election results, which are then sent to the national vote-counting commissions."[228]

The Supreme Court (*Cour suprême*), Cameroon's highest court, is located within the Ministry of Justice, an executive department.[229] It is granted the power to verify and officially certify and proclaim the results of all national elections.[230] In Cameroon, "[n]ot only are judges of the Supreme Court appointed by the President of the Republic, but prior to each election there are judicial promotions, appointments and transfers to ensure that compliant judges are placed in strategic positions."[231]

Given the fact that members of Cameroon's judiciary have become "the malleable instruments of politicians who are the most prominent purveyors of corruption," argues Fombad, "it is not surprising that the Cameroonian judiciary has been unable to

---

225. *See, e.g.*, *Biya officially declared winner of presidential election*, THE NEW HUMANITARIAN (Oct. 25, 2004), https://www.thenewhumanitarian.org/news/2004/10/25/biya-officially-declared-winner-presidential-election (noting that Paul Biya was "officially declared the winner of Cameroon's presidential election" by the "Supreme Court, sitting as the Constitutional Council").

226. *Id.* at 248.

227. *Id.*

228. *Id.*

229. *See* U.S. Department of State, *2018 Country Reports on Human Rights Practices: Cameroon*, STATE.GOV, https://www.state.gov/reports/2018-country-reports-on-human-rights-practices/cameroon/ (last visited Feb. 14, 2023) (noting that in Cameroon, "[t]he court system is subordinate to the Ministry of Justice, which in turn is under the president").

230. Fombad, *Endemic Corruption in Cameroon*, *supra* note 223, at 248.

231. *Id.*

act as a credible check against corruption, fraud and other malpractices in the country."[232] Of course, this is not to imply that all judges in Cameroon are corrupt and engage in self-dealing. The problem is that the country's institutions generally—and the judicial system in particular—have rendered many judicial officers vulnerable to corruption and made it extremely difficult for judges to remain objective and honest in the performance of their official duties.[233] Hence, each country must provide itself with institutional arrangements that guarantee judicial independence, enhance the ability of the judiciary to withstand interference from other branches of government, especially the executive, and provide the judiciary with the legal tools to act independently as a check on the exercise of government power. In the next section, this Article will examine the concept of judicial independence and how it can be achieved.

B. Judicial Independence as a Critical Factor in the Protection of Human Rights

Currently, many African countries have imperial or reinforced presidencies, relatively weak legislatures, and civil societies that are not politically active enough to fully serve as a guard on the exercise of government power.[234] In these countries, the courts may be the only effective legal "tool to fight government impunity and safeguard the fundamental rights of citizens."[235] It has been argued that some African countries still have "overbearing and 'imperial' presidents [that] continue to reign and dominate the legislature as well as to control the judiciary."[236] Many African countries, such as Cameroon, boast of governing processes that are characterized by the separation of powers, with an executive, a judiciary, and a legislature. These countries, however, do not have "traditional checks and balances,"[237]

232. *Id.*

233. *Id.*

234. Mbaku, *Protecting Human Rights*, *supra* note 152, at 164–165 (noting Africa's reinforced presidencies).

235. *Id.* at 38 n.180.

236. Charles Manga Fombad & Enyinna Nwachue, *Africa's Imperial Presidents: Immunity, Impunity and Accountability*, 5 AFR. J. LEGAL STUD. 91, 93 (2012).

237. *Id.*

which include "strong, robust and politically active civil societies, a free press, and truly independent judiciaries."[238]

Although many African countries have undertaken institutional reforms to provide themselves with more democratic institutions, "[t]he imbalance in power among the three branches of government" remains a major constraint to the effective protection of human rights, especially given the lack of judicial independence and the absence of robust civil societies.[239] Given the fact that the judiciary is often called upon to adjudicate matters or conflicts that bear directly on the protection of human rights, such as conflicts over whether an ethnocultural group should be allowed to undertake child or forced marriage as part of its customs and tradition, it is very important that the judiciary's independence is constitutionally guaranteed so as to minimize arbitrary interference in its activities by other branches of government.[240]

In the case *De Lange v. Smuts*, the Constitutional Court of South Africa (CC) noted that "judicial independence . . . is foundational to and indispensable for the discharge of the judicial function in a constitutional democracy based on the rule of law. This independence, of which structural independence is an indispensable part, is expressly proclaimed, protected and promoted by subsections (2), (3) and (4) of section 165 of the Constitution."[241] South Africa's Constitution guarantees judicial independence as follows:

> (2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.
>
> (3) No person or organ of state may interfere with the functioning of the courts.
>
> (4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence,

238. Mbaku, *Protecting Human Rights*, *supra* note 152, at 161.

239. *Id.*

240. *See, e.g.*, *Valente v. The Queen*, [1985] 2 S.C.R. 673 (Can.) (stating that one of the minimum requirements for judiciary independence is that the judiciary is free from "arbitrary interference by the Executive").

241. *De Lange v. Smuts NO and Others* 1998 (3) SA 785 (CC) at 50–51 para. 59 (S. Afr.).

> impartiality, dignity, accessibility and effectiveness of the courts.[242]

In *De Lange*, Justice O'Regan cites the Canadian Supreme Court case, *Valente v. The Queen*,[243] where Le Dain J held as follows:

> It is generally agreed that judicial independence involves both individual and institutional relationships: the individual independence of a judge, as reflected in such matters as security of tenure, and the institutional independence of the court or tribunal over which he or she presides, as reflected in its institutional or administrative relationships to the executive and legislative branches of government . . . . The relationship between these two aspects of judicial independence is that an individual judge may enjoy the essential conditions of judicial independence but if the court or tribunal over which he or she presides is not independent of the other branches of government, in what is essential to its function, he or she cannot be said to be an independent tribunal.[244]

In its ruling in *De Lange, the CC* effectively endorsed the Canadian Supreme Court's requirements or conditions for judicial independence, as elaborated in the case, *Valente v. The Queen*.[245] In *Valente*, Justice Le Dain held that "[s]ecurity of tenure" is the "first of the essential conditions for judicial independence."[246] The honorable justice then proceeded to outline ways that "the essentials of security of tenure may be provided by constitutional or legislative provision."[247] In Canada, "superior court judges . . . enjoy what is generally regarded as the highest degree of security of tenure in the constitutional guarantee of s. 99 of the *Constitution Act, 1867* that they shall *hold office during good behavior* until the age of seventy-five, *subject to removal by the Governor General on address of the Senate and House of Commons*."[248] A similar level of security of tenure is also constitutionally granted to members of the federal judiciary in the United

242. S. AFR. CONST., 1996, art. 165(2)–(4).
243. *Valente v. The Queen*, [1985] 2 S.C.R. 673 (Can.).
244. *Id.* at 687, para. II.
245. The Supreme Court of Canada set out the standard for judiciary independence in ¶¶ IV, V, and VI of *Valente v. The Queen*.
246. *Valente*, [1985] 2 S.C.R. 673, 694 para. IV.
247. *Id.* at 695 para. IV.
248. *Id.* (emphasis added).

States.[249] According to Article III, Section 1 of the US Constitution, "[t]he Judges, both of the supreme and inferior Courts, *shall hold their Offices during good Behavior*, and shall at stated Times, receive for their Services, *a Compensation, which shall not be diminished during their Continuance in Office*."[250]

Canada's Judges Act provides grounds on which the Canadian Judicial Council ("Council") may recommend the removal of a judge:

> Where, in the opinion of the Council, the judge in respect of whom an inquiry or investigation has been made has become incapacitated or disabled from the due execution of the office of judge by reason of
>
> (a) age or infirmity;
>
> (b) having been guilty of misconduct;
>
> (c) having failed in the due execution of that office, or
>
> (d) having been placed, by his or her conduct or otherwise, in a position incompatible with the due execution of that office.[251]

Justice Le Dain also noted that any judge who has been recommended for removal, however, must be granted the benefit of due process.[252] He or she must be "given an opportunity to be heard, in person, or by counsel, and to cross-examine witnesses and adduce evidence."[253] The honorable justice cited the Deschênes Commission Report,[254] which "recommended that all judges should enjoy a tenure expressly defined as being 'during good behavior' and that they should be removable only upon an

---

249. U.S. CONST. art. III, § 1.

250. I*d.* (emphasis added).

251. Judges Act, 1985 (U.K.), *reprinted in* R.S.C. 1985, c. J-1 (Can.).

252. *Valente*, [1985] 2 S.C.R. 673, 698 para. IV (holding that while a judge may be removed for cause, that cause, however, must "be subject to independent review and determination by a process at which the judge is afforded full opportunity to be heard").

253. *Id.*

254. The Deschênes Commission, officially known as the Commission of Inquiry on War Criminals in Canada, was established in February 1985 by the government of Canada and empowered to investigate the alleged presence of Nazi war criminals in Canada. It was headed by retired Quebec Superior Court judge Jules Deschênes and delivered its report in December 1986. *See War Criminals: The Deschênes Commission* (Revised 16 October 1998), https://publications.gc.ca/collections/Collection-R/LoPBdP/CIR/873-e.htm (Feb. 14, 2023).

address of the legislature."[255] Additionally, Justice Le Dain noted that the Deschênes report recommended a second way to remove a judge: "if the power of removal by the executive without an address of the legislature were retained, the executive should be bound by the report of the judicial inquiry."[256]

Furthermore, Justice Le Dain cited a report on judicial independence by the Canadian Bar Association (CBA Report), which recommended that "[a]ll judges of Canadian Courts be guaranteed tenure during good behavior" and that "a judge should be removable only on an address of the legislature."[257] Moreover, the CBA Report, as noted by Justice Le Dain, stated that:

> [s]ince the independence of the judiciary depends to a significant extent on the judges' security of tenure it is appropriate that their removal be a major undertaking, bringing the politicians who must accomplish it under close scrutiny. The removal of a judge is not to be undertaken lightly.[258]

Justice Le Dain then concluded that:

> [i]t may be that the requirement of an address of the legislature makes removal of a judge more difficult in practice because of the solemn, cumbersome and publicly visible nature of the process, but the requirement of cause, as defined by statute, together with a provision for judicial inquiry at which the judge affected is given a full opportunity to be heard, is in my opinion a sufficient restraint upon the power of removal.[259]

The lesson from Judge Le Dain's ruling in *Valente* is that if a judge's tenure must be terminated, the process through which this is carried out must be transparent and the judge given the opportunity to be heard. In other words, the judge must be afforded due process.[260]

The essentials of security of tenure, argued Justice Le Dain, are "that the judge be removable only for cause, and that cause be subject to independent review and determination by a process at which the judge affected is afforded a full opportunity to be heard."[261] In summary, "[t]he essence of security of tenure . . . is

255. *Valente*, [1985] 2 S.C.R. 673, 696 para. IV.
256. *Id.*
257. *Id.* at 696–97 para. IV.
258. *Id.* at 697 para. IV.
259. *Id.*
260. *Id*. at 698 para. IV.
261. *Id.* at 698 para. IV.

a tenure, whether until an age of retirement, for a fixed term, or for a specific adjudicative task, that is secure against interference by the Executive or other appointing authority in a discretionary or arbitrary manner."[262]

While African countries need not adopt Canada's approach to security of tenure for judicial officers, there are certain important lessons that those interested in judicial independence in the continent can glean from the Canadian Supreme Court's ruling in *Valente*. First, security of tenure must be considered an essential and critical part of judicial independence.[263] Second, the other branches of government (i.e., executive and legislative) must be prevented from arbitrarily interfering with the performance of the judicial function.[264] Third, if a judicial officer must be removed from office, the process must be open and transparent and the affected official granted the "opportunity to be heard, in person or by counsel, and to cross-examine witnesses and adduce evidence."[265] Since the legislature is likely to be involved in the removal process, it is important that in each African country, parliament is made independent enough of the executive so that it cannot be manipulated by the president or any other high-ranking political officials. In other words, parliament must not be a "rubber stamp," effectively doing the bidding of the president. For example, in Cameroon, the National Assembly is considered a "rubber stamp Parliament which is governed by party discipline," not the rule of law or the common interest.[266]

The second essential condition for judicial independence, according to *Valente*, is "financial security," meaning "security of salary or other remuneration, and, where appropriate, security of pension."[267] Justice Le Dain notes that "[t]he essence of such security [to a judicial officer] is that the right to salary and pension should be established by law and not be subject to arbitrary interference by the Executive in a manner that could affect

---

262. *Id.*

263. Mbaku, *Protecting Human Rights*, *supra* note 152, at 196 (noting that security of tenure is a critical part of judicial independence).

264. *Id.* (stating that a critical requirement for judicial independence is the absence of arbitrary interference by the executive branch in the activities of the judiciary).

265. *Id.* at 696 para. IV.

266. *See Cameroon's Parliament: Another Rubber-Stamp Bureau*, THE FOMUNYOH FOUND. (Mar. 20, 2014), https://www.tffcam.org/press/2014/another-rubber-stamp-bureau.html.

267. *Valente*, [1985] 2 S.C.R. 673, 704 para. V.

judicial independence."[268] With respect to a pension, it is important to distinguish "between a right to a pension and a pension that depends on the grace or favor of the Executive."[269]

Questions have arisen over whether judicial salaries should be fixed by the legislative branch rather than by the executive government and whether these salaries should be made a charge on the account into which taxes and revenue are deposited (i.e., the Consolidated Revenue Fund) instead of requiring an annual appropriation.[270] Although Justice Le Dain argues that this distinction is not important for judicial independence in Canada, it can actually have a significant impact on the independence of the judiciary in African countries, particularly those such as Cameroon, which have imperial presidencies. For example, as noted by Professor Fombad, Cameroonian President Paul Biya has routinely manipulated compensation packages[271] for judicial officers in order to enhance his chances of being declared the winner in presidential elections.[272]

It has been suggested that "the pensions and other financial benefits of judges should be given special and separate treatment in the law" because of the "special position" that judges hold in society and the important role that they play in the maintenance of the rule of law in general and the protection of human rights in particular.[273] This is especially important for developing countries, where lack of judicial independence from the executive has been a major problem during most of the post-independence period.[274]

In a study of the role of the judiciary in fighting corruption in Ghana, it was determined that "the lack of judicial independence from the executive is one of the root causes of a judiciary's

---

268. *Id.*

269. *Id.*

270. *Id.* at 706 para. V.

271. These packages include salary, pension, sick leave with pay, health insurance, and other benefits.

272. *See* Fombad, *Endemic Corruption in Cameroon*, *supra* note 223, at 247 (noting that in Cameroon, the "judiciary has been reduced to allies and partners of the executive in enjoying the spoils of power"). *See also Valente v. The Queen* [1985] 2 R.C.S. 673, 707 para. V.

273. *Valente*, [1985] 2 S.C.R. 673, 708 para. V.

274. Franck Kuwonu, *Judiciary: Fighting Graft Needs Muscles*, AFR. RENEWAL (Aug.–Nov. 2016), https://www.un.org/africarenewal/magazine/august-2016/judiciary-fighting-graft-needs-muscles.

inability to uphold the law."[275] Global Integrity, an organization devoted to promoting transparency and accountability around the world, produced a 2016 report concluding that "judicial independence is not guaranteed in about half of the 54 African countries."[276] Thus, an important key to significantly improving the institutional environment within which human rights in Africa can be recognized and protected, is to constitutionally guarantee judicial independence.

The third essential condition for judicial independence, as detailed by Justice Le Dain in *Valente*, is "institutional independence of the tribunal with respect to matters of administration bearing directly on the exercise of its judicial function."[277] An important issue that virtually all countries face, especially as it relates to judicial independence, is "[t]he degree to which the judiciary should ideally have control over the administration of the courts."[278] Some courts, including those in Canada, have drawn a distinction "between adjudicative independence and administrative independence."[279] In other countries, such as the United States, "the federal judiciary is a separate branch which includes judicial administration."[280] Moreover, other countries may provide that "the primary role of the judiciary is adjudication."[281] The "Executive on the other hand is responsible for providing the court rooms and the court staff," while the "assignment of judges, the sittings of the court, and the court lists are all matters for the judiciary."[282]

Regardless of whether the judiciary is granted the power of both adjudication and administration or whether the two functions are split between the Judiciary and the Executive, the key to judicial independence is that the law adequately constrains the State so that the Executive is not able to "interfere with, or . . . influence the adjudicative function of the judiciary."[283] In the case where the judiciary is not granted full responsibility for judicial administration, then judicial officers must work closely

275. *Id.*
276. *Id.*
277. *Valente*, [1985] 2 S.C.R. 673, 708 para. VI.
278. *Id.*
279. *Id.*
280. *Id.* at 708 para. VI.
281. *Id.*
282. *Valente*, [1985] 2 R.C.S. 673, 709 para. VI.
283. *Id.*

with representatives of the Executive. Under such an arrangement, care must be taken to make sure that judicial officers are not "captured" by representatives of the Executive, effectively placing the judiciary in a position to be unduly and arbitrarily influenced.[284]

With respect to "institutional" or "collective" independence, it has been argued that the minimum or essential requirement for such independence is that the judiciary should be granted control over the "assignment of judges, sittings of the court, and court lists—as well as the related matters of allocation of court rooms and direction of the administrative staff engaged in carrying out these functions."[285] Some issues that bear directly on institutional independence include "the financial aspects of court administration—budgetary preparation and presentation and allocation of expenditure—and in the personnel aspects of administration—the recruitment, classification, promotion, remuneration, and supervision of the necessary support staff."[286]

Justice Le Dain notes that "other elements which [are] desirable . . . for judicial independence" include "independence in budgeting and in expenditure of an approved budget, and independence in administration, covering not only the operation of the Courts but also the appointment and supervision of the supporting staff."[287] Justice Le Dain further argued that "[b]udget independence does not mean that Judges should be allowed to fix their own salaries; it means simply that the budget should not be part of any departmental budget but should be separately presented and dealt with."[288]

The former Chief Justice of Canada, Brian Dickson CJ, has argued that "[p]reparation of judicial budgets and distribution of allocated resources should be under the control of the Chief Justices of the various courts, not the Ministers of Justice" and that "[c]ontrol over finance and administration must be accompanied by control over the adequacy and direction of support staff."[289] In the Canadian Supreme Court case *The Queen v. Beauregard*, Chief Justice Dickson summarized the principle of judicial independence:

---

284. *Id.*
285. *Id.*
286. *Id.* at 709–10 para. VI.
287. *Id.* at 710 para. VI.
288. *Id.*
289. *Id.* at 711 para. VI.

> Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: no outsider—be it government, pressure group, individual or even another judge—should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision. This core continues to be central to the principle of judicial independence.[290]

Chief Justice Dickson noted further that while "[t]he ability of individual judges to make decisions in discrete cases free from external interference or influence continues, of course, to be an important and necessary component of the principle [of judicial independence]. Today, however, the principle is far broader."[291] It is argued by some academics that "[t]he judiciary has developed from a dispute-resolution mechanism, to a significant social institution with an important constitutional role which participates along with other institutions in shaping the life of its community."[292] In the modern understanding, "judicial independence involves both individual and institutional relationships: the individual independence of a judge, as reflected in such matters as security of tenure, and the institutional independence of the court or tribunal over which he or she presides, as reflected in its institutional or administrative relationships to the executive and legislative branches of government."[293]

Chief Justice Dickson noted that

> [t]he rationale for this two-pronged modern understanding of judicial independence is recognition that the courts are not charged solely with the adjudication of individual cases. That is, of course, one role. It is also the context for a second, different and equally important role, namely as protector of the Constitution and the fundamental values embodied in it—rule of law, fundamental justice, equality, preservation of the democratic process, to name perhaps the most important.[294]

---

290. *The Queen v. Beauregard*, [1986] 2 S.C.R. 56, 69 ¶ V (1) (Can.).

291. *Id.*

292. *Id.* (*quoting* Professor Shimon Shetreet*, The Emerging Transnational Jurisprudence on Judicial Independence: The IBA Standards and Montreal Declaration*, *in* JUDICIAL INDEPENDENCE: THE CONTEMPORARY DEBATE 393 (S. Sheetreet & J. Deschênes eds., 1985).

293. *Beauregard*, [1986] 2 R.C.S. 56, 70 ¶ V (1).

294. *Id.*

Thus, while judicial independence is essential for the effective and fair adjudication of individual cases, it is also "the lifeblood of constitutionalism in democratic societies."[295]

The protection of human rights requires not just the internationalization of national constitutional law and the creation of rights that are justiciable in domestic courts, but also the provision of each African country with a judiciary that is independent enough to be able to enforce these rights without arbitrary interference from the other branches of government, particularly, the executive. The process to secure such an independent judiciary should begin with constitutional reforms to provide the country with institutional arrangements undergirded by separation of powers with checks and balances. Within such a governing reform process, an independent judiciary is one of these checks and balances.

The effort to achieve the full protection of human rights in the African countries is three-tiered: first, each country must sign and ratify the various human rights instruments; second, the country must then domesticate each human rights treaty to create rights that are justiciable in domestic courts; and finally, the country must undertake institutional reforms to provide itself with a governing process that is characterized by separation of powers with checks and balances.[296] As noted above, one of these checks and balances is an independent judiciary. Unfortunately, the process to transform the governing architecture in each African country to provide a truly independent judiciary is likely to take some time. In the meantime, progressive judges in some African countries are challenging the status quo and using their powers to interpret their respective constitutions and determine the constitutionality of laws, including customary laws, to invalidate and declare null and void, those laws and customs that violate the national constitution and international human rights instruments.[297] This is taking place even in countries which do not yet have fully independent judiciaries and are still to fully

295. *Id.*

296. Mbaku, *International Law and the Rights of Children, supra* note 208, at 227.

297. John Mukum Mbaku, *International Law and Limits on the Sovereignty of African States*, 30 FLA. J. INT'L L. 43, 57 (2018) (noting that "judges can use their interpretive powers to advance the protection of human rights by striking down customary laws that discriminate against and harm some citizens") [hereinafter Mbaku, *International Law and Limits*].

domesticate the various international human rights instruments.[298] In the section that follows, this Article will examine cases from a few African countries to determine the extent to which judges are utilizing international and comparative law sources as tools for interpreting national constitutional law, legislative acts, and customary laws, including those dealing with human rights.

III. THE AFRICAN JUDICIARY AND HUMAN RIGHTS

A. Introduction

Although international law had, for many years, been "the province primarily of diplomatic and trade treaties," it has, nevertheless, reached "not just interactions between states but states' behavior within their own borders as well."[299] The revolution in international law, which has produced "more than 100,000 international treaties [covering] topics ranging from taxation to torture," has, however, "brought with it many new challenges."[300]

The most important of these challenges is the conflict between "the notion of an international order based on law" and the "ideal of state sovereignty."[301] For example, although the United States was a key force in the design of the ICCPR, it took the country 26 years to finally sign it. This was due to a "general reluctance [among U.S. political leaders] to commit to international human rights provisions."[302] Thus, some countries consider

298. This has been the case in Ghana. For example, in the case *New Patriotic Party v. Inspector-General of Police*, the Chief Justice held as follows: "Ghana is a signatory to this African Charter and Member States of the [OAU] and parties to the Charter are expected to recognize the rights, duties, and freedoms enshrined in the Charter and to undertake to adopt legislative and other measures to give effect to the rights and duties. I do not think the fact that Ghana has not passed specific legislation to give effect to the Charter means that the Charter cannot be relied upon." *New Patriotic Party v. Inspector-General of Police*, Accra [Ghana 1993] 1 N.L.P.r. 73, suit 3/93.

299. Oona A. Hathaway, *International Delegation and State Sovereignty*, 71 LAW & CONT. PROB. 115, 115 (2008).

300. Hathaway, *supra* note 299, at 115.

301. *Id.*

302. Richard Louis Lara, *The Problem of Sovereignty, International Law, and Intellectual Conscience*, 5 J. PHIL. INT'L L. 1, 23 (2014).

international law, including international human rights law, as a threat to or an infringement on their national sovereignty.[303]

International law, including international human rights law, "can infringe a country's sovereign right to determine, not just the content of domestic constitutional law, but also how it is interpreted."[304] In many former British colonies in Africa, whose legal systems are based on the common law of England and Wales, "an instrument which has been signed, whether or not it has been ratified and domesticated," can still impact a country's domestic legal system through its role in the interpretation of the constitution, including the bill of rights.[305]

Many of Africa's Anglophone countries—that is, those that were formerly colonies of Great Britain and which made common law as the foundation for their legal systems—have usually followed the well-established common law "presumption in statutory construction that courts will strive to interpret legislation in a manner that will not conflict with international law."[306] For example, in the High Court of Botswana case, *Att'y Gen. v. Unity Dow*, Justice Amissah, writing for the court, remarked:

> Botswana is a member of the community of civilised States which has undertaken to abide by certain standards of conduct, and, unless it is impossible to do otherwise, it would be wrong for its courts to interpret its legislation in a manner which conflicts with *the international obligations Botswana has undertaken*.[307]

A court should not adopt this principle of interpretation when domestic legislation is clear and unambiguous.[308] If, however, "there are ambiguities or uncertainties in relevant constitutional provisions, one possible solution is to adopt an interpretive principle that resolves the uncertainties and/or ambiguities

---

303. Hathaway, *supra* note 299, at 115–16 (noting that several legal scholars in the United States have "criticized international law as posing a threat to state sovereignty").

304. Mbaku, *International Law and Limits*, *supra* note 297, at 77.

305. Fombad, *Internationalization of Constitutional Law*, *supra* note 134, at 455.

306. *Id.* at 455–56.

307. *Attorney-General v. Dow* [1992] BLR 119, 154 (CA) (emphasis added).

308. *See Salomon v. Comm'rs of Customs and Excise*[1967] 2 QB 116 at 143 (Eng.) (holding that "[i]f the terms of the legislation are clear and unambiguous, they must be given effect to whether or not they carry out Her Majesty's treaty obligations.").

in a manner that upholds any international instruments, particularly human rights instruments, and which may have inspired the adoption of the relevant constitutional provisions."[309] The Australian jurist, Justice Michael Donald Kirby, a former justice of the High Court of Australia, has stated that

> [w]here such a constitutional text makes reference to fundamental human rights, as also recognised in international law, it is highly desirable, indeed obligatory, for judges within municipal systems to familiarise themselves with the international jurisprudence collecting around the same words in international and regional bodies devoted to expounding their meaning.[310]

Professor Fombad[311] has argued that "as a result of the Bangalore Principles on the Domestic Application of International Human Rights norms there is now some sort of a duty on judges to adopt this interpretative principle."[312] Professor Fombad notes, however, that "as with legislation, this interpretative principle will certainly not apply where the constitution is clear and not inconsistent with international law."[313]

Since the end of the Cold War and the collapse of many socialist regimes in Eastern Europe, including the disintegration of the Soviet Union and significant improvements in information and communication technology, interaction between peoples and nations has increased tremendously.[314] An important

309. Mbaku, *International Law and Limits*, *supra* note 297, at 77–78.

310. The Hon. Justice Michael Kirby AC CMG, The Road From Bangalore The First Ten Years of The *Bangalore Principles* On The Domestic Application Of International Human Rights Norms (Dec. 28, 1998), https://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_bang11.htm.

311. Dr. Fombad is a professor of law at the Institute for International and Comparative Law of the Faculty of Law of the University of Pretoria. He is also Vice President of the International Association of Constitutional Law and a member of the Stellenbosch Institute for Advanced Study. He is the editor of THE SEPARATION OF POWERS IN AFRICAN CONSTITUTIONALISM (2016). *See, e.g.*, THE SEPARATION OF POWERS IN AFRICAN CONSTITUTIONALISM (Charles M. Fombad ed., 2016) (presenting a series of essays that examine separation-of-powers schemes in Africa and their impact on constitutionalism).

312. Fombad, *Internationalization of Constitutional Law*, *supra* note 134, at 457.

313. *Id.*

314. Sol Rogers, *The Role Technology in the Evolution of Communication*, FORBES (Oct. 15, 2019), https://www.forbes.com/sites/solrogers/2019/10/15/the-role-of-technology-in-the-evolution-of-communication/?sh=65aca592493b

consequence of increased globalization has been the internationalization of national constitutional law.[315] Thus, countries, including those in Africa, "must see the evolving internationalization of domestic constitutional law as a global effort to improve governance and generally enhance the protection of human and peoples' rights."[316]

Legal scholars have argued that in light of these changes, countries, including those in Africa, "should not blindly adhere to strict doctrines such as monism or dualism, but should take into consideration rulings of international and regional tribunals, with a view to enhancing the maintenance of good governance and adherence to the rule of law."[317] In each African country, "[t]he overwhelming objective of domestic law should be to improve peaceful coexistence, enhance the protection of human and peoples' rights and generally promote sustainable human development."[318]

Throughout the continent, judges should not make themselves "slaves to their domestic legal traditions," especially given the fact that some of them (e.g., those that promote child marriage and FGM) actually harm women and children, as well as deprive them of the opportunity to develop the skills that they need to be productive members of their communities.[319] Policymakers, it is argued, should seek a progressive approach to constitutional design and judges should be willing "to look outside their own domestic legal traditions to the elaboration of international, regional and other bodies."[320] Professor Fombad notes that this is "a universal trend that is bound to be copied in Africa as judges realize that they cannot isolate themselves from the rapid changes in legal thinking and analysis and from the fresh

(showing how improvements in information has impacted interaction between peoples).

315. Fombad, *Internationalization of Constitutional Law*, *supra* note 134, at 440 (linking internationalization of constitutional law to "globalization, liberalization and regionalism").

316. Mbaku, *International Law and Limits*, *supra* note 297, at 78.

317. *Id.*

318. *Id.*

319. Mbaku, *Child Marriage*, *supra* note 130 (examining child marriage and its impact on African women and girls).

320. Fombad, *Internationalization of Constitutional Law*, *supra* note 134, at 457.

approaches and new insights generated by international jurisprudence to deal with common problems."[321]

African countries, like countries in other parts of the world, must recognize the fact that "giving up some level of national sovereignty is necessary to enhance the meeting of certain minimum standards of governance in a free and modern nation-state—for example, the protection of human rights, peaceful coexistence of each country's subcultures, and poverty alleviation and human development."[322]

Since the pro-democracy movements of the early-1990s, many countries in Africa have embarked on institutional reforms to create "constitutions that provide the effective foundation for constitutionalism, democracy, the rule of law, the protection of fundamental human rights, and good governance."[323] If African countries successfully meet the demands of international human rights instruments, such as the UDHR, the ICCPR, the CEDAW, and the ICESCR, and make certain that their domestic laws, including their constitutions and customary laws and traditions, conform with the provisions of international human rights instruments, these steps could potentially help in the minimization of government impunity in particular and the improvement of governance in general. The only losers from successful efforts to internationalize constitutional law in the African countries are the opportunistic politicians "whose power and fortunes are tied to dysfunctional institutional arrangements and bad governance."[324]

International legal scholars have argued that applying international law standards and principles to the legal system of any country, including those in Africa, "is usually not intended as a replacement for domestic law."[325] International law, however, is "supposed to supplement domestic law and enhance good governance."[326] For example, if a country's national laws are deficient and hence, are not capable of effectively and adequately protecting human rights, international human rights instruments can "replace deficient domestic law[s] or complement them" and provide the institutional environment within which

321. *Id.* at 457–58.
322. Mbaku, *International Law and Limits*, *supra* note 297, at 79.
323. *Id.* at 94.
324. *Id.* at 95.
325. *Id.*
326. *Id.*

human rights can be recognized and protected.[327] This is especially important in Africa, where national constitutions in many countries have either failed to specifically invalidate customs and traditions that harm vulnerable groups (e.g., women and girls) or do not have a bill of rights that conforms with the provisions of international human rights instruments.[328] In such countries, international human rights instruments can serve as a tool to interpret the constitution and national laws. This process allows local judges, through their decisions, to make certain that domestic laws, including custom and tradition, conform to the provisions of international human rights instruments.

Throughout the continent, "international human rights standards and principles have become especially important," particularly for African countries that have "highly dysfunctional constitutional orders, including those countries, such as South Sudan, Central African Republic, Somalia, and the Democratic Republic of Congo, where sectarian violence remains pervasive and domestic legal responses are no longer capable of resolving [these pervasive conflicts] and restoring peace and security."[329] In these parts of Africa, where sectarian violence continues to threaten not just citizens' overall security, but their human rights—including especially their right to life—it is argued that "evolving principles of the internationalization process will have the effect of reinforcing constitutionalism by putting oppressive regimes on notice that the international community is watching and may intervene when massive atrocities are committed."[330]

For countries like Central African Republic, Mali, Libya, Somalia, South Sudan, and several others, whose governing

327. Fombad, *Internationalization of Constitutional Law*, *supra* note 134, at 463.

328. The Constitution of the Republic of Sudan has a Bill of Rights and Freedoms, which includes the following statement on children's rights: "The state protects the rights of the child as provided in *international agreements ratified by Sudan*." Emphasis added. When Sudan signed the African Charter on the Rights and Welfare of the Child, however, it included a declaration to the effect that it did not consider itself bound by Article 11(6) (the education of girls who become pregnant before they complete their schooling) and Article 21(2) (child marriage and the betrothal of girls and boys). *See* CONSTITUTION OF THE REPUBLIC OF SUDAN, 2019, at chapter 14, art. 5; *African Charter on the Rights and Welfare of the Child*, at arts. 11(6) & 21(2).

329. Mbaku, *International Law and Limits*, *supra* note 297, at 96.

330. Fombad, *Internationalization of Constitutional Law*, *supra* note 134, at 464.

institutions have either disintegrated or are no longer able to provide even the most basic of government services, the way forward calls for a total reconstruction of the state through a participatory, inclusive, bottom-up, and people-driven constitution-making process.[331] The outcome of this process must be a governing process characterized by separation of powers with checks and balances, including, at the minimum, an independent judiciary; a bicameral legislature, with each chamber exercising an absolute veto over legislation enacted by the other; a robust and politically active civil society; and independent civil society organizations (e.g., independent press and political parties).[332]

In other African countries, such as Ghana, Kenya, and South Africa, there has emerged "more independent judiciaries with judges who are more educated, confident and increasingly more assertive in their role to creatively promote the course of constitutional justice in every facet of their judgments."[333] For example, on December 7, 2012, Ghana conducted a presidential election in which the top candidates were incumbent John Mahama of the National Democratic Congress (NDC) and Nana Akufo-Addo of the opposition New Patriotic Party.[334] The official results revealed that John Mahama, who had taken office after the unexpected death of President John Atta Mills, had won with 50.7 percent of the votes over opposition leader Nana Akufo-Addo's 47.74 percent.[335]

Despite the fact that Ghana's 2012 presidential election was "declared free and fair by the regional body, the Economic

---

331. *See, e.g.*, JOHN MUKUM MBAKU, PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES: A CONSTITUTIONAL POLITICAL ECONOMY APPROACH 48–107 (2018) (elaborating on the process-driven, inclusive, participatory and bottom-up approach to constitution making).

332. Judith A. Best, *Fundamental Rights and the Structure of Government*, *in* THE FRAMERS AND FUNDAMENTAL RIGHTS 37, 48 (Robert A. Licht ed., 1992) (examining the concept of separation of powers with checks and balances and noting the importance of a bicameral legislature).

333. Fombad, *Internationalization of Constitutional Law*, *supra* note 134, at 464.

334. John Mukum Mbaku, *The Ghanaian Elections: 2016*, THE BROOKINGS INST. (Dec. 15, 2016), https://www.brookings.edu/blog/africa-in-focus/2016/12/15/the-ghanaian-elections-2016/ (providing an overview of Ghana's 2016 presidential election).

335. *Ghana Election: John Mahama Declared Winner*, BBC NEWS (Dec. 10, 2012), https://www.bbc.com/news/world-africa-20661599 (providing an overview of Ghana's December 2012 presidential election).

Community of West African States (Ecowas) and a local group, the Coalition of Domestic Election Observers (CODEO)," the loser, Akufo-Addo, indicated that he would "contest the result, accusing the governing NDC party of conspiring with [the Electoral Commission of Ghana] staff to fix Friday's poll."[336] The Supreme Court of Ghana, exercising its Article 64 jurisdiction to adjudicate all challenges to the election of President of the Republic, "upheld the December 2012 election results, clearing the way for Mahama to become president of Ghana."[337] The opposition accepted the ruling and there was no post-election violence.[338]

In 2016, the government of South African President Jacob Zuma notified the UN Secretary-General of the country's intention to withdraw from the Rome Statute of the International Criminal Court (the ICC).[339] Shortly after this announcement, the Democratic Alliance (DA), an opposition political party, brought action before the North Gauteng High Court in Pretoria, praying that the court order the government to reverse the decision.[340] The DA argued that the action to withdraw the country from the Rome Statute was illegal because the South African Parliament had not been consulted as required by the constitution.[341] In what observers saw as a rebuke to the government,

336. *Id.*

337. Mbaku, *The Ghanaian Elections*, *supra* note 334.

338. *Id.* (noting that after the Ghana Supreme Court upheld the results of the December 12, 2012 presidential elections and cleared the way for John Mahama to be inaugurated president, there was no post-election violence).

339. *See* Gabriele Steinhauser, *South Africa to Withdraw from International Criminal Court*, WALL ST. J. (Oct. 21, 2016, 4:46 AM), https://www.wsj.com/articles/south-africa-to-withdraw-from-international-criminal-court-1477038370 (noting the decision by President Jacob Zuma to withdraw South Africa from the Rome Statute of the International Criminal Court). *See also* Camila Domonoske, *South Africa Announces Withdrawal From the International Criminal Court*, NPR INTERNATIONAL (Oct. 21, 2016, 9:32 AM), https://www.npr.org/sections/thetwo-way/2016/10/21/498817513/south-africa-announces-withdrawal-from-international-criminal-court (reporting South Africa's decision to withdraw from the Rome Statute of the ICC).

340. *Democratic Alliance v. Minister of International Relations and Cooperation and Others* 2017 (3) SA 1 (HC) at 5 para. 6 (S. Afr.).

341. *See, e.g.*, *South Africa's decision to leave ICC ruled 'invalid'*, BBC NEWS (Feb. 22, 2017), https://www.bbc.com/news/world-africa-39050408 (noting the court decision supporting the DA's argument that the withdrawal of South Africa from the Rome Statute was unconstitutional since the government had failed to seek parliamentary approval).

the High Court ruled that "the country's bid to withdraw from the International Criminal Court is 'unconstitutional and invalid.'"[342]

In its ruling, the North Gauteng High Court said that "the executive did not have the power to [withdraw the country from the ICC] without prior parliamentary approval."[343] Deputy Judge President Mojapelo and Judges Makgoka and Mothe, sitting as a Full Bench and court of first instance, held that "[t]he United Nations, the ICC and member states to the Rome Statute, as well as the broader international community, deserve a united, final and determinative voice from South Africa on [the issue of the withdrawal of South Africa from the ICC]."[344] That, the honorable judges argued, "can only be achieved through our country's normal legislative process."[345] The judges then posed a question to the government in particular and South Africans in general:

> The question should be: what is so pressing for the national executive about the withdrawal from the Rome Statute which cannot wait for our legislative processes (and possibly judicial pronouncements) to take their course? Government respondents have not provided any explanation for this seemingly urgent need to withdraw from the Rome Statute. All these, in our view, point to one conclusion: the prematurity and procedural irrationality of the lodging of the notice of withdrawal by the national executive without first consulting parliament. This unexplained haste, in our view, itself constitutes procedural irrationality.[346]

Civil society organizations, including the DA, considered the court's ruling a "victory for the rule of law."[347] Specifically, the DA declared that "South Africa does not want to be lumped together with pariah states who have no respect for human rights and who do not subscribe to accountability for those guilty of the

---

342. Merrit Kennedy, *Court Blocks South Africa's Withdrawal from International Criminal Court*, NPR NEWS (Feb. 22, 2017, 11:35 AM), https://www.npr.org/sections/thetwo-way/2017/02/22/516620190/court-blocks-south-africas-withdrawal-from-international-criminal-court.

343. *Id.*

344. *Democratic Alliance v. Minister of International Relations and Cooperation and Others*, 2017 (3) SA (1) (HC) at 31 para. 70 (S. Afr.).

345. *Id.*

346. *Id.* at 31–32 para. 70.

347. Kennedy, *supra* note 342.

most heinous human rights violations."[348] The government abided by the court's ruling and subsequently revoked the decision to withdraw from the ICC.[349] On March 7, 2017, the Permanent Mission of the Republic of South Africa notified its decision by *note verbale* to the Secretary-General of the UN in his role as depositary of the Treaty:

> Reference is made to the Instrument of Withdrawal from the Rome Statute of the International Criminal Court and its Declaratory Statement that was deposited to you by the Permanent Mission of the Republic of South Africa to the United Nations under cover of Note No. 568/2016 on 19 October 2016.
>
> I wish to inform you that the Gauteng High Court of the Republic of South Africa has on 22 February 2017 issued a judgement in the matter between the *Democratic Alliance and the Minister of International Relations and Cooperation and others* and found that the approval of the Parliament of South Africa had to be obtained before the Instrument of Withdrawal from the Rome Statute of the International Criminal Court can be deposited with the United Nations as provided for In Article 127(1) of the Rome Statute of the International Criminal Court. Consequently, the abovementioned depositing of the Instrument of Withdrawal was found to be unconstitutional and invalid.
>
> In order to adhere to the said judgement, I hereby revoke the Instrument of Withdrawal from the Rome Statute of the International Criminal Court with immediate effect.[350]

The decision of the executive branch of the government of South Africa to abide by the High Court's ruling augurs well for the country's separation-of-powers regime in general and judicial independence and fidelity to the rule of law in particular.[351] The

---

348. *Id.*

349. *See South Africa revokes ICC withdrawal after court ruling*, BBC NEWS (March 8, 2017), https://www.bbc.com/news/world-africa-39204035 (reporting that South Africa had revoked its decision to withdraw from the ICC after the High Court held that the decision was unconstitutional).

350. U.N. Secretary-General, SOUTH AFRICA: WITHDRAWAL OF NOTIFICATION OF WITHDRAWAL (Mar. 7, 2017), https://treaties.un.org/doc/Publication/CN/2017/CN.121.2017-Eng.pdf.

351. Coalition for the International Criminal Court, *South Africa reverses ICC withdrawal: Now make international justice work for all*, (Mar. 15, 2017), https://www.coalitionfortheicc.org/news/20170315/south-africa-reverses-icc-withdrawal-now-make-international-justice-work-all (noting that the

revocation of the decision to withdraw from the ICC was welcomed by many South Africans, as well as the President of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Mr. Sidiki Kaba.[352]

On August 8, 2017, Kenya held general elections to select a President, Members of Parliament, and officials for various subnational governments.[353] After the results of the presidential election were officially released, incumbent president, Uhuru Kenyatta, had been re-elected by capturing 54.27 percent of the votes cast.[354] Raila Odinga, the main opposition leader, received 44.74 percent of the votes and was expected to concede to the winner.[355] However, Odinga argued that the election had been fraudulent with numerous irregularities and that it had been rigged in favor of Kenyatta.[356] Odinga and his National Super Alliance took their grievances about the election to the Kenya Supreme Court.[357] On September 1, 2017, the Supreme Court exercised its Article 140 powers to decide "questions as to [the] validity of presidential election[s]"[358] and declared that

---

revocation of the decision to withdraw from the ICC "is a commendable indication of the country's commitment to the rule of law").

352. Press Release, *International Criminal Court, ASP President Welcomes the Revocation of South Africa's Withdrawal from the Rome Statute*, (Mar. 11, 2017), https://asp.icc-cpi.int/en_menus/asp/press%20releases/Pages/PR1285.aspx.

353. *See, e.g.,* Hamza Mohamed, *Uhuru Kenyatta Wins Kenya Presidential Election*, ALJAZEERA (Aug. 11, 2017), https://www.aljazeera.com/news/2017/8/11/uhuru-kenyatta-wins-kenya-presidential-election (noting that incumbent Kenyatta had won the August 8, 2017 presidential election). *See also* Njoki Chege, *History as Kenya set to have first elected women senators*, NATION (Aug. 9, 2017), https://nation.africa/kenya/news/politics/elected-women-senators/1064-4051738-ax8nnoz/index.html (reporting on Kenya's 2017 parliamentary elections). See also Newsplex Team, *Jubilee wins more than half governor races, while 24 incumbents to lose seats*, NATION (Aug. 10, 2017; updated Aug. 20, 2021), https://nation.africa/newsplex/jubileee-governor-races/2718262-4053204-d6l1vfz/index.html (announcing the 2017 sub-national government elections results in Kenya).

354. *Id.*

355. *Id.*

356. *Id.*

357. *Kenya Election: Raila Odinga to Challenge Result in Court*, BBC NEWS (Aug. 16, 2017), https://www.bbc.com/news/world-africa-40949265 (noting that the losing party in the August 2017 presidential election in Kenya had decided to challenge the results in court).

358. CONST. KENYA, 2010, at art. 140.

Kenyatta's victory was invalid and ordered "a new vote to be held within 60 days."[359]

In addition to incumbent President Kenyatta's acceptance of the court's decision, he called on his supporters and all Kenyans to remain peaceful.[360] He went on to declare: "[t]he court has made its decision. We respect it. We don't agree with it. And again, I say peace . . . peace, peace, peace. That is the nature of democracy."[361] Throughout the country, opposition supporters rejoiced.[362] The decision, however, surprised many Kenyans since, historically, "courts have long been subservient to the president."[363] Nonetheless, it appeared that there was an emergence, within Kenya, of a new crop of progressive jurists who were determined to make the democratic institutions established by the 2010 Constitution work.[364]

As noted by Daniel Wesangula, a journalist who specializes in human rights issues, "[t]he court decision is a win for democracy in a country dominated by flawed political processes—a litany of convenient mishaps, technological and logistical letdowns and this year, the murder of an electoral official."[365] For impartial observers of Kenya's political economy, noted Wesangula, "the latest ruling represents much more than a one-up for Odinga against Kenyatta. It was more than the victory songs and dances by the opposition—and more than the stubborn chest-thumping and 'We can beat you again' by Kenyatta stalwarts too."[366]

---

359. Jason Burke, *Kenya Supreme Court Annuls Uhuru Kenyatta Election Victory*, THE GUARDIAN (Sept. 1, 2017, 12:39 AM), https://www.theguardian.com/world/2017/sep/01/kenyan-supreme-court-annuls-uhuru-kenyatta-election-victory.

360. *Id.*

361. *Id.*

362. Burke, *supra* note 359 (noting that after the Supreme Court declared Uhuru Kenyatta's victory invalid, there was "jubilation among opposition supporters").

363. Burke, *supra* note 359.

364. *See* International Crisis Group, *A Triumph for Democracy*, CRISISGROUP.ORG (Sept. 8, 2022), https://www.crisisgroup.org/africa/horn-africa/kenya/triumph-kenyas-democracy (emphasizing the democracy-enhancing role of the Kenya Supreme Court ruling in the 2022 post-election conflict in Kenya).

365. David Wesangula, *Kenya's Supreme Court Has Stood Tall Instead of Ducking: It Gives Us Hope*, THE GUARDIAN (Sept. 4, 2017), https://www.theguardian.com/commentisfree/2017/sep/04/kenya-supreme-court-stood-tall-hope-win-for-democracy.

366. *Id.*

Thus, noted Wesangula,

> Kenya's supreme court, buoyed up by the constitution and a clear conscience, stood tall at a time when ducking seemed likely. Kenyans will soon go to the polls again, more confident that the whole election and the tallying of results will be conducted in a much better way. And if anything does not add up, the courts, not the politicians fighting for their relevance, will have to step in.[367]

Thus, by boldly exercising its Article 140 powers, the Supreme Court of Kenya averted what could have been a repeat of the ethnic-induced violence that accompanied the December 2007 presidential election.[368]

Ghana, Kenya and South Africa have democratic systems that are young but are making significant progress.[369] One can consider these constitutional orders "works-in-progress" and that given time, they will eventually mature and become fully functional, and be characterized by true adherence to the rule of law.[370] Of course, these countries' governing processes are not at the same stage of development.[371] Given the significant

---

367. *Id.*

368. Article 140 of the Kenya Constitution grants the Supreme Court original jurisdiction to decide all questions as to the validity of a presidential election. *See* CONSTITUTION art. 140 (2010) (Kenya).

369. Peter Dizikes, *From South Africa, a success story for democracy*, MIP POLITICAL SCIENCE (May 19, 2022), https://polisci.mit.edu/news/2022/south-africa-success-story-democracy (discussing progress in South African democracy since transition from apartheid in 1994). *See also* Betty N. Wainaina, *Kenya's Election 2022: Institutions' coming of age in governance and violence prevention*, NYU CTR. ON INT'L COOP. (Sept. 7, 2022), https://cic.nyu.edu/resources/kenyas-election-2022-institutions-coming-of-age-in-governance-and-violence-prevention/ (showing the level of progress that Kenya's democracy has achieved since the post-election violence of 2007/2008); Stacey Knott, *Close Election Shows Maturing Democracy, Ghanaian Analysts Say*, VOA NEWS (Dec. 10, 2020), https://www.voanews.com/a/africa_close-election-shows-maturing-democracy-ghanaian-analysts-say/6199421.html (showing a significant level of maturing in Ghana's democracy).

370. *Id.*

371. Although Ghana, Kenya and South Africa have democratic constitutions with a bill of rights, South Africa's post-apartheid constitution is generally considered as one of the most progressive and inspiring. *See, e.g.,* Julie Middleton, *Translating South Africa's AU Commitments From Words into Action*, 3 J. AFR. U. STUD. 23, 23 (2014) (noting that "South Africa soon adopted a constitutional order, embodying human rights aspirations . . . which is celebrated today as one of the most comprehensive and progressive in the world").

progressive human rights jurisprudence that has been produced by South Africa's Constitutional Court, one could conclude that South Africa has the most developed constitutional order among the three countries.[372] However, that could be an unfair conclusion since courts in all three countries have not had the same opportunities to develop their human rights jurisprudence.[373] Hence, the only conclusion that we to need draw here is that all three countries have relatively progressive judiciaries that are working hard within their existing institutional and legal environments to make certain that the judiciary serves as one of each country's checks and balances, guards the exercise of government power, and enhances the protection of human rights.

In the sections that follow, this Article will examine case law from a few African countries to show how judges are using their power to interpret the constitution to bring their national laws (including customary laws) into conformity with the provisions of international human rights instruments. By doing so, these progressive judges are significantly enhancing the ability of their countries to recognize and protect human rights.

B. Ephrahim v. Pastory and Another (High Court of Tanzania)

It has been argued that during the last several years, the High Court "has produced some bold decisions demonstrating an

372. That jurisprudence includes *AB & Another v. Pridwin Preparatory Schools and Others*, where the Constitutional Court of South Africa held that children have rights, not just when they are adults, but also when they are still young. *See AB & Another v. Pridwin Preparatory School and Others* 2020 (12) ZACC 1 (CC). *See also Centre for Child Law and Others v. Minister of Basic Education and Others* 2019 (126) SA 1 (EGG) (where the court upheld the right to education of undocumented children).

373. In fact, through at least one ruling in cases involving post-elections conflicts, the supreme courts of Ghana and Kenya have asserted a significant level of judicial independence. *See, e.g.*, Reuters Staff, *Mahama admits defeat after Ghana court upholds president's election victory*, REUTERS (Mar. 5, 2021), https://www.reuters.com/article/uk-ghana-election/mahama-admits-defeat-after-ghana-court-upholds-presidents-election-victory-idUSKCN2AX0PO (Feb. 15, 2023) (noting the Ghana Supreme Court decision that upheld President Nana Akufo-Addo's election victory). *See also* Jason Burke, *Kenyan supreme court annuls Uhuru Kenyatta election victory*, THE GUARDIAN (UK) (Sept. 17, 2017), https://www.theguardian.com/world/2017/sep/01/kenyan-supreme-court-annuls-uhuru-kenyatta-election-victory (noting the Kenya Supreme Court's ruling in the post-election conflict in Kenya in 2017). A critical point here is that in both cases, the losers accepted their respective courts' rulings. *See id*.

impressively firm stand by the judiciary in its role of dispensing justice without fear of executive threat or intimidation."[374] These decisions came to light especially after Tanzania amended its constitution and introduced a Bill of Rights and "widened the scope of judicial control of executive powers."[375] The Fifth Constitutional Amendment Act of 1984, "which brought the Bill of Rights into the Constitution for the first time is an important landmark in the constitutional history of Tanzania."[376] Its adoption marked "the beginnings of a reassertion of legality in the administration of the state."[377] Until the 1984 constitutional amendments, it is argued that "the government had gone on unchecked by the law, governing largely according to political fiat rather than according to law."[378] In fact, Tanzania's Bill of Rights significantly enhanced citizens' "awareness of their rights and how [they could] defend them by court action."[379]

As argued by Professor J. T. Mwaikusa, who has studied judicial powers in Tanzania, not long after the 1984 constitutional amendments entered into force, "various groups of people [in Tanzania] started asserting their right to organize themselves free from the state control that had hitherto attended to all organizations."[380] As time passed, "this development merged with the wave of demands for free political organization, and the political changes which saw the end of the one-party state system in 1992."[381] In these monumental developments, noted Professor Mwaikusa, the "judiciary has played a very important role."[382]

Tanzania has benefited significantly from the judiciary.[383] In its transition from a "severely restrictive one-party state" to one more accepting of political pluralism, the judiciary enabled an institutional environment more likely to recognize and protect human rights, especially those of girls and women.[384] In the

374. J. T. Mwaikusa, *The Limits of Judicial Enterprise: Judicial Powers in the Process of Political Change in Tanzania*, 40 J. AFR. L. 243, 243 (1996).
375. *Id.*
376. *Id.*
377. *Id.*
378. *Id.*
379. *Id.*
380. *Id.*
381. Mwaikusa, *supra* note 374, at 243.
382. *Id.*
383. *Id.*
384. *Id.*

following pages, this Article examines *Ephrahim v. Pastory*,[385] a landmark case in the development of human rights jurisprudence in Tanzania. This case is also important because it shows how courts can make use of international human rights law to interpret national constitutions, particularly the Bill of Rights, and void or hold invalid customary laws that conflict with the Bill of Rights or modify them accordingly.

Ephrahim v. Pastory, Civil Appeal No. 70 of 1989, is a landmark case from the High Court of Tanzania at Mwanza. It addresses conflicts between customary law and the bill of rights, as well as the High Court's power to interpret the constitution.[386] A woman named Holaria d/o Pastory, a member of the Haya (or Bahaya) ethnic group based in the Kagera Region of Tanzania, had inherited a certain parcel of clan land from her father by a valid will.[387] For a variety of reasons, including the fact that "she was getting old and senile and [had] no one to take care of her, she sold the clan land on 24 August 1988 to the second respondent Gervazi s/o Kaizilege for shs. 300,000."[388] Kaizilege was a stranger and not a member of Pastory's clan.[389] Another person named Bernado s/o Ephrahim, who was a member of Pastory's clan, brought legal action in the Primary Court at Kashasha, Muleba District, Kagera Region of Tanzania, praying the court to declare the sale of the clan land null and void under Haya Customary law.[390] Kaizilege's prayer was in line with Haya Customary law, which specifically states that: "Women can inherit, except clan land, which they may receive in usufruct but may not sell. However, if there is no male of that clan, women may inherit such land in full ownership."[391]

The Primary Court at Kashasha agreed with the appellant and granted his prayer, declaring the sale void and ordering the first respondent, Pastory, to refund Shs. 300,000 to the purchaser of the land.[392] Pastory appealed the decision to the District Court

385. *Ephrahim v. Pastory* (2001) AHRLR 236 (TzHC 1990) (Tanz.).
386. *Id.*
387. *See id.* para. 1.
388. *Id.*
389. *Id.*
390. *Id.*
391. *Id.* para 2. *See also* LAWS OF INHERITANCE OF THE DECLARATION OF CUSTOMARY LAW, 1963, GOVERNMENT NOTICE NO. 436 OF 1963 (Tanz.), https://leap.unep.org/countries/tz/national-legislation/local-customary-law-declaration-no-4-order-gn-no-4361963.
392. *Ephrahim v. Pastory*, para. 1.

at Muleba, which quashed the decision on the basis that it violated the Bill of Rights in the Constitution of the United Republic of Tanzania, which guarantees equality for both men and women.[393] Not satisfied with the District Court's decision, Ephrahim appealed to the High Court of Tanzania at Mwanza.[394]

Mwalusanya J, writing for the High Court, began his analysis of the case by noting that the appeal before the court "is about women's rights under our Bill of Rights."[395] He then proceeded to review case law to confirm discrimination against women by the law in Tanzania.[396] First, Justice Mwalusanya cited to the decision in *Bi. Verdiana Kyabuje and Others v. Gregory s/o Kyabuje*,[397] where Hamlyn J made the following declaration:

> Now however much this court may sympathize with these very natural sentiments it is in cases of this nature bound by the Customary law applicable to these matters. It has frequently been said that it is not for courts to overrule customary law. Any variations in such law as takes place must be variations initiated by the altering customs of the community where they originate. Thus, if a customary law draws a distinction in a matter of this nature between males and females, it does not fall to this court to decide that such law is inappropriate to modern development and conditions. That must be done elsewhere than in the courts of law.[398]

In a case that was decided about thirteen years after the decision in *Kyabuje*, Justice Mwalusanya noted that the Tanzania Court of Appeal agreed with Hamlyn J's ruling, as per Mwankasendo JA in *Deocres Lutabana v. Deus Kashaga*.[399] The rule that female members of the Bahaya ethnic group "do not have

393. The Constitution of the United Republic of Tanzania guarantees that "[a]ll human beings are born free, and are all equal." THE CONSTITUTION OF THE UNITED REPUBLIC OF TANZANIA (CAP. 2), art. 12, ¶ 1. In addition, the constitution also guarantees equality before the law for all persons: "All persons are equal before the law and are entitled, without any discrimination, to protection and equality before the law" and that "[n]o law enacted by any authority in the United Republic [of Tanzania] shall make any provision that is discriminatory either of itself or in its effect." CONST. TANZANIA, at art. 13, ¶¶ 1, 2.

394. *See Ephrahim v. Pastory*, para. 1.

395. *Id.*

396. *See id.* para. 3.

397. *Cited by* Justice Mwalusanya in *Ephrahim v. Pastory*, para. 3.

398. *Id.*

399. *Cited by* Justice Mwalusanya in *Ephrahim v. Pastory*, para. 4.

the rights to sell clan land," noted Justice Mwalusanya, "was affirmed by the Tanzania Court of Appeal in *Rukuba Nteme v. Bi. Jalia Hassani and Another* (supra) as per Nyatali CJ and later in *Haji Athumani Isaa v. Rweutama Mituta* (Court of Appeal of Tanzania, Civil Appeal no. 9 of 1988, unreported) as per Kisanga JA."[400]

Noting that the fate of women in Tanzania, especially as relates to the sale of clan land, seemed to have been sealed by custom and tradition, Justice Mwalusanya stated that at least one judge in Tanzania, Senior District Magistrate of Muleba, Mr. LS2 Ngoyani, did not believe that the "courts were helpless or impotent to help women." [401] In his judgment, he had stated as follows:

> What I can say here is that the respondents' claim is to bar female clan members on clan holdings in respect of inheritance and sale. That female clan members are only to benefit or enjoy the fruits from the clan holdings. I may say that this was the old proposition. With the Bill of Rights of 1987 (sic) female clan members have same rights as male clan members.[402]

It was Magistrate Ngoyani who had heard Pastory's appeal at the District Court at Muleba.[403] He had held that Pastory, the first respondent (in the appeal before the High Court), had the rights under the Constitution of the United Republic of Tanzania, "to sell clan land and that the appellant [before the High Court, Bernado s/o Ephrahim] was at liberty to redeem that clan land on payment of the purchase price shs. 300,000."[404] In his appeal to the High Court, the appellant, Ephrahim, had argued that the District Court's ruling was contrary to the law.[405]

Next, in his analysis of the appeal before the High Court, Justice Mwalusanya recalled that since Tanzania adopted the doctrine of Ujamaa and self-reliance in the 1960s, discrimination against women had been rejected throughout the country and was considered a crime.[406] He cited to the writings of former President Mwalimu Julius K. Nyerere, considered an architect of the doctrine of Ujamaa, when he declared:

---

400. *Ephrahim v. Pastory*, para. 4.
401. *Id.* para. 5.
402. *Id.*
403. *See id.*
404. *Id.* para. 6.
405. *Id.*
406. *See id.* para. 7.

> . . . although every individual was joined to his fellow by human respect, there was in most parts of Tanzania, an acceptance of one human inequality. Although we try to hide the fact and despite the exaggeration which our critics have frequently indulged in, it is true that the women in traditional society were regarded as having a place in the community which was not only different, but was also to some extent inferior. This is certainly inconsistent with our socialist conception of the equality of all human beings and the right of all to live in such security and freedom as is consistent with equal security and freedom from all other. If we want our country to make full and quick progress now, it is essential that our women live in terms of full equality with their fellow citizens who are men.[407]

As long as 1968, noted Justice Mwalusanya, the courts had taken notice of the discriminatory nature of customary law, especially as regards the treatment of girls and women.[408] In the case *Ndewawiosia d/o Ndeamtzo v. Imanuel s/o Malasi*, Justice Saidi declared:

> Now it is abundantly clear that this custom, which bars daughters from inheriting clan land and sometimes their own father's estate, has left a loophole for undeserving clansmen to flourish within the tribe. Lazy clan members anxiously await the death of their prosperous clansman who happens to have no male issue and as soon as death occurs they immediately grab the estate and mercilessly mess up things in the dead man's household, putting the widow and daughters into terrible confusion, fear, and misery. It is quite clear that this traditional custom has outlived its usefulness. The age of discrimination based on sex is long gone and the world is now in the stage of full equality of all human beings irrespective of their sex, creed, race or color.[409]

Justice Mwalusanya's judgment in *Ephrahim* noted that while many courts in Tanzania since the 1960s have declared that "the customary law in question" discriminates against women, that law has not yet been changed.[410] Additionally, noted Mwalusanya J, when the Bill of Rights was incorporated into the

---

407. *Id.* para. 7 (quoting JULIUS K. NYERERE, FREEDOM AND SOCIALISM: A SELECTION FROM WRITINGS AND SPEECHES 1965–1967, 337 (1970)).

408. *Ephrahim v. Pastory*, para. 8.

409. *Id.* (quoting *Ndewawiosia d/o Ndeamtzo v. Imanuel s/o Malasi* (1968) HCD No. 127)).

410. *Id.* para. 9.

country's constitution through "Act No. 15 of 1984 by Article 13(4)," discrimination against women became prohibited.[411] The honorable justice then cited to various international human rights instruments that outlaw discrimination against women.[412]

Justice Mwalusanya then noted that the Universal Declaration of Human Rights ("UDHR") is part of the Constitution of the United Republic of Tanzania by virtue of Article 9(1)(f).[413] Article 7 of the UDHR prohibits discrimination based on sex: "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."[414]

Article 9(1)(f) of the Constitution of Tanzania states as follows:

> The object of this Constitution is to facilitate the building of the United Republic as a nation of *equal and free individuals* enjoying freedom, justice, fraternity and concord, through the pursuit of the policy of Socialism and Self Reliance which emphasizes the application of socialist principles while taking into account the conditions prevailing in the United Republic. Therefore, the state authority and all its agencies are obliged to direct their policies and programs towards ensuring—(f) that human dignity is preserved and upheld in accordance with the spirit of the Universal Declaration of Human Rights.[415]

Next, Justice Mwalusanya referenced various international human rights instruments that Tanzania has ratified and that prohibit discrimination against women.[416] The first is the CEDAW.[417] The United Republic of Tanzania signed the CEDAW on July 17, 1980, and ratified it on August 20, 1985.[418] Article 1 of CEDAW defines "discrimination against women" to mean "any distinction, exclusion or restriction made on the basis of sex" and which effectively prevents women from enjoying their

411. *Id.* para. 10.
412. *See id.*
413. *Id.*
414. G.A. Res. 217 (III) A, at art. 7.
415. CONST. OF TANZ., at art. 9(1)(f). (emphasis added).
416. *See Ephrahim v. Pastory*, para. 10.
417. CEDAW, *supra* note 103.
418. *Chapter IV: Human Rights, Convention on the Elimination of All Forms of Discrimination against Women*, *supra* note 156.

"human rights and fundamental freedoms" on "a basis of equality of men and women."[419]

Tanzania is also a State Party to the *African Charter on Human and Peoples' Rights* ("Banjul Charter").[420] Tanzania signed the Banjul Charter on May 31, 1982, and ratified it on February 18, 1984.[421] Article 18 of the Banjul Charter compels States Parties to "ensure the elimination of every discrimination against women and also ensure the protection of the rights of women and the child as stipulated in international declarations and conventions."[422] Finally, Justice Mwalusanya brought the court's attention to the *International Covenant on Civil and Political Rights* ("ICCPR"), which Tanzania ratified on June 11, 1976.[423] Article 26 of the ICCPR prohibits discrimination based on sex and states:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[424]

After reviewing these international human rights instruments, Justice Mwalusanya then noted that the "principles" elaborated in these international human rights instruments are "a standard below which any civilized nation should be ashamed to fall."[425] Justice Mwalusanya then declared that "the customary law under discussion flies in the face of our Bill of Rights as well as the international conventions to which we are signatories."[426]

Tanzania's courts, Justice Mwalusanya argued, "are not impotent to invalidate laws which are discriminatory and

---

419. CEDAW, *supra* note 103, at art. 1.

420. *African Commission on Human and Peoples' Rights, Ratification Table: African Charter on Human and Peoples' Rights*, https://www.achpr.org/ratificationtable?id=49 (Feb. 2023) (showing that Tanzania ratified the Banjul Charter on Feb. 18, 1984).

421. *Id.*

422. African Charter on Human and Peoples' Rights, art. 18, June 27, 1981, 1520 U.N.T.S. 217.

423. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

424. *Id.*, at art. 26.

425. *Ephrahim v. Pastory* (2001) AHRLR 236 (TzHC 1990), para. 10.

426. *Id.*

unconstitutional."[427] For example, noted the honorable justice, "[t]he Tanzania Court of Appeal both in the cases of *Rukuba Nteme* . . . and *Haji Athumani Issa* . . . agreed that the discriminatory laws can be declared void for being unconstitutional by filing a petition in the High Court under Article 30(3) of the Constitution."[428] Article 30(3) of the Constitution of Tanzania states as follows:

> [a]ny person claiming that any provision in this Part of this Chapter or in any law concerning his right or duty owed to him has been, is being or is likely to be violated by any person anywhere in the United Republic, may institute proceedings for redress in the High Court.[429]

Before rendering the court's decision, however, Justice Mwalusanya cited to *Haji Athumani Issa*, where Kisanga JA "seems to suggest that 'rules of the court' must first be enacted under Article 30(4) of the Constitution before a citizen can file a petition under Article 30(3) of the Constitution."[430] The honorable justice noted that Kisanga JA's statement was "just an obiter dicta as the decision of the case did not turn on the point."[431]

In addition, argued Justice Mwalusanya, "Article 30(4) states that authority 'may' make rules of the court and does not say it 'must' make them" and that "[t]hat appears to envisage a situation whereby petitions may be filed without rules of the court made for the purpose."[432]

Justice Mwalusanya then made reference to section 18(1) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Ordinance, 1955 as amended by Law Reform (Fatal Accidents and Miscellaneous Provisions) Ordinance (Amendment) Act, 1968.[433] Section 18(1) provides that "[t]he Chief Justice may make rules of the court prescribing the procedure and the fees payable or documents filed or issued in cases where an order of mandamus, prohibition or *certiorari* is sought."[434] Nevertheless, argued Justice Mwalusanya,

---

427. *Id.* para. 11.
428. *Id.* para. 12.
429. CONST. OF TANZANIA, at art. 30(3).
430. *Ephrahim v. Pastory*, *supra* note 425, para. 13.
431. *Id.*
432. *Id.*
433. *See id.* para. 13
434. *Id.*

> [i]t is now 22 years since that provision was made and yet the successive Chief Justices have yet to make rules of the court for the purpose. But that has not prevented nor deterred litigants from filing the necessary applications under the law. By parity of reasoning, when Article 30(4) of the Constitution states that the authority may make rules of the court for filing petitions, in the absence of those rules of the courts it does not mean the courts are impotent to act.[435]

The High Court, argued Justice Mwalusanya, "will invoke its inherent powers and use the available rules of the court. After all, the Rules of Procedure are the handmaidens of justice and should not be used to defeat substantive justice."[436] Thus, argued the honorable justice, "failure to invoke the correct rules of the court cannot defeat the course of justice, particularly when human rights are at stake. In other words, wrong rules of the court may only render the proceedings a nullity when they result in a miscarriage of justice."[437]

Justice Mwalusanya then cited to a Supreme Court of Mauritius case that involved procedural irregularities.[438] In that case, *Noordally v. Attorney-General and Another*,[439] Moolan CJ held that "notwithstanding all those procedural irregularities, the court would disregard the errors since the case raised matters of great public interest and no useful purpose would be served by insistence on form other than to delay a decision on the merits."[440] Mwalusanya J noted that the court in *Noordally* had cited to one of its earlier cases in which it declared that:

> It is the Court's duty to determine the validity of any statute which is alleged to be unconstitutional, because no law that contravenes the Constitution can be suffered to survive, and the authority to determine whether the legislature has acted within the powers conferred upon it by the Constitution is vested in the Court. The Court's primary concern, therefore, in any case where a contravention of the Constitution is invoked

435. *Id.* para. 14.
436. *Id.*
437. *Id.*
438. *See id.* para. 15.
439. *Nordally v. Attorney-General and Another*, [1986] S.C.R. 339 (Mauritius).
440. *Ephrahim v. Pastory*, *supra* note 425, para. 15 (Justice Mwalusanya paraphrasing Moolan CJ).

> is to ensure that it be redressed as conveniently and speedily as possible.[441]

Justice Mwalusanya noted that this approach, which was also adopted by the Privy Council in *Kariapper v. Wijesinha*,[442]

> is a commendable approach which I hope will be adopted by the High Court of Tanzania as well as the Tanzania Court of Appeal. The primary concern of the court should not be as to whether the correct rules of the court have been invoked, but rather to redress the wrong as speedily as possible.[443]

Mwalusanya J then cited to a law review article written by the former Chief Justice of Botswana, Aguda CJ, where the latter declared:

> If the Constitution entrenches fundamental rights, these must be regarded as the basic norm of the whole legal system. Therefore all laws and statutes which are applicable to the state must be subjected, as the occasion arises, to rigorous tests and meticulous scrutiny to make sure that they are in consonance with the declared basic norm of the Constitution. It is clear from this that there is no room here for a rigid application of the common law doctrine of stare decisis. It is submitted therefore that a court can refuse to follow the judgment of a higher court which was given before the enactment of a Constitution if such a judgment is in conflict with a provision of the Constitution. Also the final court of the land must regard itself absolutely bound only by the Constitution and not by any previous decision of the same court.[444]

Specifically, ruled Justice Mwalusanya,

> [i]f the *Haji Athumani Issa* case . . . is to be regarded as binding authority and not just an obiter dicta then the hopes of the masses of Tanzania that they would be saved by the Bill of Rights have been dashed. This is because the rules of the court may not be enacted for years on end.[445]

The learned justice then made reference to section 5(1) of the Constitution (Consequential, Transitional and Temporary Provisions) Act, 1984, which states that "with effect from March

441. *Id.*
442. *Kariapper v. Wijesinha*, [1967] 3 W.L.R. 1460 (Eng.).
443. *Ephrahim v. Pastory*, *supra* note 425, para. 16.
444. *Id.* para. 17.
445. *Id.* para. 18.

1988 the courts will construe the existing law, including customary law with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with the provisions of the Fifth Constitutional Amendment Act, 1984, i.e., the Bill of Rights."[446]

Justice Mwalusanya then cited to a statement by the former Chief Justice of Tanzania, Georges CJ, who said: "[a]part from judicial review, the Courts can usually be depended upon to be astute in finding interpretations for enactments which will promote rather than destroy the rights of the individual and this is quite apart from declaring them bad or good."[447] With respect to the role that courts should play in the interpretation of statutes, Justice Mwalusanya notes that "[t]he courts put life into the dead words of the statute. By statutory interpretation courts make judge-made law affecting the fundamental rights of a citizen."[448]

Mwalusanya J then cited to a law review article authored by Professor B. A. Rwezaura of the Faculty of Law at the University of Dar es Salaam.[449] Professor Rwezaura argues that "courts in Tanzania can modify discriminatory customary law in the course of statutory interpretation."[450] In the article titled "Reflections on the Relationship between State Law and Customary Law in Contemporary Tanzania: Need for Legislative Action?," Professor Rwezaura declares:

> It is also anticipated by Section 5 (1) of the Constitution (Consequential, Transitional and Temporary Provisions), 1984, with effect from March 1988 courts will construe existing law, including customary law, with such modifications, adaptions, qualifications and exceptions as may be necessary to bring it into conformity with the provisions of the Constitution.[451]

With respect to how constitutional provisions should be interpreted, Justice Mwalusanya cited to a case of the Court of Appeal of England and Wales, *Seaford Court Estate Ltd. v. Asher*,[452] in which Lord Denning MR, declared:

---

446. *Id.* para. 19.
447. *Id.* at para. 20.
448. *Id.* at para. 21.
449. *See id.* para. 22.
450. *Id.*
451. *Id.*
452. *Seaford Court Estate Ltd. v. Asher* [1949] 2 K.B. 481 (CA).

> He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it, and of the mischief which it was passed to remedy and then he must supplement the written word so as to give "force and life" to the intention of the legislature. That was clearly laid down by the resolution of the judges in *Heydon's Case*, and it is the safest guide today. Good practical advice on the subject was given about the same time by Plowden.[453]

Justice Mwalusanya then cited to two more cases decided under the leadership of Lord Denning, who at the time was the Master of the Rolls (MR).[454] Furthermore, Justice Mwalusanya noted the English jurist's warnings regarding "the use for the courts to invoke a purposive approach of interpretation which is sometimes referred to as the schematic and teleological method of interpretation."[455] In *Nothman v. Barnet London Borough Council*,[456] one of the two cases decided by Lord Denning MR, the latter noted that "the days of strict literal and grammatical construction of the words of a statute were gone."[457] In addition, declared Lord Denning MR,

> [t]he method is now completely out of date. It has been replaced by the approach which Lord Diplock described as the purposive approach (in *Kammins Ballrooms Co. Ltd v. Zenith Investment (Torquay) Ltd*). In all cases now in the interpretation of statutes we adopt such a construction as will promote the general legislative purpose underlying the provision.[458]

Mwalusanya J noted that the Tanzania Court of Appeal "has adopted the above purposive approach as shown in the case of *Bi. Hawa Mohamed v. Ally Sefu* . . . as per Nyalali CJ."[459] In *Bi.*

---

453. *Ephrahim v. Pastory*, *supra* note 425, at para. 24. *Seaford Court Estate Ltd. v. Asher* was decided in 1949 when Lord Denning served as the Keeper or Master of the Rolls and Records of the Chancery of England, commonly referred to as the Master of the Rolls (MR). *See generally* GARY SLAPPER & DAVID KELLY, THE ENGLISH LEGAL SYSTEM (8th ed., 2006) (examining and explaining the roles of the Lord Chief Justice of England and Wales before and after the Constitutional Reform Act of 2005).

454. *See Ephrahim v. Pastory*, *supra* note 425, at para. 25.

455. *Id.*

456. *Nothman v. Barnet London Borough Council*, [1978] 1 W.L.R. 220 (CA).

457. *Ephrahim v. Pastory*, *supra* note 425, para. 25.

458. *Id.*

459. *Id.* para. 26.

Hawa Mohamed, the High Court adopted "a narrow view of a statutory provision with the result that the meaning attributed to the relevant part of the statute excluded the wife's domestic services in computing her contribution in building the husband's house."[460]

Justice Mwalusanya noted further that "[b]y applying the purposive approach [to interpretation] the Court of Appeal of Tanzania arrived at a different conclusion."[461] The learned justice then asked the following question: "Now what was the intention of the Parliament of Tanzania to pass Section 5 (1) of Act 16 of 1984 and what was the mischief that it intended to remedy?"[462] He then answered the question by stating:

> There can be no doubt that Parliament wanted to do away with all oppressive and unjust laws of the past. It wanted all existing laws (as they existed in 1984) which were inconsistent with the Bill of Rights to be inapplicable in the new era or be treated as modified so that they are in line with the Bill of Rights. It wanted the courts to modify by construction those existing laws which were inconsistent with the Bill of Rights such that they were in line with the new era. We had a new Grundnorm since 1984, and so Parliament wanted the country to start with a clean slate. That is clear from the express words of Section 5 (1) of Act 16 of 1984. The mischief it intended to remedy is all the unjust existing laws, such as the discriminatory customary law now under discussion.[463]

Justice Mwalusanya then rendered the High Court's decision:

> I have found as a fact that Section 20 of the Rules of Inheritance of the Declaration of Customary Law, 1963, is discriminatory of females in that, unlike their male counterparts, they are barred from selling clan land. That is inconsistent with Article 13 (4) of the Bill of Rights of our Constitution which bars discrimination on account of sex. Therefore under Section 5 (1) of Act 16 of 1984 *I take Section 20 of the Rules of Inheritance to be now modified and qualified such that males and females have now equal rights to inherit and sell clan land*.[464]

He added that:

---

460. *Id.*
461. *Id.*
462. *Id.* para. 27.
463. *Id.* para. 28.
464. *Id.* para. 42 (emphasis added).

> [l]ikewise the Rules Governing the Inheritance of Holdings by Female Heirs (1944) made by the Bukoba Native Authority, which in rules 4 and 8 entitle a female who inherits self-acquired land of her father to have usufructuary rights only (rights to use for their lifetime only) with no power to sell that land, *is equally void and of no effect*. Females just like males can now and onwards inherit clan land or self-acquired land of their fathers and dispose of the same when and as they like. The disposal of the clan land to strangers without the consent of the clansmen is subject to the fact that any other clan member can redeem that clan land on payment of the purchase price to the purchaser. That now applies to both males and females. Therefore the District Court of Muleba was right to take judicial notice of the provisions of Section 5 (1) of Act 16 of 1984 and to have acted on them, the way it did.[465]

Justice Mwalusanya then provided a powerful statement about the rights of women in Tanzania:

> From now on, females all over Tanzania can at least hold their heads high and claim to be equal to men as far as inheritance of clan land and self-acquired land of their fathers is concerned. It is part of the long road to women's liberation. But there is no cause for euphoria as there is much more to do in the other spheres. One thing which surprises me is that it has taken a simple, old rural woman to champion the cause of women in this field but not the elite women in town who chant jejune slogans years on end on women's liberation but, without delivering the goods.[466]

The Court in *Ephrahim* was dealing with a very important and serious conflict in Tanzania's legal system. It involved "the country's recent internationalization of its constitutional law and the rights of its citizens under customary laws that conflicted with the country's modernized and internationalized constitution."[467] During the time that the High Court decided *Ephrahim*, "the people of Tanzania had revised their constitution and incorporated a Bill of Rights and other provisions reflecting those found in various international and regional human rights

---

465. *Id.* paras. 42–43.

466. *Id.* para. 44 (emphasis added).

467. John Mukum Mbaku, *International Law, African Customary Law, and the Protection of the Rights of Children*, 28 MICH. ST. INT'L L. REV. 535, 688 (2020) [hereinafter Mbaku, African Customary Law].

instruments."[468] These new constitutional changes guaranteed "nondiscrimination and equal treatment of all citizens before the law" and the *Ephrahim* Court "recognized its duty to modify customary law and bring it into compliance with the provisions of the national constitution, which, through recent amendments, had 'been brought into line with provisions of international human rights instruments.'"[469]

What the *Ephrahim* Court did was to modify customary law so as to "allow and enhance the ability of 'women to realize the rights guaranteed them under the Constitution of Tanzania.'"[470] Through its decision, the *Ephrahim* Court made clear that "in the case of a conflict between international human rights norms and customary law, the latter must give way to the former."[471] The function performed by the *Ephrahim* Court to modify and/or invalidate "customary laws that violate the rights of citizens, . . . is a noble one that must be emulated by other countries in Africa."[472]

The *Ephrahim* Court also showed that even after a country has internationalized its constitutional law and provided for a Bill of Rights that guarantees fundamental rights, it is still necessary that there exist a judiciary that is independent enough from the other branches of government to be able to make certain that these newly-guaranteed rights are recognized, respected, and protected.[473] In the next section, this Article continues its examination of how courts in African countries are making use of international human rights law to significantly improve and enhance the protection of human rights by examining a case from South Africa. Specifically, the Article will examine the Constitutional Court of South Africa landmark case, *The State v. Makwanyane and Another*.[474]

---

468. *Id.* at 688.
469. *Id.* at 688–89.
470. *Id.* at 689.
471. *Id.*
472. *Id.*
473. John Mukum Mbaku, *International Human Rights Law and the Tyranny of Harmful Customary and Traditional Practices on Women in Africa*, 52 CAL. W. INT'L L. J. 1, 22 (2021) (noting that each African country must provide itself with "a judiciary that is independent enough and has the capacity to enforce [national] laws and bring to justice those who violate them"] [Mbaku, *Tyranny of Harmful Customary Practices*].
474. *State v. Makwanyane and Another* 1995 (3) SA 391 (CC) (S. Afr.). This case was decided under post-apartheid South Africa's Interim Constitution.

C. The State v. Makwanyane & Another (Constitutional Court of South Africa)

S v. Makwanyane & Another was a landmark case brought before the Constitutional Court of South Africa ("CC") to determine the constitutionality of the death penalty.[475] In the case before the CC, "[t]he two accused . . . were convicted in the Witwatersrand Local Division of the Supreme Court on four counts of murder, one count of attempted murder and on one count of robbery with aggravating circumstances."[476] They were subsequently "sentenced to death on each of the counts of murder and to long terms of imprisonment on the other counts."[477] The defendants appealed their convictions and the sentences to the Appellate Division of the Supreme Court.[478] The Appellate Division, however, "dismissed the appeals against the convictions and came to the conclusion that the circumstances of the murders were such that the accused should receive the heaviest sentence permissible according to law."[479]

Prior to trial, conviction, and subsequent sentencing of the defendants, South Africa's Interim Constitution had come into force.[480] Noting that Section 277(1)(a) of the Criminal Procedure Act No. 51 of 1977 "prescribes that the death penalty is a competent sentence for murder," the Appellate Division invited the counsel for the accused "to consider whether this provision was consistent with the Republic of South Africa Constitution, 1993."[481] The counsel for the accused argued that Section 277(1)(a) was not consistent with the Interim Constitution—specifically, counsel for the accused argued that Section 277(1)(a) of the Criminal Procedure Act was "in conflict with the provisions of *sections* 9 and 11(2) of the [Interim] Constitution."[482]

That constitution is officially known as the CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA ACT 200 OF 1993. All references to the "South African Constitution" during the discussion of *S. v. Makwanyane* refer to this Interim Constitution. S. AFR. (INTERIM) CONST., 1993 [hereinafter Interim Constitution].

475. *S. v. Makwanyane and Another*, at para. 5.

476. *Id.* para. 1.

477. *Id.*

478. *Id.*

479. *Id.*

480. Interim Constitution, *supra* note 474.

481. *S v. Makwanyane & Another*, para. 2.

482. *Id.* Section 9 states as follows: "Every person shall have the right to life." Interim Constitution, *supra* note 474, at Ch. 3 sec. 9. Section 11(2) states: "No person shall be subject to torture of any kind, whether physical, mental or

Subsequently, the Appellate Division "dismissed the appeals against the sentences on the counts of attempted murder and robbery, but postponed the further hearing of the appeals against the death sentence until the constitutional issues [were] decided by [the Constitutional Court]."[483] At the Appellate Division, "[t]wo issues raised were raised: the constitutionality of *section* 277(1)(a) of the Criminal Procedure Act, and the implications of *section* 241(8) of the Constitution."[484]

Chaskalson P, writing for the CC, began the analysis of the case by stating that "[i]t would no doubt have been better if the framers of the Constitution had stated specifically, either that the death sentence is not a competent penalty, or that it is permissible in circumstances sanctioned by law."[485] Unfortunately, noted Chaskalson P, the framers failed to do so and left "to this Court to decide whether the penalty is consistent with the provisions of the Constitution. That is the extent and limit of the Court's power in this case."[486]

The learned President of the Constitutional Court then noted that at the time, there were as many as four hundred persons on death row in South Africa who were waiting for the CC to resolve the constitutionality of the death penalty.[487] Noting that some of "these convictions date back to 1988, and [that] approximately half of the persons on death row were sentenced more than two years" earlier, Chaskalson P argued that this was "an intolerable situation" and that it was "essential that it be resolved one way or another without further delay."[488]

Taking the Constitution as the starting point for analyzing the case at bar, Chaskalson P cited to the transitional or Interim Constitution, specifically the first paragraph of the provision on National Unity and Reconciliation:

---

emotional, nor shall any person be subject to cruel, inhuman or degrading treatment or punishment.", *Id.* at Ch.3 sec. 11(2). Section 277(1)(a) of the Criminal Procedure Act states as follows: "Sentence of death may be passed by a superior court only and—*(a)* shall, subject to the provisions of subsection (2), be passed upon a person convicted of murder." *See* CRIMINAL PROCEDURE ACT 51 OF 1977 § 277(1)(a) (S. Afr.).

483. *S v. Makwanyane & Another*, para 3.

484. *Id.*

485. *Id.* para. 5.

486. *Id.*

487. *Id.* para. 6.

488. *Id.*

> This Constitution provides a historic bridge between the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of color, race, class, belief or sex. [489]

Justice Chaskalson then noted that although the 1993 Constitution was a transitional constitution, it nevertheless

> establishe[d] a new order in South Africa; an order in which human rights and democracy are entrenched and in which the Constitution '. . .shall be the supreme law of the Republic and any law or act inconsistent with its provisions shall, unless otherwise provided expressly or by necessary implication in this Constitution, be of no force and effect to the extent of the inconsistency.'[490]

Chaskalson P next cited to section 3 of the Constitution, which "sets out the fundamental rights to which every person is entitled under the Constitution and also contains provisions dealing with the way in which the Chapter is to be interpreted by the Courts."[491] The Constitution, noted the honorable justice, does not "deal specifically with the death penalty . . . [however], section 11(2) [prohibits] 'cruel, inhuman or degrading treatment or punishment.'"[492] The Constitution, however, does not provide definitions for "cruel, inhuman or degrading," leaving it to the courts to "give meaning to these words."[493]

Next, the learned justice addressed the issue of interpretation of the "fundamental rights enshrined in Chapter Three of the Constitution"[494] and noted that in *S v. Zuma and Two Others*, the Court approved "an approach which, whilst paying due regard to the language that has been used, is 'generous' and 'purposive' and gives expression to the underlying values of the Constitution."[495] He continued and argued that "*section* 11(2) of the

---

489. Interim Constitution, *supra* note 474, at National Unity and Reconciliation.

490. *S v. Makwanyane & Another*, para. 7.

491. *Id.* para. 8.

492. *Id.*

493. *Id.*

494. *Id.* para. 9.

495. *Id.* The CC also notes Zuma Court's reference to the ruling by Kentridge AJ, in the Canadian case of *R v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 (Can.). *See id.*

Constitution must not be construed in isolation, but in its context, which includes the history and background to the adoption of the Constitution, other provisions of the Constitution itself and, in particular, the provisions of Chapter Three of which it is part."[496]

Justice Chaskalson stated that the representative of the South African government at the hearing of the matter before the CC, Mr. Bizos, had conceded that "the death penalty is a cruel, inhuman and degrading punishment and that it should be declared unconstitutional."[497] He noted, however, that the A.-G. of the Witwatersrand, "whose office [was] independent of the government, [had taken] a different view, and contended that the death penalty is a necessary and acceptable form of punishment and that it is not cruel, inhuman or degrading within the meaning of *section* 11(2)."[498] The Witwatersrand A.-G. argued further that "if the framers of the Constitution had wished to make the death penalty unconstitutional they would have said so, and that their failure to do so indicated an intention to leave the issue open to be dealt with by Parliament in the ordinary way."[499]

Chaskalson P then looked at the country's legislative history to determine the extent to which it might inform the interpretation of the constitution.[500] He argued that while South African courts "have held that it is permissible in interpreting a statute to have regard to the purpose and background of the legislation in question,"[501] it has not been the case that "[d]ebates in Parliament, including statements made by Ministers responsible for legislation, and explanatory memoranda providing reasons for new bills" have been admitted as background material.[502] The honorable justice, however, noted that "[i]t is . . . permissible to take notice of the report of a judicial commission of enquiry for the limited purpose of ascertaining 'the mischief aimed at [by] the statutory enactment in question.'"[503]

After noting that courts in several jurisdictions, including England, Australia, and New Zealand, have relaxed this

496. *Id.* para. 10. (emphasis in original).
497. *Id.* para. 11.
498. *Id.*
499. *Id.*
500. *See id.* para. 12.
501. *Id.* para 13.
502. *Id.* para. 14.
503. *Id.*

exclusionary rule, he stated that that matter did not arise in the case at bar.[504] Instead, argued Chaskalson P, the issue before the CC concerned "the interpretation of the Constitution, and not the interpretation of ordinary legislation."[505] In countries, such as the United States, where "the constitution is similarly [considered] the supreme law, it is not unusual for the courts to have regard to the circumstances existing at the time the constitution was adopted, including the debates and writings which formed part of the process."[506]

Chaskalson P also made reference to the fact that "[t]he European Court of Human Rights and the United Nations Committee on Human Rights all allow their deliberations to be informed by *travaux préparatoires*."[507] South Africa's permanent constitution, noted Justice Chaskalson, "was the product of negotiations conducted at the Multi-Party Negotiating Process [and] [t]he final draft adopted by the forum of the Multi-Party Negotiating Process was, with few changes, adopted by Parliament."[508] More importantly, noted Justice Chaskalson, "[t]he Multi-Party Negotiating Process was advised by technical committees, and the reports of these committees on the drafts are the equivalent of the *travaux préparatoires*, relied upon by the international tribunals" and that "[s]uch background material can provide a context for the interpretation of the Constitution and, where it serves that purpose, I can see no reason why such evidence should be excluded."[509] Justice Chaskalson, however, argued that "[b]ackground evidence may . . . be useful to show why particular provisions were or were not included in the Constitution."[510]

Justice Chaskalson then examined the death penalty within the meaning of section 11(2) of the Constitution.[511] He concluded that "[t]he question is not, however, whether the death sentence is a cruel, inhuman or degrading punishment in the ordinary meaning of these words but whether it is a cruel, inhuman or degrading punishment within the meaning of *section* 11(2) of our

504. *Id.* para. 15.
505. *Id.*
506. *Id.* para. 16.
507. *Id.*
508. *Id.* para. 17.
509. *Id.*
510. *Id.* para. 19.
511. *Id.* para 26.

Constitution."[512] With respect to the contentions of the parties before the Court, Chaskalson P stated that:

> [t]he principal arguments advanced by counsel for the accused in support of their contention that the imposition of the death penalty for murder is 'cruel, inhuman or degrading punishment,' were that the death sentence is an affront to human dignity, is inconsistent with the unqualified right to life entrenched in the Constitution, cannot be corrected in case of error or enforced in a manner that is not arbitrary, and that it negates the essential content of the right to life and the other rights that flow from it.[513]

The Attorney-General, who was representing the State, argued that "the death penalty is recognised as a legitimate form of punishment in many parts of the world, it is a deterrent to violent crime, it meets society's need for adequate retribution for heinous offences, and it is regarded by South African society as an acceptable form of punishment."[514] Therefore, "it is, [ ], not cruel, inhuman or degrading within the meaning of *section* 11(2) of the Constitution."[515] Although these "arguments for and against the death sentence are well known and have been considered in many of the foreign authorities and cases to which we were referred," argued Justice Chaskalson, the CC must now deal with them in light of the provisions of the country's Constitution.[516]

As part of the analysis to determine the constitutionality of the death penalty within South Africa's post-apartheid constitutional disposition, Justice Chaskalson turned to international and foreign comparative law and noted that "[t]he death sentence is a form of punishment which has been used throughout history by different societies" and that over the years, the movement to abolish it has gained significant momentum.[517] In addition, some countries now prohibit the death sentence in all circumstances while in others which "have retained it as a penalty for crime, its use has been restricted to extreme cases."[518]

---

512. *Id.* (emphasis in original).
513. *Id.* para. 27.
514. *Id.*
515. *Id.* (emphasis in original).
516. *Id.*
517. *Id.* para. 33.
518. *Id.*

With respect to international and foreign comparative law, Chaskalson P argued that

> [t]he international and foreign authorities are of value because they analyse arguments for and against the death sentence and show how courts of other jurisdictions have dealt with this vexed issue. For that reason alone they require our attention. They may also have to be considered because of their relevance to *section* 35(1) of the Constitution.[519]

Section 35(1) states:

> In interpreting the provisions of this Chapter a court of law *shall* promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and *may* have regard to comparable foreign case law.[520]

Section 231 of the South African Constitution deals with "[c]ustomary international law and the ratification and accession to international agreements."[521] This section sets "the requirements for such law to be binding within South Africa."[522] Justice Chaskalson noted that "[i]n the context of *section* 35(1), public international law would include non-binding as well as binding law" and that "[t]hey may both be used under the *section* as tools of interpretation."[523] In addition, argued Chaskalson P:

> International agreements and customary international law accordingly provide a framework within which Chapter Three can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights, and the European Court of Human Rights, and in appropriate cases, reports of specialised agencies such as the International Labour Organisation may provide guidance as to

519. *Id.* para. 34.
520. Interim Constitution, *supra* note 474, at Ch. 3 sec. 35(1) (emphasis added).
521. *S v. Makwanyane & Another*, para. 35.
522. *Id.*
523. *Id.*

> the correct interpretation of particular provisions of Chapter Three.[524]

After noting that capital punishment is "not prohibited by public international law," Chaskalson P stated that "this is a factor that has to be taken into account in deciding whether [capital punishment] is cruel, inhuman or degrading punishment within the meaning of *section* 11(2)" of the Constitution.[525] Justice Chaskalson went on to state that international human rights agreements differ from South Africa's Constitution "in that where the right to life is expressed in unqualified terms they either deal specifically with the death sentence, or authorise exceptions to be made to the right to life by law."[526]

With respect to the case at bar, Chaskalson P cited pertinent parts of Article 6 of the International Convention on Civil and Political Rights ("ICCPR"), which he argued are relevant:

> 1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
>
> 2. . . . sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant . . . .[527]

Similar provisions as those found in Article 6 of the ICCPR are also contained in Article 4(2) of the American Convention on Human Rights and Article 2 of the European Convention on Human

524. *Id.* Chapter 3 deals with "Fundamental Rights." *See* Interim Constitution, *supra* note 474, at Ch. 3.

525. *S v. Makwanyane & Another*, para. 36.

526. *Id.*

527. ICCPR, *supra* note 423, at art. 6, ¶¶ 1, 2.

Rights.[528] The Banjul Charter also addresses the right to life.[529] Article 4 states that "[n]o one may be *arbitrarily* deprived of this right."[530]

Chaskalson P goes on to argue that South African courts would invariably have to rely on "comparative 'bill of rights' jurisprudence, . . . particularly in the early stages of the transition [from apartheid] when there is no developed indigenous jurisprudence in this branch of the law on which to draw."[531] He noted that section 35(1) of the Constitution permits the courts to "'have regard to' such law."[532] Justice Chaskalson, held, however, that "[t]here is no injunction to do more than this."[533] In the case where "challenges to the death sentence in international or foreign courts and tribunals have failed, the constitution or the international instrument concerned has either directly sanctioned capital punishment or has specifically provided that the right to life is subject to exceptions sanctioned by law."[534]

South Africa's Constitution, the learned justice declared, "expresses the right to life in an unqualified form, and prescribes the criteria that have to be met for the limitation of entrenched rights, including the prohibition of legislation that negates the essential content of an entrenched right."[535] Justice Chaskalson cautioned, however, that "[i]n dealing with comparative law, [courts] must bear in mind that [they] are required to construe

---

528. Article 2 of the European Convention on Human Rights states as follows:

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection.

See European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 2, Sept. 3, 1953, 213 U.N.T.S. 2889.

529. Banjul Charter, *supra* note 39, at art. 4.

530. *Id.*

531. *S v. Makwanyane & Another*, para. 37.

532. *Id.*

533. *Id.*

534. *Id.* para. 38.

535. *Id.* para. 39.

the South African Constitution, and not an international instrument or the constitution of some foreign country, and that this has to be done with due regard to our legal system, our history and circumstances, and the structure and language of our own Constitution."[536]

Next, Justice Chaskalson examined the way U.S. Courts have litigated issues related to the death penalty and noted that "[t]he earliest litigation on the validity of the death sentence seems to have been pursued in the courts of the United States of America."[537] Given the fact that the Constitution of the United States "recognised capital punishment as lawful," the constitution itself became the "first obstacle to [the] argument that capital punishment is per se unconstitutional."[538] Justice Chaskalson then noted that "[a]lthough challenges under state constitutions to the validity of the death sentence have been successful, the federal constitutionality of the death sentence as a legitimate form of punishment for murder was affirmed by the United States Supreme Court in *Gregg v. Georgia*."[539]

Chaskalson then provides an overview of the process through which an accused is actually prosecuted for a death-penalty offense and eventually sentenced to death in case of conviction. In doing so, the learned justice noted that "[t]he Criminal Procedure Act allows a full right of appeal to persons sentenced to death, including a right to dispute the sentence without having to establish an irregularity or misdirection on the part of the trial judge."[540] In addition, the Appellate Division of the Supreme Court "is empowered to set the sentence aside if it would not have imposed such sentence itself, and it has laid down criteria for the exercise of this power by itself and other courts."[541] Justice Chaskalson notes that if the person sentenced to death fails to appeal the judgment, the Appellate Division is "required to review the case and to set aside the death sentence if it is of the opinion that it is not a proper sentence."[542]

Justice Chaskalson mentions some statistics on the application of the death penalty in South Africa. He notes that "[i]n the

536. *Id.*
537. *Id.* para. 40.
538. *Id.*
539. *Id.* para. 41. *See Gregg v. Georgia*, 428 U.S. 153 (1976).
540. *Id.* para. 45.
541. *Id.*
542. *Id.*

amicus brief of Lawyers for Human Rights, Centre for Applied Legal Studies and the Society for the Abolition of the Death Penalty in South Africa it is pointed out that the overwhelming majority of those sentenced to death are poor and black."[543] In addition, "[t]here is an enormous social and cultural divide between those sentenced to death and the judges before whom they appear, who are presently almost all white and middle class. This in itself gives rise to problems which even the most meticulous judge cannot avoid."[544] Perhaps, more important, notes the *amicus brief*, is the fact that "[t]he formal trial proceedings are recorded in English or Afrikaans, languages which the judges understand and speak, but which many of the accused may not understand, or of which they may have only an imperfect understanding. The evidence of witnesses and the discourse between the judge and the accused often has to be interpreted, and the way this is done influences the proceedings."[545] Finally, notes the *amicus brief*, "[r]ace and class are, however, factors that run deep in [South African] society and cannot simply be brushed aside as no longer being relevant."[546]

Justice Chaskalson then provides an overview of various factors that can have a significant impact on the outcome of a death penalty case. These include, inter alia, the fact that most accused individuals who face a possible death sentence usually are (1) unable to afford legal assistance; (2) are defended under the *pro deo* system; (3) are more likely than not to have counsel who is young and inexperienced, and is usually not of the same race as the defendant and also most likely to speak a different language from that spoken and understood by the defendant, forcing the consultation to be undertaken only through an interpreter; and (4) poor and lack the financial resources to conduct legal research, engage expert witnesses, put together a credible list of witnesses, strike bargains with the prosecution, and generally put forth an effective defense.[547]

Chaskalson does caution that in several extremely difficult cases, highly experienced senior members of the bar do act *pro deo*, and provide extremely zealous and effective defense for the

543. *Id.* para. 48 n.78.
544. *Id.*
545. *Id.*
546. *Id.*
547. *Id.* para. 49.

accused.[548] The honorable justice also notes that the *pro deo* counsel does perform "an invaluable service, often under extremely difficult conditions, and to whom the courts are much indebted."[549] He argues, however, that "the unpalatable truth is that most capital cases involve poor people who cannot afford and do not receive a good defense as those who have means. In this process, the poor and ignorant have proven to be the most vulnerable, and are the persons most likely to be sentenced to death."[550]

Justice Chaskalson states that "[i]t cannot be gainsaid that poverty, race and chance play roles in the outcome of capital cases and in the final decision as to who should live and who should die."[551] Chaskalson then contends that the Court should "follow this approach and hold that the factors to which I have referred, make the application of *section* 277, in practice, arbitrary and capricious and, for that reason, any resulting death sentence is cruel, inhuman and degrading punishment."[552]

Chaskalson then returns to US death penalty jurisprudence and noted that it "has not resolved the dilemma arising from the fact that the Constitution prohibits cruel and unusual punishments, but also permits, and contemplates that there will be capital punishment. The acceptance by a majority of the United States Supreme Court of the proposition that capital punishment is not per se unconstitutional, but that in certain circumstances it may be arbitrary, and thus unconstitutional, has led to endless negative litigation."[553] The learned justice then examines the relationship between capital punishment and human dignity—the latter is guaranteed by the South African Constitution and can only be limited by legislation and, as noted by Justice Chaskalson, "[t]he weight given to human dignity by Justice Brennan [of the US Supreme Court] is wholly consistent with the values of [South Africa's Constitution] and the new order established by it [and] [i]t is also consistent with the approach to extreme punishments followed by courts in other countries."[554]

---

548. *See id.* para. 50.
549. *Id.* para. 49 n.79.
550. *Id.*
551. *Id.* para. 51.
552. *Id.* para. 53.
553. *Id.* para. 56.
554. *Id.* para.58.

Justice Chaskalson then makes reference to an important death penalty case of the Canadian Supreme Court, *Kindler v. Canada*, which concerned "the extradition from Canada to the United States of two fugitives, Kindler, who had been convicted of murder and sentenced to death in the United States, and Ng who was facing a murder charge there and a possible death sentence."[555] Justice Chaskalson states that three of the seven judges who heard these cases had "expressed the opinion that the death penalty was cruel and unusual."[556] In their ruling, the majority of the Canadian Supreme Court "held that the validity of the order for extradition did not depend upon the constitutionality of the death penalty in Canada, or the guarantee in its Charter of Rights against cruel and unusual punishment."[557]

The issue in *Kindler* was "whether the action of the [Canadian] Minister of Justice, who had authorised the extradition without any assurance that the death penalty would not be imposed, was constitutional."[558] Justice Chaskalson states that in *Kindler*, it had been "argued that this executive act was contrary to *section* 12 of the Charter[559] which requires the executive to act in accordance with fundamental principles of justice."[560] The Canadian Supreme Court held by "a majority of four to three that in the particular circumstances of the case the decision of the Minister of Justice could not be set aside on these grounds."[561] The majority believed that returning the fugitives to the United States "could not be said to be contrary to the fundamental principles of justice" and that "it would not shock the conscience of Canadians to permit this to be done."[562]

The appellants, Ng and Kindler, took their cases to the Human Rights Committee (HRC) of the United Nations, arguing that Canada had breached its obligations under the International

555. *Id.* para. 60.
556. *Id.*
557. *Id.* para. 61.
558. *Id*. para. 62.
559. Canadian Charter of Rights and Freedoms (*La Charte canadienne des droits et libertés*) is a bill of rights entrenched in the Constitution of Canada. The Charter was signed into law by Queen Elizabeth II of Canada on April 17, 1982. *See* Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.).
560. *S v. Makwanyane & Another*, para. 62.
561. *Id.*
562. *Id.*

Covenant on Civil and Political Rights (ICCPR).[563] The HRC's decision, in the case of *Ng*, was: "The Committee is aware that, by definition, every execution of a sentence of death may be considered to constitute cruel and inhuman treatment within the meaning of article 7 of the covenant."[564] The HRC issued that statement without dissent.[565] In *Kindler*, the HRC held that "the method of execution which was by lethal injection was not a cruel method of execution, and that the extradition did not in the circumstances constitute a breach of Canada's obligations under the International Covenant."[566]

Justice Chaskalson also notes that "although articles 6(2) to (5) of the [ICCPR] specifically allow the imposition of the death penalty under strict controls 'for the most serious crimes' by those countries which have not abolished it, it provides in article 6(6) that '[n]othing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant."[567] In conclusion, Chaskalson states that "what is clear from the decisions of the Human Rights Committee of the United Nations is that the death penalty is regarded by it as cruel and inhuman punishment within the ordinary meaning of those words, and that it was because of the specific provisions of the International Covenant authorising the imposition of capital punishment by member States in certain circumstances, that the words had to be given a narrow meaning."[568]

Next, Justice Chaskalson moves to the jurisprudence of the European Convention on Human Rights on the death penalty by examining the landmark case, *Soering v. UK*.[569] This case concerned the extradition of a fugitive from the UK to the United States "to face murder charges for which capital punishment was a competent sentence."[570] This case involved Soering, a

563. *Id.* para. 63.

564. *Id.* para. 63. Article 7 of ICCPR states as follows: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation." International Covenant on Civil and Political Rights, art. 7, Dec. 16, 1966, 999 U.N.T.S. 171.

565. *S v. Makwanyane & Another*, para. 64.

566. *Id.*

567. *Id.* para. 66.

568. *Id.* para. 67.

569. *Soering v. U.K.*, 161 Eur. Ct. H.R. (ser. A) (1989).

570. *S v. Makwanyane & Another*, para. 68.

German national who was wanted for murder in Bedford County, Virginia (USA).[571] Soering had fled Virginia for Europe where he was later arrested in England and charged with check fraud.[572] After Bedford County indicted Soering for murder, the United States filed an order for his extradition based on a 1972 Extradition Treaty with the UK.[573]

A UK court subsequently found that Soering could be extradited to the United States. Appeals against the extradition were unsuccessful and the government was ordered to hand Soering to US authorities.[574] Soering then filed a complaint with the European Commission of Human Rights (ECHR) and the ECHR advised the government of the UK to delay the extradition until the ECHR had fully investigated the matter.[575] The UK government complied. The ECHR later ruled, six votes to five against Soering but decided to refer the matter to the European Court of Human Rights (ECtHR), which ruled unanimously that there existed a real risk that if Soering was extradited to the United States, he was likely to be found guilty by a Virginia court and sentenced to death, and that the suffering Soering would experience on death row would violate Article 3 of the European Convention on Human Rights.[576] As noted by Justice Chaskalson, "[t]he special factors taken into account were the youth of the fugitive, . . . an impaired mental capacity, and the suffering on death row which could endure for up to eight years if he were convicted" in the Virginia court.[577]

Chaskalson then moves on to review death penalty jurisprudence from India based on the fact that the *amicus brief* of the South African Police had relied on the decisions of the Indian Supreme Court in the *Bachan Singh*'s case.[578] In that case, the majority of the Indian Supreme Court "rejected the argument that the imposition of the death sentence in such circumstances is arbitrary, holding that a discretion exercised judicially by

---

571. *Soering v. U.K.*, ¶ 12 (noting that Soering was accused of crimes committed in Bedford County, Virginia, in March 1985).

572. *Id.* ¶ 11.

573. *See* 1972 UK-USA Extradition Treaty, U.K.-U.S., *entered into force* January 21, 1977, 28 U.S.T. 227. *See also Soering v. U.K.*, ¶¶ 13–14.

574. *See Soering v. U.K.*, ¶¶ 11–26.

575. *See generally id.*

576. *See id.*

577. *S v. Makwanyane & Another*, para. 69.

578. *Bachan Singh v. State of Punjab*, (1980) 2 SCC 684 (India).

persons of experience and standing, in accordance with principles crystallized by judicial decisions, is not an arbitrary discretion."[579] Justice Chaskalson, however, notes that "long delays in carrying out the death sentence in particular cases have apparently been held in India to be unjust and unfair to the prisoner, and in such circumstances the death sentence is liable to be set aside."[580]

Justice Chaskalson then examines the "unqualified right to life vested in every person by *section* 9 of [the Constitution of South Africa]," which he argues is a factor that is "crucially relevant to the question whether the death sentence is cruel, inhuman or degrading punishment within the meaning of *section* 11(2) of [South Africa's] Constitution."[581] The learned justice then notes that South Africa's Constitution "differs materially from the Constitutions of the United States and India," as well as from "the European Convention [on Human Rights] and the International Covenant [on Civil and Political Rights]."[582] In addition, notes Justice Chaskalson, "in the cases decided under these constitutions and treaties there were judges who dissented and held that notwithstanding the specific language of the constitution or instrument concerned, capital punishment should not be permitted."[583]

In some judgments from jurisdictions outside South Africa the dissent has "focused on the right to life."[584] For example, in *Soering*, Judge de Meyer of the ECtHR declared that "capital punishment is 'not consistent with the present state of European civilisation' and for that reason alone, extradition to the United States would violate the fugitive's right to life."[585] Also in the dissent in *Kindler*, B. Wennergren, a member of the UN Human Rights Committee "also stressed the importance of the right to life."[586]

Justice Chaskalson also cited to case law from Hungary dealing with the right to life and noted that the "[t]he challenge to the death sentence in Hungary was based on *section* 54 of its

579. *S v. Makwanyane & Another*, para. 79.
580. *Id.*
581. *Id.* para. 80.
582. *Id.*
583. *Id.*
584. *Id.* para. 81.
585. *Id.*
586. *Id.* para. 82.

Constitution which provides: (1) In the Republic of Hungary everyone has the inherent right to life and to human dignity, and no one shall be arbitrarily deprived of these rights. (2) No one shall be subjected to torture or to cruel or inhuman or degrading punishment."[587] The learned justice notes that section 8 of the Constitution of Hungary is the "counterpart of *section* 33 of [South Africa's Constitution] [and] "provides that laws shall not impose any limitations on the essential content of fundamental rights."[588]

In Hungary, notes Justice Chaskalson, section 54(1) of the constitution prohibits only the "*arbitrary* deprivation of life."[589] The South African Constitution, however, does not have such a qualification and, as such, the right to life in section 9 of the South African Constitution "is given greater protection than it is by the Hungarian Constitution."[590]

With respect to public opinion, Justice Chaskalson states that although the majority of South Africans agree that the death sentence should be imposed in "extreme cases of murder," the question before the Court "is not what the majority of South Africans believe a proper sentence for murder should be. It is *whether the Constitution allows the sentence*."[591] Chaskalson then goes on to argue that the Constitutional Court "cannot allow itself to be diverted from its duty to act as an independent arbiter of the Constitution by making choices on the basis that they will find favour with the public."[592] He then cites to the US Supreme Court case, *Furman v. Georgia*,[593] where Justice Powell held as follows:

---

587. *Id.* para. 83. *See also* MAGYARORSZÁG ALAPTÖRVÉNYE [THE FUNDAMENTAL LAW OF HUNGARY], ALAPTÖRVÉNY, at art. 54 [hereinafter Constitution of Hungary].

588. *S v. Makwanyane & Another*, para. 84. *See also* Constitution of Hungary, at art. 8.

589. *Id.* para. 85 (emphasis in original).

590. *Id.* Section 54(1) of the Constitution of Hungary states as follows: "In the Republic of Hungary everyone has the inherent right to life and to human dignity. No one shall be arbitrarily deprived of these rights." Constitution of Hungary, at art. 54(1). Section 9 of the Constitution of South Africa states as follows: "Every person shall have the right to life." Interim Constitution, *supra* note 474, at Ch.3 sec. 9.

591. *S v. Makwanyane & Another*, para. 87 (emphasis added).

592. *Id.* para. 89.

593. *Furman v. Georgia*, 408 U.S. 238 (1972).

> . . . the weight of the evidence indicates that the public generally has not accepted either the morality or the social merit of the views so passionately advocated by the articulate spokesmen for abolition. But however one may assess the amorphous ebb and flow of public opinion generally on this volatile issue, this type of inquiry lies at the periphery—not the core—of the judicial process in constitutional cases. *The assessment of popular opinion is essentially a legislative, not a judicial, function*.[594]

Justice Chaskalson also makes reference to the US Supreme Court case, *West Virginia State Board of Education v. Barnette*, in which Justice Jackson held as follows:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. *One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections*.[595]

Justice Chaskalson noted that "[t]he United Nations Committee on Human Rights has held that the death sentence by definition is cruel and degrading punishment."[596] Similar rulings have been made by the Hungarian Constitutional Court, and three judges of the Canadian Supreme Court.[597] Additionally, "[t]he death sentence has also been held to be cruel or unusual punishment and thus unconstitutional under the state constitutions of Massachusetts and California."[598]

Continuing with the analysis of the case at bar, Justice Chaskalson delves into the issue of proportionality, which he argues, is "an ingredient to be taken into account in deciding whether a penalty is cruel, inhuman or degrading."[599] He notes that in eighteenth century England, the death penalty was considered a competent sentence for "the cutting down of trees or the killing of deer," but that "murder is not to be equated with

---

594. *Id.* at 443 (emphasis added).

595. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) (emphasis added).

596. *S v. Makwanyane & Another*, para. 90.

597. *Id.* para. 90.

598. *Id.*

599. *Id.* para. 94.

such 'offences.'"[600] The willful taking of an innocent life, argues Justice Chaskalson, "calls for a severe penalty."[601] However, notes Chaskalson:

> [d]isparity between the crime and the penalty is not the only ingredient of proportionality; factors such as the enormity and irredeemable character of the death sentence in circumstances where neither error nor arbitrariness can be excluded, the expense and difficulty of addressing the disparities which exist in practice between accused persons facing similar charges, and which are due to factors such as race, poverty, and ignorance, and the other subjective factors which have been mentioned, are also factors that can and should be taken into account in dealing with the issue. It may possibly be that none alone would be sufficient under our Constitution to justify a finding that the death sentence is cruel, inhuman or degrading. But these factors are not to be evaluated in isolation. They must be taken together, and in order to decide whether the threshold set by *section* 11(2) has been crossed they must be evaluated with other relevant factors, including the two fundamental rights on which the accused rely, the right to dignity and the right to life.[602]

Chaskalson P then made the following conclusion regarding the death sentence in South Africa:

> The carrying out of the death sentence destroys life, which is protected without reservation under *section* 9 of our Constitution, it annihilates human dignity which is protected under *section* 10, elements of arbitrariness are present in its enforcement and it is irremediable. Taking these factors into account, as well as the assumption that I have made in regard to public opinion in South Africa, and giving the words of *section* 11(2) the broader meaning to which they are entitled at this stage of the enquiry, rather than a narrow meaning, I am satisfied that in the context of our Constitution the death penalty is indeed a cruel, inhuman and degrading punishment.[603]

Having determined that in the context of South Africa's Constitution, the death penalty is "a cruel, inhuman and degrading punishment," Justice Chaskalson then proceeds to determine whether if, in the context of the Constitution, capital

600. *Id.*
601. *Id.*
602. *Id.*
603. *Id.* para. 95.

punishment is justifiable for murder.[604] Next, Chaskalson P considers whether the death penalty is "justifiable as a penalty for murder in the circumstances contemplated by sections 277(1)(a), 316A and 322(2A) of the Criminal Procedure Act."[605] The learned justice starts the analysis of the case by noting that "[c]apital punishment . . . *has not* been absolutely prohibited by public international law."[606] He goes on to argue that "[i]t is therefore not inappropriate to consider whether the death penalty is justifiable under our Constitution as a penalty for murder."[607] In the case of South Africa, Justice Chaskalson noted, the issue of the constitutionality of the death sentence would be examined under *section* 33(1) of the Constitution, which states as follows:[608]

The rights entrenched in this Chapter may be limited by law of general application, provided that such limitation—

> (a) shall be permissible only to the extent that is–
>
> (i) reasonable; and
>
> (ii) justifiable in an open and democratic society based on freedom and equality; and
>
> (b) shall note negate the essential content of the right in question.[609]

Chaskalson then notes that the South African Constitution "deals with the limitation of rights through a limitation clause" and that "this calls for a 'two-stage' approach, in which a broad rather than a narrow interpretation is given to the fundamental rights enshrined in Chapter Three, and limitations have to be justified through the application of *section* 33."[610] The issue before the Court, argues Justice Chaskalson, is "whether the infliction of death as a punishment for murder has been shown to be both reasonable and necessary, and to be consistent with the other requirements of *section* 33."[611]

Next, Chaskalson examines the application of section 33 and notes that "[t]he criteria prescribed by *section* 33(1) for any

604. *S v. Makwanyane & Another*, para. 95.
605. *Id.* para. 96.
606. *Id.* para. 97 (emphasis added).
607. *Id.*
608. *Id.*
609. Interim Constitution, *supra* note 474, at Ch. 3. sec. 33(1).
610. *S v. Makwanyane & Another*, para. 100.
611. *Id.* para. 102.

limitation of the rights contained in *section* 11(2) are that the limitation must be justifiable in an open and democratic society based on freedom and equality, it must be both reasonable and necessary and it must not negate the essential content of the right."[612] Justice Chaskalson argues that "[t]he limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality."[613] Justice Chaskalson then notes that "[a] proportionality test is applied to the limitation of fundamental rights by the Canadian courts, the German Federal Constitutional Court and the European Court of Human Rights"[614] and that "[a]lthough the approach of these Courts to proportionality is not identical, all recognise that proportionality is an essential requirement of any legitimate limitation of an entrenched right. Proportionality is also inherent in the different levels of scrutiny applied by United States courts to governmental action."[615]

Chaskalson P also examines the limitation of rights under the European Convention on Human Rights and states that:

> [t]he jurisprudence of the European Court of Human Rights provides some guidance as to what may be considered necessary in a democratic society, but [that] the margin of appreciation allowed to national authorities by the European Court must be understood as finding its place in an international agreement which has to accommodate the sovereignty of member states. It is not necessarily a safe guide as to what would be appropriate under *section* 33 of [the Constitution of South Africa].[616]

Section 33 of South Africa's Constitution, argues Chaskalson, "prescribes in specific terms the criteria to be applied for the limitation of different categories of rights and it is in the light of these criteria that the death sentence for murder has to be justified."[617] He goes on to state that every South African citizen is guaranteed by the constitution the right to "claim the protection of the rights enshrined in Chapter Three [of the

612. *Id.* para. 103.
613. *Id.* para. 104.
614. *Id.* para. 104 n. 130.
615. *Id.*
616. *Id.* para. 109.
617. *Id.* para. 110.

Constitution]."[618] Justice Chaskalson notes further that "[c]arrying out the death penalty would destroy these and all other rights that the convicted person has, and a clear and convincing case must be made out to justify such action."[619]

Chaskalson P then proceeds to examine justifications proffered by the Attorney General for imposing the death penalty for violent crime including (1) deterrence; (2) prevention; and (3) retribution.[620] With respect to the death penalty as a form of deterrence for violent crime, Chaskalson argues that "[t]he cause of the high incidence of violent crime cannot simply be attributed to the failure to carry out the death sentences imposed by the courts."[621] He notes that "[t]he upsurge in violent crime [in South Africa] came at a time of great social change associated with political turmoil and conflict, particularly during the period 1990 to 1994."[622] Chaskalson notes further that "[i]t is a matter of common knowledge that the political conflict during this period, particularly in Natal and the Witwatersrand, resulted in violence and destruction of a kind not previously experienced."[623]

With respect to prevention as a justification for imposing the death penalty, Chaskalson argues that while "[t]he death sentence ensures that the criminal will never again commit murders," it is, however, "not the only way of doing so, and life imprisonment also serves this purpose."[624] Justice Chaskalson notes that "[a]lthough there are cases of gaol murders, imprisonment is regarded as sufficient for the purpose of prevention in the overwhelming number of cases in which there are murder convictions, and there is nothing to suggest that it is necessary for this purpose in the few cases in which death sentences are imposed."[625]

The Attorney-General, representing the State in the case at bar, also argued that the death penalty was necessary for the purpose of retribution. Justice Chaskalson notes that "[t]he righteous anger of family and friends of the murder victim, reinforced by the public abhorrence of vile crimes, is easily

618. *Id.* para. 110.
619. *Id.* para. 111.
620. *See id.* paras. 116–31.
621. *Id.* para. 119.
622. *Id.*
623. *Id.*
624. *Id.* para. 128.
625. *Id.*

translated into a call for vengeance."[626] Nevertheless, argues Chaskalson, "capital punishment is not the only way that society has of expressing its moral outrage at the crime that has been committed. . . . A very long prison sentence is also a way of expressing outrage and visiting retribution upon the criminal."[627]

Noting that South Africa's Constitution "is premised on the assumption that [South Africa] will be a constitutional state founded on the recognition of human rights," Justice Chaskalson cites to a statement from the concluding provision on National Unity and Reconciliation:

> The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and *revenge*.
>
> These can now be addressed on the basis that there is a need for understanding but *not for vengeance*, a need for reparation but *not for retaliation*, a need for *ubuntu* but *not for victimisation*.[628]

Although the commitment contained in the National Unity and Reconciliation "has its primary application in the field of political reconciliation," argues Chaskalson P, it "is not without relevance to the enquiry we are called upon to undertake in the present case. To be consistent with the value of *ubuntu* ours should be a society that 'wishes to prevent crime . . . [not] to kill criminals simply to get even with them.'"[629] Then, the learned justice notes that Section 33(1)(b) of South Africa's Constitution provides as follows: "The Rights entrenched in this Chapter may be limited by law of general application, provided that such limitation—(b) shall not negate the *essential content* of the right in question."[630] Justice Chaskalson argues further that "[t]here is uncertainty in the literature concerning the meaning of this provision."[631] He went on to state that the provision "seems to have entered constitutional law through the provisions of the German

---

626. *Id.* para. 129.
627. *Id.*
628. *Id*. para. 130 (emphasis in original).
629. *Id.* para. 131.
630. Interim Constitution, *supra* note 474, at Ch. 3 sec. 33(1)(b) (emphasis added).
631. *S v. Makwanyane & Another*, para. 132.

Constitution, and in addition to the South African constitution, appears, though not precisely in the same form, in the constitution of Namibia, Hungary, and possibly other countries as well."[632]

Chaskalson P then notes that "[t]he difficulty of interpretation arises from the uncertainty as to what the 'essential content' of a right is, and how it is to be determined."[633] The issue to be resolved, notes Justice Chaskalson, is whether the right's "essential content . . . [s]hould be determined subjectively from the point of view of the individual affected by the invasion of the right" or "objectively, from the point of view of the nature of the right and its place in the constitutional order, or possibly in some other way."[634] The German Constitutional Court, notes Justice Chaskalson, has dealt with this issue "by subsuming the enquiry into the proportionality test that it applies and the precise scope and meaning of the provision is controversial."[635] Nevertheless, the learned justice states that such an inquiry is not necessary to resolve the problem in the case at bar.[636]

Justice Chaskalson then talks of a "balancing process" in which "deterrence, prevention and retribution must be weighed against the alternative punishments available to the state, and the factors which taken together make capital punishment cruel, inhuman and degrading: the destruction of life, the annihilation of dignity, the elements of arbitrariness, inequality and the possibility of error in the enforcement of the penalty."[637] In the case before the Court, the Attorney General had argued that "the right to life and the right to human dignity were not absolute concepts" and that "[l]ike all rights they have their limits."[638] The AG also argued that "[o]ne of those limits is that a person who murders in circumstances where the death penalty is permitted by *section* 277, forfeits his or her right to claim protection of life and dignity."[639] To support his arguments, the AG invoked the "principles of self-defence."[640] He argued that "[i]f the law

632. *Id.*
633. *Id.* para. 132.
634. *Id.*
635. *Id.*
636. *Id.* para. 134
637. *Id.* para. 135.
638. *Id.* para. 136.
639. *Id.*
640. *Id.*

recognises the right to take the life of a wrongdoer in a situation in which self-defense is justified, then, in order to deter others, and to ensure that the wrongdoer does not again kill an innocent person, why would it not be appropriate for the state to execute a person who has been convicted of murder?"[641]

Chaskalson P calls the AG's argument "fallacious" and argued that "[t]he rights vested in every person by Chapter Three of the Constitution are subject to limitation under *section* 33" and that "[i]n times of emergency, some [of these rights] may be suspended in accordance with the provisions of *section* 34 of the Constitution."[642] Justice Chaskalson argues, however, that subject to limitations in times of emergency in accordance with the provisions of section 34 of the Constitution, "the rights vest in every person, including criminals convicted of vile crimes" and that "[s]uch criminals do not forfeit their rights under the Constitution and are entitled, as all in our country now are, to assert these rights, including the right to life, the right to dignity and the right not to be subjected to cruel, inhuman or degrading punishment."[643] Finally, argues Chaskalson, "[w]hether or not a particular punishment is inconsistent with these rights depends upon an interpretation of the relevant provisions of the Constitution, and not upon a moral judgment that a murderer should not be allowed to claim them."[644]

Justice Chaskalson then addresses the arguments made by the AG and states that the law resolves problems of self-defense and the taking of hostages through "the doctrine of proportionality, balancing the rights of the aggressor against the rights of the victim, and favouring the life or lives of innocents over the life or lives of the guilty."[645] In addition, "there are material respects in which killing in self-defense or necessity differ from the execution of a criminal by the State."[646] First, "[s]elf-defense takes place at the time of the threat to the victim's life, at the moment of the emergency which gave rise to the necessity."[647] Second, "traditionally, under circumstances in which no less-severe

641. *Id.*
642. *Id.* para. 137.
643. *Id.*
644. *Id.*
645. *Id.* para. 138.
646. *Id.*
647. *Id.*

alternative is readily available to the potential victim,"[648] argues Chaskalson P, "[k]illing by the State takes place long after the crime was committed, at a time when there is no emergency and under circumstances which permit the careful consideration of alternative punishment."[649]

In conclusion, Justice Chaskalson makes the following statement:

> The right to life and dignity are the most important of all human rights, and the source of all other rights in Chapter Three [of the South African Constitution]. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others. And this must be demonstrated by the State in everything that it does, including the way it punishes criminals. This is not achieved by objectifying murderers and putting them to death to serve as an example to others in the expectation that they might possibly be deterred thereby.[650]

Chaskalson P then announces the Court's judgment:

> In terms of section 98(5) of the Constitution, and with effect from the date of this order, the provision of paragraphs (a), (c), (d), (e) and (f) of *section* 277(1) of the Criminal Procedure Act, and all corresponding provisions of other legislation sanctioning capital punishment which are in force in any part of the national territory in terms of *section* 229, are declared to be inconsistent with the Constitution and, accordingly, to be invalid.

In terms of *section* 98(7) of the Constitution, and with effect from the date of this order:

> (a) the State is and all its organs are forbidden to execute any person already sentenced to death under any of the provisions thus declared to be invalid; and
>
> (b) all such persons will remain in custody under the sentences imposed on them, until such sentences have been set aside in accordance with law and substituted by lawful punishments.[651]

In *S v. Makwanyane & Another*, the Constitutional Court of South Africa utilized international and foreign comparative law

---

648. *Id.*
649. *Id.*
650. *Id.* para. 144.
651. *Id.* para. 151.

as an aid of interpreting provisions of the Constitution dealing with the right to life and freedom and security of the person. Specifically, the Court noted that in the context of § 35(1) of the Interim Constitution of South Africa, which was the relevant basic law at the time this case was decided, public international law, which includes non-binding and binding law, could be used under this section as "tools of interpretation."[652] The Court concluded that "[i]nternational agreements and customary international law accordingly provide a framework within which Chapter Three can be evaluated and understood."[653] Specific references were made to the UN Committee on Human Rights; the Inter-American Commission on Human Rights; the Inter-American Court of Human Rights; the European Commission on Human Rights; and the European Court of Human Rights; and the International Labor Organization. [654]

The Court also made reference to the International Covenant on Civil and Political Rights, the European Convention on Human Rights, the Canadian Charter of Rights and Freedoms, and the African Charter on Human and Peoples' Rights.[655] Additionally, the Court drew inspiration from foreign comparative law and made specific references to case law from the Hungarian Constitutional Court, the US Supreme Court, Germany's Federal Constitutional Court, the Canadian Supreme Court, the Indian Supreme Court, and the Tanzanian Court of Appeal.[656] Thus, in making its decision in this case, the Constitutional Court of South Africa, relied on and drew inspiration from international and foreign comparative law.[657]

The Court ruled that any laws "sanctioning capital punishment which are in force in any part of [South Africa] in terms of *section* 229 [of the Constitution], are declared to be inconsistent with the Constitution and, accordingly, to be invalid."[658] The Court then instructed the state to stop all executions of "any

652. *Id.* para. 35.

653. *Id.* Chapter Three of the Interim Constitution of South Africa deals with "fundamental rights." *See* Interim Constitution, *supra* note 474, at Ch. 3.

654. *Id*. para. 35.

655. *Id*. paras. 63, 68, 110.

656. *Id*. paras. 16, 38, 59, 70, 114, 154.

657. *Id*. para. 33.

658. *Id.* para. 151(1). This is section 229 of the Interim Constitution, which deals with "continuation of existing laws." *See* Interim Constitution, *supra* note 474, at section 229.

person already sentenced to death under any of the provisions thus declared invalid."[659] Individuals who had been sentenced to death, the Court declared, would "remain in custody under the sentences imposed on them, until such sentences have been set aside in accordance with law and substituted by lawful punishment.[660]

South Africa and Tanzania are not the only African countries whose judiciaries are taking advantage of their power to interpret the constitution to bring national laws, including customary laws, into conformity with the provisions of international human rights instruments. In the section that follows, this Article examines the Constitutional Court of Zimbabwe's landmark case, *Mudzuru & Another v. Minister of Justice, Legal & Parliamentary Affairs & 2 Others*, which deals with three important human rights-related issues: (1) standing to bring a constitutional challenge under the Constitution of Zimbabwe;[661] (2) the use of international and foreign comparative law to interpret the constitution; and (3) the adoption of the purposive approach to the interpretation of provisions of the constitution dealing with or relevant to child marriage.[662]

D. Mudzuru & Another v. Minister of Justice, Legal & Parliamentary Affairs & Two Others (Constitutional Court of Zimbabwe)

Zimbabwe amended its constitution in 2013 through the Constitution of Zimbabwe Amendment (No. 20) Act and, inter alia, "enshrine[d] the rights of Zimbabwean citizens and residents."[663] For example, section 44 states as follows: "The State and every person, including juristic persons, and every institution and agency of the government at every level must respect, protect, promote and fulfil the rights and freedoms set out in this Chapter."[664] Chapter 4 also provides guidelines on how it is to be interpreted. Specifically, section 46 states as follows:

---

659. *Id.* para. 151(2)(a).

660. *Id.* para. 151(2)(b).

661. CONSTITUTION OF ZIMBABWE AMENDMENT (NO. 20) ACT, May 22, 2013 [hereinafter Zimbabwe Constitution].

662. *See* Julia Sloth-Nielsen & Kuda Hove, *Mudzuru & Another v. The Minister of Justice, Legal and Parliamentary Affairs & 2 Others: A Review*, 16 AFR. HUM. RTS. L. J. 554, 555 (2016).

663. *Id.* at 556*; see also* Zimbabwe Constitution, at Ch. 4.

664. Zimbabwe Constitution, at Ch. 4 sec. 44.

> (1) When interpreting this Chapter, a court, tribunal, forum or body—
>
> (a) must give full effect to the rights and freedoms enshrined in this Chapter;
>
> (b) must promote the values and principles that underlie a democratic society based on openness, justice, human dignity, equality and freedom, and in particular, the values and principles set out in section 3;
>
> (c) must take into account international law and all treaties and conventions to which Zimbabwe is a party;
>
> (d) must pay due regard to all the provisions of this Constitution, in particular the principles and objectives set out in Chapter 2; and
>
> (e) *may* consider relevant foreign law; in addition to considering all other relevant factors that are to be taken into account in the interpretation of a Constitution.
>
> (2) When interpreting an enactment, and when developing the common law and *customary law*, every court, tribunal, forum or body must promote and be guided by the spirit and objectives of this Chapter.[665]

Chapter 4 is divided into Part 1 (Application and Interpretation of Chapter 4); Part 2 (Fundamental Human Rights and Freedoms); Part 3 (Elaboration of Certain Rights);[666] and Part 4 (Enforcement of fundamental human rights and freedoms).[667] The rights elaborated in Part 3 include every woman's right to "equal dignity of the person with men and this includes equal opportunities in political, economic and social activities."[668] Section 80(3) addresses conflicts between the Constitution and customary law and traditional practices. It states as follows: "All laws, customs, traditions and cultural practices that infringe the rights of women conferred by this Constitution are void to the extent of the infringement."[669] This chapter also sets the

665. *Id.* at Ch. 4 sec. 46 (emphasis added).

666. Section 79 of Part 3 notes as follows: (1) This Part elaborates certain rights and freedoms to ensure greater certainty as the application of those rights and freedoms to particular classes of people" and that "[t]his Part must not be construed as limiting any right or freedom set out in Part 2." *Id.* at Ch. 4 sec. 79.

667. *Id.* at Ch. 4.

668. *Id.* at Ch. 4 sec. 80 para. 1

669. *Id.* para 3.

marriage age at 18 years: "Every person who has attained the age of eighteen years has the right to found a family" and "[n]o person may be compelled to enter into marriage against their will."[670]

In the case *Mudzuru & Another*, two young women aged nineteen and eighteen years respectively, "approached [the Constitutional Court] in terms of s 85(1) of the Constitution of the Republic of Zimbabwe Amendment (No. 20) 2013 . . . which came into force on 22 May 2013."[671] Specifically, this case "revolved around a constitutional challenge to the Marriage Act and to the Customary Marriages Act."[672] In Zimbabwe, there are three types of marriage: (1) civil marriage, which is registered under the Marriage Act; (2) customary marriage, which is registered under the Customary Marriages Act;[673] and (3) an unregistered customary law union (*kuchaya mapoto*).[674]

Article 22(1) of the Marriage Act states as follows: "No boy under the age of eighteen years and no girl under the age of sixteen years shall be capable of contracting a valid marriage except with the written permission of the Minister, which he may grant in any particular case in which he considers such marriage desirable."[675] The Marriage Act, hence, permitted child marriages and effectively established a different marriage age for boys and girls. The Customary Marriages Act, however, did not set any minimum age for marriage, for either boys or girls and, as argued by some observers of customary marriages in Zimbabwe, "the received wisdom . . . [is] that the minimum age for marriage is the attainment of puberty."[676]

In *Mudzuru & Another*, two Zimbabwean women, who had been forced into a marital union since childhood, brought the

---

670. *Id.* at Ch. 4 sec. 78 paras. 1, 2.

671. *Mudzuru & Another v. Minister of Just., Legal & Parliamentary Affs.*, (2016) Judgement No. CCZ 12/2015 (Const. Application No. 79/2014) (Zim.).

672. Sloth-Nielsen & Hove, *supra* note 662, at 555.

673. Customary Marriages Act, tit 5, ch. 5:07, sec. 8 (Zim.).

674. Dominique Meekers, *The Noble Custom of Roora: The Marriage Practices of the Shona of Zimbabwe*, 32 ETHNOLOGY 35, 35–39 (1993) (delineating the various types of marriages in Zimbabwe, with specific emphasis on the Shona ethnolinguistic group). *See also* Beverley Casmila Madzikatire & Elizabeth Rutsate, *An Interrogation of the Law Relating to Cohabitation in Zimbabwe and the Need for Law Reform*, 2 UNIV. ZIM. L. J. 116, 117 (2019) (examining the law relating to *kuchaya mapoto* in Zimbabwe and the need for reforms).

675. Marriage Act, Ch. 5:11, sec. 22(1) (Zim.).

676. Sloth-Nielsen & Hove, *supra* note 662, at 555.

constitutional challenge before the Constitutional Court, seeking to have child marriage under both the Marriage Act and Customary Marriages Act declared in violation of the Constitution of Zimbabwe. After analyzing the consequences of child marriage and using international and foreign comparative law as a tool of interpretation, the Constitutional Court held that "[w]ith effect from 20 January 2016, no person, male or female, may enter into any marriage, including an unregistered customary law union or any other union including one arising out of religion or religious rite, before attaining the age of eighteen (18) years."[677]

Writing for the Constitutional Court of Zimbabwe ("CCZ"), Malaba DCJ begins his analysis of the case by noting that the applicants had complained "about the infringement of the fundamental rights of girl children subjected to early marriages" and were seeking "a declaratory order in terms that:

> 1. The effect of s 78(1) of the Constitution of the Republic of Zimbabwe Amendment (No. 20) 2013 is to set 18 years as the minimum age for marriage in Zimbabwe; 2. No person, male or female in Zimbabwe may enter into any marriage including an unregistered customary law union or any other union including one arising out of religion or a religious rite before attaining the age of eighteen (18); 3. Section 22(1) of the Marriage Act [*Chapter 5: 11*] is unconstitutional; 4. The Customary Marriages Act [Chapter 5: 07] is unconstitutional in that it does not provide for a minimum age limit of eighteen (18) years in respect of any marriage contracted under the same.[678]

Malaba DCJ noted that "[t]he application arose out of the interpretation and application by the applicants, on the legal advice, of s 78(1) and read with s 8(1(1) of the Constitution."[679] Section 78(1) of the Constitution of Zimbabwe falls within Chapter 4—the latter enshrines fundamental human rights and freedoms and is Zimbabwe's equivalent of a Bill of Rights and provides as follows:

> Marriage rights
>
> (1) Every person who has attained the age of eighteen years has the right to found a family.

677. *Mudzuru & Another*, at 55.
678. *Id.* at 1.
679. *Id.* at 2.

> (2) No person may be compelled to enter into marriage against their will.
>
> (3) Persons of the same sex are prohibited from marrying each other.[680]

Section 81 of the Constitution of Zimbabwe also falls within Chapter 4 and enshrines the fundamental rights of the child. The alleged infringement of these rights, noted Malaba DCJ, is "relevant to the determination of the issues raised by the application" before the CCZ. These rights are:

Rights of children

> (1) Every child, that is to say every boy and girl under the age of eighteen years, has the right—
>
> (a) to equal treatment before the law, including the right to be heard;
>
> (b) . . .
>
> (c) . . .
>
> (d) to family or parental care or to appropriate care when removed from the family environment;
>
> (e) to be protected from economic and sexual exploitation, from child labour, and from maltreatment, neglect or any form of abuse;
>
> (f) to education, health care services, nutrition and shelter;
>
> (g) . . .
>
> (h) . . .
>
> (2) A child's best interests are paramount in every matter concerning the child.
>
> (3) Children are entitled to adequate protection by the courts, in particular by the High Court as their upper guardian.[681]

The Constitution of Zimbabwe guarantees the fundamental rights of children in section 44 and imposes an obligation on the State, as well as every person, including "juristic persons, and every institution and agency of the government at every level" to "respect, protect, promote and fulfil the rights and freedoms set out in this Chapter."[682] Malaba DCJ noted that the

680. Zimbabwe Constitution, at Ch. 4 sec. 78.
681. *Id.* sec. 81.
682. *Id.* sec. 44.

applicants had contended that "on a broad, generous and purposive interpretation of s 78(1) as read with s 81(1) of the Constitution, the age of eighteen years has become the minimum age for marriage in Zimbabwe."[683] Additionally, notes Malaba DCJ, the applicants also contended that "s 78(1) of the Constitution cannot be subjected to a strict, narrow and literal interpretation to determine its meaning if regard is had to the contents of similar provisions on marriage and family rights found in international human rights instruments from which s 78(1) derives inspiration."[684]

The applicants, states Malaba DCJ, claimed standing to bring a constitutional challenge under s 85(1)(a) and (d) of the Constitution.[685] The honorable Deputy Chief Justice noted that "[i]n para. 16 of the founding affidavit, the first applicant, with whom the second applicant agreed, states: 'The issues I raise below are in the public interest and therefore I bring this application in terms of s 85(1)(a) and (d) of the Constitution of Zimbabwe.'"[686] Additionally, in paragraph 21 of the founding affidavit, the first applicant stated as follows: "The instant application is an important public interest application that seeks to challenge the law in so far as it relates to child marriages in Zimbabwe. It is motivated by my desire to protect the interests of children in Zimbabwe."[687]

When sections 78(1) and 81(1) of the Constitution of Zimbabwe came into force, notes Malaba DCJ, "s 22(1) of the Marriage Act [*Chapter 5: 11*] provided that a girl who had attained the age of sixteen years was capable of contracting a valid marriage."[688] However, to do so, such a girl had "to obtain the consent in writing to the solemnization of the marriage of persons who were, at the time of the proposed marriage, her legal guardians or, where she had only one legal guardian, the consent in writing of such legal guardian."[689] Also, notes Malabar DCJ, "[a] boy under the age of eighteen years and a girl under the age of sixteen years had no capacity to contract a valid marriage except with the

683. *Mudzuru & Another*, at 3; *see* Zimbabwe Constitution, at Ch. 4 secs. 78, 81.
684. *Mudzuru & Another*, at 3.
685. *Id.*
686. *Id.*
687. *Id.*
688. *Id.*; *see also* Marriage Act, *supra* note 675, sec. 22(1).
689. *Mudzuru & Another*, at 3–4.

written permission of the Minister of Justice, Legal and Parliamentary Affairs."[690]

Under section 2 of the Child Abduction Act [*Chapter 5: 05*] and section 2 of the Children's Protection and Adoption Act [*Chapter 5: 06*], a child was defined "to be a person under the age of sixteen years."[691] In their application, the applicants contended that since the definition of a child is now provided by section 81(1) of the Constitution to mean "every boy and girl under the age of eighteen years,"[692] no child in Zimbabwe "has the capacity to enter into a valid marriage . . . since the coming into force of ss 78(1) and 81(1) of the Constitution on 22 May 2013."[693]

Deputy Chief Justice Malaba noted that the applicants also contended that "s 22(1) of the Marriage Act or any other law which authorises a girl under the age of eighteen years to marry, infringes the fundamental right of the girl child to equal treatment before the law enshrined in s 81(1)(a) of the Constitution" and thus exposes the girl child to "the horrific consequences of early marriage which are the very injuries against which the fundamental rights are intended to protect every child."[694]

The respondents—the Minister of Justice, Legal & Parliamentary Affairs N.O, Minister of Women's Affairs, Gender & Community Development, and the Attorney General of Zimbabwe—opposed both the application and the granting of the relief that the applicants had prayed for.[695] Malabar DCJ noted that "[t]he argument made on behalf of the respondents was that although the applicants claimed to have approached the court in terms of s 85(1)(a) of the Constitution, they did not allege that any of their own interests was adversely affected by the alleged infringement of the fundamental rights of the girl child."[696] Basically, the respondents argued that the applicants did not have *locus standi* to bring the constitutional challenge before the CCZ.

The respondents' main argument was that the applicants "had not produced facts to support their claim to *locus standi* under s

690. *Id.* at 4.

691. *Id.* at 4 (quoting Child Abduction Act, Ch. 5:05, sec. 2 (Zim.); Children's Protection and Adoption Act, Act No. 22 of 1971 as amended through Act No. 9 of 1997, ch. 5:06 sec. 2 (Zim.).

692. Zimbabwe Constitution, at Ch. 4 sec. 81.

693. *Mudzuru & Another*, at 4.

694. *Id.*

695. *Id.*

696. *Id.*

85(1)(d) of the Constitution."[697] As grounds for their opposition to standing for the applicants, the respondents "denied that s 78(1) of the Constitution has the effect of setting the age of eighteen years as the minimum age for marriage in Zimbabwe."[698] Instead, argued the respondents, "s 78(1) of the Constitution does not give a person who has attained the age of eighteen years the 'right to enter into marriage' and that the 'right to found a family' does not imply the right to marry."[699]

As part of the argument denying that section 78(1) of the Constitution sets the age of eighteen years as the minimum age of marriage, the respondents argued that "s 78(1) is not amenable to a broad, generous and purposive interpretation in the determination of its meaning" and that "it is only accommodative of a literal interpretation."[700] Malaba DCJ notes that "[t]he effect of the respondents' argument was that the question of interpretation did not arise as the words used were clear and unambiguous."[701] The Honorable Deputy Chief Justice then went on to note that the respondents also denied "that s 22(1) of the Marriage Act or any other law which authorises a girl child who has attained the age of sixteen to marry contravenes s 78(1) of the Constitution."[702]

To explain the "difference in the treatment of a girl child and a boy child under s 22(1) of the Marriage Act," the respondents invoked "the old notion that a girl matures physiologically and psychologically earlier than a boy."[703] Malaba DCJ then argued that the respondents were advancing "the notion of the alleged difference in the rates of maturity in the growth and development of girls and boys, as justification for legislation which condemns a girl child, under the pretext of marriage, to a life of sexual exploitation and physical abuse."[704] The honorable Deputy Chief Justice then stated that "[f]our questions arise for the

697. *Id.* at 5.
698. *Id.*
699. *Id.* at 6. Section 78(1) states as follows: "Every person who has attained the age of eighteen years has the rights to found a family." Zimbabwe Constitution, at Ch. 4 sec. 78.
700. *Mudzuru & Another*, at 6.
701. *Id.*
702. *Id.*
703. *Id.*
704. *Id.*

determination from the positions taken by the applicants and the respondents:

> (1) Whether or not the applicants have, on the facts, *locus standi* under s 85(1)(a) or s 85(1)(d) of the Constitution to institute the proceedings claiming the relief they seek.
>
> (2) If they are found to have standing before the Court, does s 78(1) of the Constitution set the age of eighteen years as the minimum age for marriage in Zimbabwe.
>
> (3) If the answer to issue No. 2 is in the affirmative; did the coming into force of ss 78(1) and 81(1) of the Constitution on 22 May 2013 render invalid s 22(1) of the Marriage Act [*Chapter 5:05*] and any other law authorising a girl who has attained the age of sixteen to marry.
>
> (4) If the answer to issue No. 3 is in the affirmative; what is the appropriate relief to be granted by the Court in the exercise of the wide discretion conferred on it under s 85(1) of the Constitution.[705]

After an overview of the case, Malaba DCJ then proceeded to analyze the first substantive issue before the Court—that is, *locus standi*. The honorable Deputy Chief Justice began the analysis of standing by making reference to the constitutional provision that deals with standing as regards any alleged infringement of a fundamental right or freedom enshrined in Chapter 4 of the Constitution.[706]

After examining the Constitution's definition of standing, Malaba DCJ concluded that "[w]hat is in issue is the capacity in which the applicants act in claiming the right to approach the court on the allegations they have made" and that "[i]n claiming *locus standi* under s 85(1) of the Constitution, a person should act in one capacity in approaching a court and not act in two or more capacities in one proceeding."[707] The justice then examined the "rule of *locus standi* based on the requirement of proof by the claimant of having been or of being a victim of infringement or threatened infringement of a fundamental right or freedom enshrined in Chapter 4 of the Constitution."[708]

---

705. *Id.* at 7.
706. *Id.* at 8.
707. *Mudzuru & Another*, at 8.
708. *Id.* at 9.

Malaba DCJ then cited to the Constitutional Court of Zimbabwe case, *Mawarire v. Mugabe NO and Others*, in which Chidyausiku CJ speaks to the first leg of the definition of standing—"any person acting on their own interests":[709]

> Certainly this Court does not expect to appear before it only those who are dripping with the blood of the actual infringement of their rights or those who are shivering incoherently with the fear of the impending threat which has actually engulfed them. This Court will entertain even those who calmly perceive a looming infringement and issue a declaration or appropriate order to stave the threat, more so under the liberal post-2009 requirement.[710]

This, noted Justice Malaba, is the "familiar rule of *locus standi* based on the requirement of proof by the claimant of having been or of being a victim of infringement or threatened infringement of a fundamental right or freedom enshrined in Chapter 4 of the Constitution."[711] He then proceeded to examine the second aspect of the rule of *locus standi*, which he noted is "not so familiar."[712] In elaborating on this aspect of the rule of *locus standi*, Malaba DCJ cited to two cases from Canada—*R v. Big M Drug Mart Ltd*[713] and *Morgentaler, Smoling and Scott v. R*[714]—which he argued,

> illustrate the point that a person would have standing under a provision similar to s 85(1)(a) of the Constitution to challenge unconstitutional law if he or she could be liable to conviction for an offence charged under the law even though the unconstitutional effects were not directed against him or her *per se*. It would be sufficient for a person to show that he or she was directly affected by the unconstitutional legislation. If this was shown it mattered not whether he or she was a victim.[715]

In *R v. Big M Drug Mart Ltd.*, a corporation was allowed to "challenge the constitutionality of a statutory provision at a criminal trial on the grounds that it infringed the rights of

709. Zimbabwe Constitution, at Ch. 4 sec. 85.

710. *Mudzuru & Another*, at 9 (quoting *Mawarire v. Mugabe*, (2013) Judgment No. CCZ 1/2013, 8 (Const. Application No. 146/2013) (Zimb.))

711. *Mudzuru & Another*, at 9.

712. *Id.*

713. *R v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 (Can.).

714. *Morgentaler and Others v. R*, [1988] 1 S.C.R. 30 (Can.).

715. *Mudzuru & Another*, at 10 (emphasis in original).

human beings and was accordingly invalid."[716] The corporation had alleged that "the statute was unconstitutional because it infringed the fundamental right to freedom of religion of non-Christians who did not observe Sunday as the day of rest and worship."[717] Malaba DCJ noted, however, that in seeking to have the statute declared unconstitutional, "the corporation's primary purpose was the protection of its own commercial interests and freedom from criminal prosecution for alleged breach of an invalid statutory provision."[718] Despite the fact that the corporation "did not have a right to religious freedom," it was, nevertheless, "permitted to raise the constitutionality of the statute which was held to be in breach of the Charter on Rights and Freedoms."[719]

In *Morgentaler*, male doctors, "who were prosecuted under anti-abortion provisions successfully challenged the constitutionality of the legislation in terms of which they were prosecuted."[720] Although the rights under consideration "did not and could not vest in the male doctors," the doctors were nevertheless granted standing to challenge them before the courts. Infringing the rights of the pregnant women to security of the person enshrined in section 7 of the Canadian Charter of Rights and Freedoms would negatively affect the ability of the male doctors to "benefit financially from charging for services rendered in performing abortions."[721]

In the case before the CCZ, Malaba DCJ noted the respondents' contention that "the applicants lack standing under s 85(1)(d) of the Constitution is based on an erroneous view of the requirements of the rule."[722] The justice then noted that

> [t]he argument that the applicants were not entitled to approach the court to vindicate public interest in the well-being of children protected by the fundamental rights of the child enshrined in s 81(1) of the Constitution, overlooked the fact that children are a vulnerable group in society whose interests constitute a category of public interest. Notwithstanding the allusion to acting under s 85(1)(a) of the Constitution, the founding

716. *Id.*
717. *Id.*
718. *Id.*
719. *Id.*
720. *Id.* at 11.
721. *Id.*
722. *Id.*

> affidavit shows that the applicants believed themselves to be acting in terms of s 85(1)(d) and had their hearts in that rule.[723]

Malaba DCJ noted that "[t]he form and structure of s 85(1) shows that it is a product of the liberalization of the narrow traditional conception of *locus standi*."[724] In addition, argued Justice Malaba,

> [t]he traditional rule of standing gave a right to approach a competent court for enforcement of a fundamental right or freedom to a person who would have suffered direct legal injury by reason of infringement or threatened infringement of his or her fundamental right or legally protected interest by the impugned action of the State or public authority. Except for the case where a person was unable to personally seek redress by reason of being under physical detention, no one could ordinarily seek judicial redress for legal injury suffered by another person.[725]

Justice Malaba then noted that the objective of section 85(1) is "to overcome the formal defects in the legal system so as to guarantee real and substantial justice to the masses, particularly the poor, marginalised and deprived sections of society" and that "[t]he liberalisation of the narrow traditional conception of standing and the provision of the fundamental right to access to justice compel a court exercising jurisdiction under s 85(1)A VCMN of the Constitution to adopt a broad and generous approach to standing."[726]

With respect to the need for courts to adopt a broad approach to standing in constitutional cases, Malaba DCJ cited to a case from the Constitutional Court of South Africa, where Chaskalson P held as follows:

> Whilst it is important that this Court should not be required to deal with abstract or hypothetical issues, and should devote its scarce resources to issues that are properly before it, I can see no good reason for adopting a narrow approach to the issue of standing in constitutional cases. On the contrary, it is my view that we should rather adopt a broad approach to standing. This would be consistent with the mandate given to this Court to uphold the Constitution and would serve to ensure that

723. *Id.* at 11–12.
724. *Id.* at 13.
725. *Id.* at 13–14.
726. *Id.* at 14.

> constitutional rights enjoy the full measure of the protection to which they are entitled.[727]

After citing to cases from Australia and England, Justice Malaba concluded that "[t]he paramount test [for standing in constitutional cases] should be whether the alleged infringement of a fundamental right or freedom has the effect of prejudicially affecting or potentially affecting the community at large or a significant section or segment of the community."[728] In addition, noted Malaba DCJ, "[t]he test covers cases of marginalized or underprivileged persons in society who because of sufficient reasons such as poverty, disability, socially and economically disadvantaged positions, are unable to approach a court to vindicate their rights."[729] Along those lines, argued Justice Malaba, "[s]ection 85(1)(d) of the Constitution was introduced with a view of providing expansive access to justice to wider interests in society, particularly the vulnerable groups in society, the infringement of whose rights would have remained unredressed under the narrow traditional conception of standing. The interest is therefore the interest of the public as distinct from the interest of an individual or individuals."[730]

With respect to "factors that any person genuinely acting in the public interest has to satisfy," Justice Malaba cites to *Ferreira v. Levin* (Const. Court of S. Africa), where O'Regan J states as follows:

> This court will be circumspect in affording applicants standing by way of section 7(4)(b)(v) and will require an applicant to show that he or she is genuinely acting in the public interest. *Factors relevant to determining whether a person is genuinely acting in the public interest will include considerations such as: whether there is another reasonable and effective manner in which the challenge can be brought; the nature of the relief sought, and the extent to which it is of general and prospective application; and the range of persons or groups who may be directly or indirectly affected by any order made by the court and the opportunity that those persons or groups have had to present evidence and argument to the court*. These factors will need to

727. *Ferreira v. Levin & Others*, [1995] ZACC 13, 1996 (1) SA 984 (CC), para. 165..
728. *Mudzuru & Another*, at 17.
729. *Id.*
730. *Id.*

> be considered in the light of the facts and circumstances of each case.[731]

In another case from the Constitutional Court of South Africa, notes Malaba DCJ, Yacoob J holds that the issue that the Court was called upon to decide was whether "a person or organization" is acting "genuinely in the public interest."[732] Yacoob J, however, noted that "[a] distinction must . . . be made between the subjective position of the person or organisation claiming to act in the public interest on the one hand, and whether it is, objectively speaking, in the public interest for the particular proceedings to be brought."[733] After citing to another case, this one from the Supreme Court of India,[734] Justice Malaba held that:

> [i]t is not necessary for a person challenging the constitutional validity of legislation to vindicate public interest on the ground that the legislation has infringed or infringes a fundamental human right, to give particulars of a person or persons who suffered legal injury as a result of the alleged unconstitutionality of the legislation. Section 85(1)(d) of the Constitution requires the person to allege that a fundamental human right enshrined in Chapter 4 has been, is being or is likely to be infringed. He or she is not required to give particulars of a right holder.[735]

Justice Malaba then proceeded to examine the possible motives of the applicants for approaching the Court. He noted that "[t]he applicants had no personal gain to derive from the proceedings" and that "[t]hey were not acting *mala fide* or out of extraneous motives as would have been the case if they were mere meddlesome busybodies seeking a day in court and cheap personal publicity."[736] Instead, noted Malaba DCJ,

> [t]he applicants were driven by the laudable motive of seeking to vindicate the rule of law and supremacy of the Constitution. . . . They acted altruistically to protect public interest in the enforcement of the constitutional obligation on the State to

731. *Ferriera v. Levin*, para. 234 (emphasis added).
732. *Lawyers for Human Rights v. Minister of Home Affairs* 2004 (4) SA 125 (CC), para. 18 (S. Afr.).
733. *Id.*
734. *Mudzuru & Another*, at 20.
735. *Id.* at 22.
736. *Id.* at 23.

> protect the fundamental rights of girl children enshrined in s 81(1) as read with s 78(1) of the Constitution.[737]

Malaba DCJ then noted that "[c]hildren fall into the category of weak and vulnerable persons in society," and that "[t]hey are persons who have no capacity to approach a court on their own seeking appropriate relief for the redress of legal injury they would have suffered."[738] Children's incapacity, argued Justice Malaba, is due to "disability arising from minority, poverty, and socially and economically disadvantaged positions" and that "[t]he law recognizes the interests of such vulnerable persons in society as constituting public interest."[739] With respect to the prayer sought by the applicants, Malaba DCJ noted that it was "the only reasonable and effective means for enforcement of the fundamental rights of the girl children subjected to early marriages."[740] Specifically, argued Justice Malaba, "[t]he remedy [that the applicants] sought was the only means for an effective protection of the public interest adversely affected by the alleged infringement of the children's fundamental rights."[741] More importantly, noted Malaba DCJ,

> [t]he interests of the girl children subjected to early marriages were properly identified as a public interest to be protected by the relief sought in the proceedings. Section 85(1)(d) of the Constitution underlies the principle that courts play a vital role in the provision of access to justice and protection of children. These are matters of public interest.[742]

Justice Malaba then moved on to "the question of the interpretation of s 78(1) as read with s 81(1) of the Constitution."[743] The respondents had argued that while section 78(1) of the Constitution grants a person who has attained the age of eighteen years the "right to found a family," it does not expressly grant such a person the "right to marry."[744] The Court, noted Malaba DCJ, is also faced "with the question of interpretation of s 22(1) of the

737. *Id.* at 23–24.
738. *Id.* at 24.
739. *Id.*
740. *Id.*
741. *Id.*
742. *Id.* at 24–25.
743. *Id.* at 25.
744. *Id. See also* Zimbabwe Constitution, at Ch. 4 sec. 78.

Marriage Act and the effect of the application of s 78(1) of the Constitution on its meaning."[745]

Malaba DCJ then examined the obligation imposed on courts in Zimbabwe to take into account "international law and all treaties and conventions to which Zimbabwe is a party . . . when interpreting any provision of the Constitution contained in Chapter 4."[746] According to section 46(1)(c) of the Constitution, "[w]hen interpreting this Chapter, a court, tribunal, forum or body (c) must take into account international law and all treaties and conventions to which Zimbabwe is a party."[747] He went on to state that "[b]oth s 22(1) of the Marriage Act and s 78(1) of the Constitution were born out of provisions of international human rights law prevailing at the time of their respective enactment."[748] Thus, argued Malaba DCJ, "[t]he meaning of s 78(1) of the Constitution is not ascertainable without regard being had to the context of the obligations undertaken by Zimbabwe under the international treaties and conventions on matters of marriage and family relations at the time it was enacted on 22 May, 2013."[749]

To decide whether section 22(1) of the Marriage Act or any other law that authorizes child marriage in Zimbabwe "infringes the fundamental rights of girl children enshrined, guaranteed and protected under s 81(1) as read with s 78(1) of the Constitution," argued Malaba DCJ, "regard must be had to the contemporary norms and aspirations of the people of Zimbabwe as expressed in the Constitution."[750] In addition, argued Justice Malaba, "[r]egard must also be had to the emerging consensus of values in the international community of which Zimbabwe is a party, on how children should be treated and their well-being protected so that they can play productive roles in society upon attaining adulthood."[751]

The interpretation of both sections of the Constitution—sections 78(1) and 81(1)—and of sections 22(1) of the Marriage Act "should be to ensure that the interpretation resonates with the founding values and principles of a democratic society based on

745. *Mudzuru & Another*, at 25.
746. *Id.* at 25–26.
747. *Id.*
748. *Id.* at 26.
749. *Id.*
750. *Id.*
751. *Id.*

openness, justice, human dignity, equality and freedom set out in s 3 of the Constitution, and regional and international human rights law."[752] Finally, argued Malaba DCJ, "[i]n considering the meaning of s 22(1) of the Marriage Act as a norm of behavior towards children, the court has to take into consideration the current attitude of the international community of which Zimbabwe is a party, on the position of the child in society and his or her rights."[753]

When section 78(1) is read with section 81(1) of the Constitution, argued Justice Malaba, it "testifies to the fact that Zimbabwe is a signatory to the Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child (ACRWC)."[754] By becoming a party to these international human rights instruments, noted Justice Malaba, Zimbabwe "expressed its commitment to take all appropriate measures, including legislative, to protect and enforce the rights of the child as enshrined in the relevant conventions to ensure that they are enjoyed in practice. Section 78(1) as read with s 81(1) of the Constitution must be interpreted progressively."[755]

Malaba DCJ then examined child marriage and indicated that international human rights instruments define child marriage "as marriages of persons under the age of 18 years."[756] The Committee on the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW Committee) sets the minimum age for marriage at eighteen years for both males and females.[757] The CEDAW Committee's definition of child marriage, argued Justice Malaba, came from the UN Convention on the Rights of the Child (CRC), which was adopted by the UN General Assembly on November 20, 1989, and entered into force on September 2, 1990.[758] Article 1 of the CRC states: "[f]or the purposes of the present Convention, a child means every human

752. *Id.*
753. *Id.*
754. *Id.* at 27.
755. *Id.*
756. *Id.*
757. UN Committee on the Convention on the Elimination of All Forms of Discrimination against Women, *General Recommendations Adopted by the Committee on the Elimination of Discrimination Against Women, General Recommendation No. 21*, art. 16(2), ¶ 36 [hereinafter CEDAW Committee, *General Recommendation No. 21*].
758. Convention on the Rights of the Child, Nov. 20, 1989,1577 U.N.T.S. 3 [hereinafter CRC].

being *below the age of eighteen years* unless under the law applicable to the child, majority is attained earlier."[759]

Zimbabwe enacted section 22(1) of the Marriage Act in 1965 "as a response to omissions and exceptions that existed in the international human rights provisions on the protection of children that existed at the time" and, as argued by Justice Malaba, "[t]he common feature of the many conventions was the failure to specify for States Parties the minimum age of marriage as a means of protecting children."[760] At this time, the international human rights community left the matter of child marriage exclusively to "domestic law."[761] Malaba DCJ argued that "[i]t was in the context of the omissions and exceptions in the provisions of international human rights law that the Marriage Act was enacted" in Zimbabwe.[762]

Article 16 of CEDAW, which came into force on September 3, 1981, imposes an obligation on States Parties to

> take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular . . . [to] ensure, on a basis of equality of men and women (a) The same right to enter into marriage; (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent.[763]

Malaba DCJ noted that Article 16(2) of CEDAW specifically limits or reserves the right to marry and establish a family only to "men and women of full age."[764] Article 16(2) states: "[t]he betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory."[765]

Malaba DCJ argued that although Article 16(2) of CEDAW prohibited child marriage, it did not define the word "child" and that "s 22(1) of the Marriage Act could not, at the time, be condemned for permitting child marriage in the absence of a specific provision in the international human rights law setting a

---

759. *Id.* at art. 1. (emphasis added).
760. *Mudzuru & Another*, at 27–28.
761. *Id.* at 28.
762. *Id.* at 30.
763. CEDAW, *supra* note 103, at art. 16.
764. *Mudzuru & Another*, at 31.
765. CEDAW, *supra* note 103, at art. 16(2).

minimum legal age for marriage."[766] The absence of a "definition for 'child' in Article 16(2) of the CEDAW was solved by the coming into force on 2 September 1990 of the [CRC]."[767] Justice Malaba then noted that "[a]lthough the CRC did not specify the age of eighteen as the minimum age for marriage, in defining 'a child', it provided the CEDAW Committee and the CRC Committee with the basis for declaring the minimum age of marriage to be eighteen years."[768] This, argued the justice, "is because Article 16(2) of the CEDAW provides in express terms that the 'marriage of a child shall have no legal effect.'"[769]

Justice Malaba then examined some of the legal literature that has criticized the CRC's failure to provide adequate protections to the rights of girls as it has done for those of boys. He noted that although the CRC was "'designed to be gender blind'[,] violations that primarily affect boys (i.e.[,]child soldiers) are covered under CRC Article 38. The same consideration is not given to violations predominantly affecting girls in child marriage."[770] One of the legal scholars that Malaba DCJ cited to in the CCZ's judgment, Ladan Askari, has suggested that a solution to the CRC's "failure to thoroughly consider gender specific rights violations is to have the concept of gender equality established as a peremptory norm."[771] Justice Malaba cited to the following passage from Askari:

> The problem of placing girls under the general category of "child" is alleviated if gender equality is recognised as a peremptory and therefore non-derogable, norm. Because it is gender-neutral, the term "child" as used in the CRC, avoids certain additional violations that are specific to girls only. Thus, girls sometimes fail to be completely protected under the provisions of the CRC. By identifying gender equality as a *jus cogens* norm, the gender-neutral language of the CRC will no longer detrimentally affect girls' human rights. Instead, girls' rights will be protected irrespective of whether the treaty provisions

766. *Mudzuru & Another*, at 31.

767. *Id.* at 32. Article 1 of the CRC states as follows: "For the purposes of the present convention a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier." CRC, *supra* note 758, at art. 1.

768. *Mudzuru & Another*, at 32.

769. *Id.*

770. *Id.* at 33.

771. *Id.* at 34.

> are specific or general since gender equality will be the standard against which violations will be measured. [772]

Despite its shortcomings, argued Malaba DCJ, the CRC remains a pioneering instrument in the protection of the rights of children, and its provisions have helped many communities around the world recognize child marriage as "a social evil in terms of consequences on the girl-child."[773] In fact, many studies have shown that child marriage infringes:

> the fundamental rights of the girl-child [that are] guaranteed by the CRC particularly[:] the right to education; the right to be protected from all forms of physical or mental violence, injury or abuse, including sexual abuse; the right to be protected from all forms of sexual exploitation; the right to the enjoyment of the highest attainable standard of health; the right to educational and vocational information and guidance; the right to seek, receive and impact information and ideas; the right to rest and leisure and to participate freely in cultural life; the right not to be separated from parents against their will and the right to protection against all forms of exploitation affecting any aspect of the child's welfare.[774]

On November 29, 1999, the African Charter on the Rights and Welfare of the Child ("African Child Charter"), which had been adopted on July 1, 1990, by the Organization of African Unity ("OAU"), entered into force.[775] The African Child Charter is especially important because it addresses a very important source of the violation of the rights of children in Africa—harmful social and cultural practices. Article 21 of the African Child Charter imposes an obligation on States to take "all appropriate measures to eliminate harmful social and cultural practices affecting" children. Specifically, Article 21 states as follows:

> 1. States Parties to the present Charter shall take all appropriate measures to eliminate harmful social and cultural practices

---

772. *Id.* at 34–35 (quoting Ladan Askari, *Girls' Rights Under International Law: An Argument for Establishing Gender Equality as a Jus Cogens*, 8 S. CAL. REV. L. & WOMEN'S STUD. 3, 15 (1998)).

773. *Mudzuru & Another*, at 35.

774. *Mudzuru & Another*, at 35. *See generally* John Mukum Mbaku, *International Law and Child Marriage in Africa*, 7 INDONESIAN J. INT'L & COMP. L. 101 (2020) (analyzing the impact of child marriage on Africa's girl children).

775. African Child Charter, *supra* note 44.

> affecting the welfare, dignity, normal growth and development of the child and in particular:
>
> (a) those customs and practices prejudicial to the health or life of the child; and
>
> (b) those customs and practices discriminatory to the child on the grounds of sex or other status.
>
> 2. Child marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be 18 years and make registration of all marriages in an official registry compulsory.[776]

Malaba DCJ noted that "[i]n clear and unambiguous language, Article 21 of the [African Child Charter] imposed on States Parties, including Zimbabwe, an obligation which they voluntarily undertook, to take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child."[777] The African Child Charter, noted Justice Malaba, specifically targeted child marriage as "a harmful social and cultural practice affecting the welfare, dignity, normal growth and development of the child particularly the girl-child."[778] Article 21(2) of the African Child Charter, argues Malaba DCJ, places the States Parties under a "positive obligation to take effective measures, including legislation, to specify the age of eighteen years as the minimum age for marriage" and implicitly, these countries are expected to abolish child marriage.[779]

Justice Malaba also noted that unlike other international human rights instruments, the African Child Charter does not have "the omissions and exceptions that the other conventions on human rights relating to marriage had permitted States Parties to exploit through local laws that authorised child marriage."[780] The provisions of the CRC's Article 21(2), argued Malaba DCJ, "had a direct effect on the views on the validity of ss 20 and 22 of the Marriage Act."[781] For example, noted Justice Malaba,

---

776. *Id.* at art. 21.
777. *Mudzuru & Another*, at 36.
778. *Id.*
779. *Id.*
780. *Id.*
781. *Id.* at 37

> [a] review of States reports presented to the CRC Committee from 1997 to 2004 reveals that forty-four States specified a lower age for girls to marry than boys. In its concluding comments E/1996/22 (1995) para. 159 the Committee on the International Convention on Economic[,] Social and Cultural Rights (ICESCR Committee) indicated that differences in marriageable age between girls and boys violated provisions of international human rights instruments guaranteeing to girls and boys equal treatment before the law.[782]

Malaba DCJ then noted that in its concluding comment on Zimbabwe, "the Committee on the Convention on Civil and Political Rights (ICCPR Committee) expressed the view based on the interpretation of s 22(1) of the Marriage Act that early marriage, and the statutory difference in the minimum age of girls and boys for marriage, should be prohibited by law."[783] Specifically, this is what the ICCPR Committee said:

> The Committee is concerned about the duality of the legal statutory law and customary law, which potentially leads to unequal treatment between individuals, particularly in the area of marriage and inheritance laws. The Committee expresses concern that where customary law contravenes the Covenant or the statutory law, the customary law continues to be upheld and applied. The Committee is concerned about continued practices, in violation of various provisions of the Covenant, including articles 3 and 24, such as *kuzvarita* (pledging of girls for economic gain), *kuripa ngozi* (appeasement to the spirits of a murdered person), *lobola* (bride price), female genital mutilation, early marriage, the statutory difference in the minimum age of girls and boys for marriage. The Committee recommends that these and other practices which are incompatible with the Covenant (articles 3, 7, 23, 24 and others) be prohibited by legislation. Moreover, the Committee urges the Government to adopt adequate measures to prevent and eliminate prevailing social attitudes and cultural and religious practices hampering the realization of human rights by women.[784]

Justice Malaba then cites comments made by the CEDAW Committee regarding States Parties that "provide for different

---

782. *Id*

783. *Id. See also* Rep. of the UN Hum. Rts. Comm. Vol. 1, at 214, U.N. Doc. A/53/40 (1998).

784. Rep. of the UN Hum. Rts. Comm. Vol 1, *supra* note 783, at 214.(emphasis in original).

ages for marriage for men and women."[785] Specifically, the Committee stated as follows:

> Some countries provide for different ages for marriage for men and women. As such provisions assume incorrectly that women have a different rate of intellectual development from men, or that their stage of physical and intellectual development at marriage is immaterial, *these provisions should be abolished*. In other countries, the betrothal of girls or undertakings by family members on their behalf is permitted. Such measures contravene not only the Convention, but also a woman's right freely to choose her partner.[786]

In making its recommendation to Zimbabwe to abolish provisions such as those in section 22(1) of the Marriage Act, the CEDAW Committee, argued Malaba DCJ, noted that this provision "and any other law authorising marriage of a person aged below eighteen years [are] inconsistent with the obligations of Zimbabwe under international human rights law to protect children against early marriage."[787] The view held by the Committee, noted Justice Malaba, "was that the abolition of the impugned statutory provisions would be consistent with the fulfilment by Zimbabwe of the obligations it undertook in terms of the relevant conventions and the [African Child] Charter."[788]

In Zimbabwe, noted Justice Malaba, "[t]he adoption of legislative measures for the abolition of the offending provisions such as s 22(1) of the Marriage Act became a compelling social need."[789] Research by legal scholars and social scientists revealed the "horrific consequences of child marriage" and "exposed child marriage as an embodiment of all the evils against which the fundamental rights are intended to protect the child."[790]

Malaba DCJ then reviewed several scientific studies of the consequences of child marriage on the girl child and concluded that "[a]lthough child marriage most often stems from poverty and powerlessness it only further reinforces the gendered notions of poverty and powerlessness stultifying the physical,

---

785. CEDAW Committee, *General Recommendation No. 21*, *supra* note 757, at art. 16(2), ¶ 38

786. *Id.* (emphasis added).

787. *Mudzuru & Another*, at 38.

788. *Id.*

789. *Id.*

790. *Id.*

mental, intellectual and social development of the girl child and heightening the social isolation of the girl child."[791] These studies also determined that child marriage (1) often evolves into a "tool of oppression which subordinates not just the woman but her family";[792] (2) perpetuates "an intergenerational cycle of poverty and lack of opportunity" and "reinforces the subordinated nature of communities that traditionally serve the powerful classes by giving a girl child in marriage to an older male"; (3) exposes the girl child to domestic violence; (4) exposes girl children to trafficking; (5) often reinforces "the incidence of infectious diseases, malnutrition, high child mortality rates, low life expectancy for women, and an inter-generational cycle of girl-child abuse";[793] and (6) "is universally associated with low levels of schooling."[794]

Justice Malaba then argued that when "changes in international human rights law on marriage and family relations over five decades" are considered, it is determined that "s 22(1) of the Marriage Act was born out of lack of commitment to the protection of the fundamental rights of the girl child."[795] Section 78(1) of Zimbabwe's Constitution, noted Malaba DCJ, "was enacted for the purpose of complying with the obligations Zimbabwe had undertaken under Article 21(2) of the [African Child Charter] to specify by legislation eighteen years as the minimum age for marriage and abolish child marriage."[796] Zimbabwe's decision to amend its Constitution to reflect the provisions of the African Child Charter, argued Justice Malaba, was in line with Article 18 of the Vienna Convention on the Law of Treaties, which enjoins States Parties "to hold in good faith and observe the rights and obligations in a treaty to which [they are] a party."[797]

---

791. *Id.* at 39–40.
792. *Id.* at 40.
793. *Id.*
794. *Id.* at 40–41.
795. *Id.* at 42.
796. *Id.*
797. *Id.* Article 18 of the Vienna Convention states as follows: "A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed."

After noting that the counsel for the applicants had argued that "only a broad, generous and purposive interpretation would give full effect to the right to found a family enshrined in s 78(1) of the Constitution," Malaba DCJ then cited to the Zimbabwe Supreme Court case, *Rattigan and Others v. Chief Immigration Officer and Others*, in which "the Court held that the preferred constitutional construction 'is one which serves the interest of the Constitution and best carries its objects and promotes its purpose.'"[798]

Returning to section 78(1) of the Constitution, Malaba DCJ argued that this section has set eighteen years as the minimum age of marriage in Zimbabwe and that that effectively limits marriage only to persons who have attained the age of eighteen years.[799] Hence, an individual who has not yet attained the age of eighteen years "has no legal capacity to marry" and such a person—he or she—"has a fundamental right not to be subjected to any form of marriage regardless of its source."[800] The corollary position, noted Justice Malaba, "is that a person who has attained the age of eighteen years has no right to marry a person aged below 18 years."[801]

Justice Malaba then returned to section 81(1) of the Constitution and argued that this provision "puts the matter of the legal effect of s 78(1) of the Constitution beyond any doubt," and it does so by providing that "a person aged below 18 years is 'a child' entitled to the list of fundamental rights guaranteed and protected thereunder."[802] Thus, argued Malaba DCJ, "the enjoyment of the right to enter into marriage and found a family guaranteed to a person who has attained the age of 18 years is legally delayed in respect of a person who has not attained the age of eighteen years."[803]

Malaba DCJ then went on to note that

> [t]he effect of s 78(1) as read with s 81(1) of the Constitution is very clear. A child cannot found a family. There are no

---

Vienna Convention on the Law of Treaties, art. 18, May 23, 1969, 1155 U.N.T.S. 331.

798. *Mudzuru & Another*, at 44. *See also Rattigan and Others v. Chief Immigration Officer and Others*, [1994] 2 ZLR 54, 1995 (2) SA 182 (ZS).

799. *Mudzuru & Another*, at 46.

800. *Id.*

801. *Id.*

802. *Id.*

803. *Id.*

> provisions in the Constitution for exceptional circumstances. It is an absolute prohibition in line with the provisions of Article 21(2) of the [African Child Charter]. The prohibition affects any kind of marriage whether based on civil, customary or religious law.[804]

Thus, argued Justice Malaba, "a child has acquired a right to be protected from any form of marriage."[805] The applicants, noted Malaba DCJ, "contended further that as a result of the coming into force of s 78(1) as read with s 81(1) of the Constitution, child marriage has been abolished in Zimbabwe."[806] The justice also noted that

> [t]he argument advanced on behalf of the applicants is that because the executive and legislative branches of government failed to take legislative measures to repeal s 22(1) of the Marriage Act, it has continued to provide the ghost of legitimacy to child marriages entered into after 22 May 2013.[807]

Malaba DCJ then cited statistical data that show that "26.2 percent of young people aged 15–19 years were in marriage of which 24.5 percent were females and only 1.7 percent males."[808]

Justice Malaba then noted that "[t]he rule of invalidity of a law or conduct is derived from the fundamental principle of the supremacy of the Constitution"[809] as made possible by section 2(1) of the Constitution of Zimbabwe.[810] Malaba DCJ then noted that "[t]he principle of constitutionalism requires that all laws be consistent with the fundamental law to enjoy the legitimacy necessary for force and effect. It is for this Court to give a final and binding decision on the validity of legislation."[811]

Malaba DCJ then cited to *Ferreira v. Levin*, a case of the Constitutional Court of South Africa, in which Ackerman J held as follows:

---

804. *Id.* at 46–47.
805. *Id.* at 47.
806. *Id.*
807. *Id.*
808. *Id.*
809. *Id.* at 48.
810. *Id.* Section 2(1) of the Constitution of Zimbabwe states as follows: "The Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency." CONSTITUTION OF ZIMBABWE (AS AMENDED UP TO 7TH MAY, 2021), s.2(1).
811. *Id.*

> The Court's order does not invalidate the law; it merely declares it to be invalid. It is a very seldom patent, and in most cases is disputed, that pre-constitutional laws are inconsistent with the provisions of the Constitution. It is one of this Court's functions to determine and pronounce on the invalidity of laws, including Acts of Parliament. This does not detract from the reality that pre-existing laws either remained valid or became invalid upon the provisions of the Constitution coming into operation.[812]

In addition, stated Ackerman J in *Ferreira v. Levin*, "[a] pre-existing law which was inconsistent with the provisions of the Constitution became invalid the moment the relevant provisions of the Constitution came into effect."[813] Justice Malaba then noted that "Section 78(1) as read with s 81(1) of the Constitution [of Zimbabwe] sets forth the principle of equality in dignity and rights for girls and boys, effectively prohibiting discriminatory and unequal treatment on the ground of sex or gender" and that "[c]onsistent with Article 21(2) of the [African Child Charter], section 78(1) of the Constitution abolishes all types of child marriage and brooks no exception or dispensation as to age based on special circumstances of the child."[814]

The justice argued further that

> Section 78(1) of the Constitution permits of no exception for religious, customary or cultural practices that permit child marriage, nor does it allow for exceptions based on the consent of a public official, or of the parents or guardian of the child. When read together with s 81(1) of the Constitution, s 78(1) has effectively reviewed local traditions and customs on marriage.[815]

Most importantly, noted Justice Malaba, "[t]he legal change is consistent with the goals of social justice at the centre of international human rights standards requiring Zimbabwe to take appropriate legislative measures, including constitutional provisions, to modify or abolish existing laws, regulations, customs and practices inconsistent with the fundamental rights of the child."[816]

---

812. *Ferreira v. Levin & Others*, [1995] ZACC 13; 1996 (1) SA 984 (CC), para. 27.
813. *Mudzuru & Another*, at 49.
814. *Id.*
815. Mudzuru & Another, at 49.
816. *Id.*

After noting that no law which authorizes child marriage can be said to do so in the best interests of the child, Malaba DCJ then declared that "[t]he best interests of the child would be served, in the circumstances, by legislation which repealed s 22(1) of the Marriage Act."[817] In addition, argued Justice Malaba, "[b]y exposing girl children to the horrific consequences of early marriage in clear violation of their fundamental rights as children s 22(1) of the Marriage Act is contrary to public interest in the welfare of children."[818] Thus, argued Malaba DCJ, "[f]ailure by the State to take such legislative measures to protect the rights of the girl child when it was under a duty to act, denied the girl children subjected to child marriages the right to equal protection of the law."[819]

In response to the respondents' contention that marriage under section 22(1) of the Marriage Act is justified on the ground that "a girl physiologically, psychologically and emotionally matures earlier than a boy," Malaba DCJ cited to pronouncements of the Inter-African Committee on Traditional Practices Affecting the Health of Children, which give

> the rationale for international human rights law setting eighteen years as the minimum age for marriage, as being that a girl aged below 18 years is invariably, physically, physiologically and psychologically immature to shoulder the responsibilities of marriage and child bearing. The horrific consequences of child marriage are clear testimony to the flaw in the respondents' argument.[820]

Malaba DCJ then recalled the CEDAW Committee's General Recommendation No. 21 at paragraph 38, which deals with the "physical and intellectual development" of boys and girls.[821] The justice then stated that "s 22(1) of the Marriage Act assumed, incorrectly that girls have a different rate of intellectual development from boys or that their stage of physical and intellectual development at marriage is immaterial."[822] Justice Malaba then argued that the respondents had "failed to appreciate that it is not the circumstance or condition of the child that is the

817. *Id.* at 50.
818. *Id.*
819. *Id.*
820. *Id.* at 51.
821. CEDAW Committee, CEDAW *General Recommendation No. 21*, *supra* note 757, at art. 16(2).
822. *Mudzuru & Another*, at 51.

determinant factor when the effect of s 78(1) of the Constitution on legislation is considered" and that "[s]ection 78(1) has the effect of protecting every child equally regardless of his or her personal condition."[823] More importantly, argued Malaba DCJ, "[s]ection 78(1) entitles a girl and a boy to equal protection and treatment before the law."[824]

After noting that a child cannot found a family, Justice Malaba then delivered the relief that the applicants sought. Specifically, he declared as follows:

> The applicants have succeeded in showing that s 78(1) of the Constitution sets 18 years as the minimum age of marriage in Zimbabwe. They have also succeeded in showing that s 22(1) of the Marriage Act and any law, custom and practice which authorises child marriage is unconstitutional. That would include the Customary Marriages Act [*Chapter 5; 07*] to the extent that it authorizes child marriage.
>
> The duty of the Court is to declare legislation which is inconsistent with the Constitution to be invalid. Section 175(6)(b) of the Constitution gives the Court a discretion to make an order that is just and equitable, including an order limiting the retrospective effect of the declaration of invalidity. In the exercise of its discretion, the Court is cognisant of the immense disruption that a retrospective declaration of invalidity may cause on the persons who conducted themselves on the basis that the legislation was valid. The Court has found it in the public interest to make the order granted to have effect from the date of issue.
>
> Notwithstanding the spirited opposition the respondents put up to the application for the relief to be granted, the Court finds that no good reasons were shown for an order of costs against the respondents. The application raised questions of national importance, the answers to which were not so obvious. The litigation really concerned the ending of the problem of child marriage.[825]

Using international and foreign comparative law as an interpretive aid and adopting a purposive approach, the Constitutional Court of Zimbabwe declared unconstitutional section 22(1) of the Marriage Act and any law, custom, and practice which

---

823. *Id.* at 51–52.
824. *Id.* at 52.
825. *Id.* at 54–55.

authorizes child marriage, including parts of the Customary Marriages Act [*Chapter 5: 07*].[826]

CONCLUSION

Since the end of World War II and the founding of the United Nations, international human rights law has become the definitive foundation and the minimum standard for the recognition and protection of human rights at both the international and national levels. That human rights would be the cornerstone and guiding light of the post-war global economic, political and social order was made evident in the UN Charter, the UN's founding document.[827] For example, Article 1(3) of the UN Charter states that one of the purposes of the United Nations is: "To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."[828]

On December 10, 1948, the UN General Assembly adopted the UDHR, an international instrument that was specifically designed to enshrine the fundamental rights and freedoms of all human beings.[829] Today, the UDHR is generally regarded as an important foundational text in the history of human rights. In the UDHR's Preamble, Member States of the UN recognize "the inherent dignity of the equal and inalienable rights of all members of the human family" as the "foundation of freedom, justice and peace in the world."[830] In addition, the UDHR notes that "disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind" and that "the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people."[831]

In the Charter of the United Nations, it is declared that the peoples of the United Nations have in the Charter reaffirmed

826. *Id.*

827. Ursula Tracy Doyle, *Strange Fruit at the United Nations*, 61 HOW. L. J. 187, 189 (2018) (noting the UN Charter is the UN's "founding document").

828. UN Charter, at art. 1(3).

829. G.A. Res. 217 (III) A.

830. *Id.* at pmbl.

831. *Id.*

their "faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women [and have determined] to promote social progress and better standards of life in larger freedom."[832] Although the UDHR does not have the legal status of a human rights treaty, it has received "favorable treatment in many domestic legal systems"[833] and in addition, over the years, many international legal scholars have advanced arguments to the effect that "all or parts of [the UDHR should be viewed] as legally binding, either as a matter of customary international law or as an authoritative interpretation of the UN Charter."[834]

Since the adoption of the UDHR, the international community has adopted other international instruments designed to recognize and protect human rights. Among these are the International Bill of Human Rights,[835] the UN Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination against Women, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[836] Many regions of the world also have instruments that are designed to recognize and protect human rights. Africa's human rights instruments include the (1) African Charter on Human and Peoples' Rights; (2) African Charter on the Rights and Welfare of the Child; and (3) Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa. In addition to being States Parties to these regional human rights instruments, most countries in Africa are also States Parties to the core international human rights instruments.

Since international human rights instruments do not automatically confer rights that are justiciable in national courts, each African country must domesticate the international human rights instruments and create rights that are justiciable in its domestic courts. During most of the post-independence period in

---

832. UN Charter, at pmbl.

833. Mbaku, *Protecting Human Rights*, *supra* note 152, at 21.

834. HENRY J. STEINER ET AL., INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 152 (2008).

835. The International Bill of Human Rights consist of the UDHR, ICCPR, ICESCR, the Optional Protocol to the ICCPR, and the Second Optional Protocol to the ICCPR.

836. There are nine (9) core international human rights instruments. *See* UNHCHR, The Core Human Rights Instruments, *supra* note 124 (listing the core international human rights instruments and their monitoring bodies).

Africa, most countries have struggled with recognizing and protecting human rights, especially those of vulnerable groups, such as girls and women, and ethnic and religious minorities.[837] This is evidenced by gross human rights violations by both state and non-state actors and these include the Rwandan Genocide, atrocities committed by extremist groups, such as Boko Haram, al-Qaeda in the Islamic Maghreb, Al-Shabaab, and the Lord's Resistance Army.[838]

Since many African countries have not yet domesticated the core international human rights instruments and created rights that are justiciable in domestic courts, "there is a limitation on the ability of international law to positively impact the protection of human rights" in these countries.[839] This is especially important in two areas: (1) when there is a conflict between the provisions of international human rights instruments and domestic or national legislation; (2) when customary law and traditional practices conflict with international human rights instruments or customary international law.[840] This Article argues that the most effective cure for African countries that have not yet created rights that are justiciable in domestic courts, is to sign and ratify the relevant international human rights treaties and then domesticate them. In the meantime, however, national judiciaries, especially if there is a system of separation of powers that guarantees judicial independence, can provide a cure, albeit a temporary one, for this problem. Within such a system, the independent judiciary can "use its interpretive powers to interpret national laws [including the constitution] in light of international human rights norms."[841]

Throughout the continent, independent and progressive judiciaries "are already taking advantage of their ability and right to interpret the constitution and determine the constitutionality of all the country's laws, including customary laws, to strike

---

837. *See generally* John Mukum Mbaku, *The Rule of Law and the Exploitation of Children*, 42 HASTINGS INT'L & COMP. L. REV. 287, 367 (2019) (examining the challenges of protecting the rights of children in post-independence Africa).

838. Rajen Harshé, *Burgeoning Terrorism in Africa: A Critical Overview*, OBSERVER RSCH. FOUND. (Sept. 28, 2021), https://www.orfonline.org/expert-speak/burgeoning-terrorism-in-africa-a-critical-overview/ (providing an overview of terrorist organizations operating in Africa).

839. Mbaku, *Protecting Human Rights*, *supra* note 152, at 34.

840. *Id.* at 35.

841. *Id.*

down laws that they determine are not in line with the national constitution or international human rights norms."[842] After providing an overview of the importance of judicial independence to the protection of human rights in Africa, this Article examined cases from Tanzania, South Africa, and Zimbabwe to show how judiciaries in these countries are using their interpretive powers to declare unconstitutional statutes and customary laws that violate human rights.

In *Ephrahim v. Pastory*, the High Court of Tanzania at Mwanza adopted the purposive approach to interpretation and employed international and comparative case law as an aid to interpretation to declare unconstitutional, and hence, invalid, a provision of the Rules Governing the Inheritance of the Declaration of Customary Law. Writing for the High Court, Justice Mwalusanya held as follows:

> I have found as a fact that Section 20 of the Rules of Inheritance of the Declaration of Customary Law, 1963 is discriminatory of females in that unlike their male counterparts, they are barred from selling clan land. That is inconsistent with Article 13 (4) of the Bill of Rights of our Constitution which bars discrimination on account of sex. Therefore under Section 5 (1) of Act 16 of 1984 *I take Section 20 of the Rules of Inheritance to be now modified and qualified such that males and females have now equal rights to inherit and sell clan land*.[843]

In *The State v. Makwanyane & Another*, the Constitutional Court of South Africa also adopted the purposive approach to interpretation. And, using international and comparative case law as a tool of or aid in interpretation, the Court declared invalid "paragraphs (a), (c), (d), (e) and (f) of *section* 277(1) of the Criminal Procedure Act, and all corresponding provisions of other legislation sanctioning capital punishment which are in force in any part of the national territory in terms of *section* 229."[844]

Finally, in a case from Zimbabwe, the Constitutional Court employed international and comparative law as an interpretive tool and adopted a purposive approach to interpretation to declare unconstitutional section 22(1) of the Marriage Act and any

---

842. *Id.*

843. *Ephrahim v. Pastory* (2001) AHRLR 236 (TzHC 1990), ¶ 42. Emphasis added.

844. *State v. Makwanyane & Another*, 1995 (3) SA 391 (CC) (S. Afr.), para. 151.

law, custom and practice which authorizes child marriage, and this includes the Customary Marriages Act [*Chapter 5: 07*] to the extent that it authorizes child marriage.

How well an African State enforces laws that protect human rights is dependent, to a large extent, on the quality of the State's governance institutions. Even if a country domesticates international human rights instruments and creates rights that are justiciable in domestic courts, those rights might still remain under threat of being violated if the courts are either unwilling or do not have the capacity to enforce them. Hence, in addition to domesticating international human rights instruments, as well as bringing customary laws and traditional practices into line with international human rights law, each African State must provide itself with a governing system undergirded by the rule of law. At the very minimum, such a governing system must be characterized or undergirded by the separation of powers with effective checks and balances, including an independent judiciary, a robust civil society, a bicameral legislature, with each chamber exercising an absolute veto over legislation enacted by the other, and a free and independent press. Such a governing system would minimize impunity and ensure that both state and non-state actors who engage in behaviors and practices that violate the fundamental rights of citizens are fully prosecuted and brought to justice.