

VIII. FRANCOPHONE AFRICA

For the first time, with this edition, the *Legal Grounds* series of publications includes some Francophone court decisions dealing with sexual and reproductive rights. This addition reflects the legal pluralism that characterises the African continent.

Indeed, because of its colonial heritage, Africa knows different legal systems that can be schematically classified into two broad categories of legal traditions. The English-speaking countries generally follow the Common law tradition, while the French-speaking countries, and, by extension, the Portuguese-speaking countries, follow the Romano-Germanic tradition, also known as the civil law tradition. The main difference between the two systems is that in the common law tradition, precedents – published court decisions – are the primary sources of law that guide judges in decision-making, while in the civil law tradition, judges rely primarily on codified statutes.

The inclusion of Francophone decisions greatly enriches this publication, although it does generate some challenges. Indeed, one of these challenges resulted from the difficulty in accessing copies of the judgments to abstract. One explanation might be the relatively low importance placed on judicial precedents by the judges in the civil law system. Another reason, however, is the broader and well-known context of the lack of availability of judicial documents, whether electronically or even on paper, in Africa. Extensive research thus does not guarantee a successful harvest. Nevertheless, the few cases that have been obtained for this publication provide some insight into how the civil law tradition has addressed sexual and reproductive rights in its courts.

The first two cases, delivered by the Constitutional Court of Benin, concern the constitutionality of legislative provisions that were challenged as discriminatory on the basis of sex. In the first case, the law provided a gendered definition of adultery. In the second case, the Court had to decide whether allowing polygyny, but not polyandry, rendered the law unconstitutional. The third case, delivered by the Court of Appeals in Niamey, Niger, concerned a case of alleged infanticide where the Court had to distinguish the offence from that of abortion.

Some other court decisions from other Francophone countries are worth mentioning, even though their content could only be known through secondary sources. Indeed, they help to paint a picture of the sexual and reproductive rights issues raised before Francophone courts. The scope that is explored seems rather large. It covers issues such as the deliberate transmission of HIV to a partner,¹⁰⁷ sexual violence such as rape, the recognition of a person's sexual identity, and the criminal repression of homosexuality.

Among these secondary sources, for example, we find a report¹⁰⁸ by Lawyers without Borders, published in 2010, which analyses three decisions¹⁰⁹ from high courts of the Democratic Republic of the Congo, about sexual violence. From an information bulletin of the Tunisian Health Law Society, we learn of a Tunisian court that authorised change of name and gender on a birth certificate to reflect someone's sexual identity:

Born with the appearance and anatomical features of a female child, Fatma, the applicant, noticed at puberty relatively visible differences that distinguished her from her sisters and her fellow female students. Suffering from the ambiguity of the situation, Fatma finally underwent genetic testing to determine actual sex. An expert medical report described the case of Fatma Mlaieh as ‘male pseudo-hermaphroditism.’ On this basis, [Fatma] entered the Court of First Instance of Tunis to obtain leave to amend the birth certificate to change the name to Mohamed Ali. The judge deferred to the medical report and issued a laconic judgment authorizing the applicant to change the name and gender on the birth certificate.¹¹⁰

Finally, articles published online show the criminal repression of homosexuality in Cameroon, illustrated in the cases of “Jonas and Franky” and “Roger Mbede.” Both cases are currently pending before the Supreme Court of Cameroon. The “Jonas and Franky” case is about two young people, considered men by the Court, convicted of homosexuality after having been found wearing women’s clothes and make-up, and drinking Bailey’s liqueur (which the judge considered a woman’s drink). They were sentenced to five years’ imprisonment, but acquitted on appeal after one year in prison.¹¹¹ The Government has appealed to the Supreme Court. Roger Jean-Claude Mbede was found guilty of homosexual conduct after he sent a text to a man saying “I am very much in love with you.” The Court of Appeal upheld his conviction. Mbede has since died, but an appeal to Supreme Court has been made by his lawyer.¹¹²

Many African countries have recently adopted progressive constitutions that include a Bill of Rights. We can observe a move to leave behind obscurantist traditional rules and customs in order to recognise the universal human rights norms codified in various international instruments. This can point towards the progressive realisation of every person’s human rights on the African continent. For example, while the penal codes of Burundi and Tunisia criminalise homosexuality,¹¹³ the constitutions of both states recognise the rights to physical integrity and human dignity,¹¹⁴ as well as strict conditions as to the limitation of rights and freedoms.¹¹⁵ The gap between the constitutional recognition of rights and their realisation opens a space for opportunities in which constitutional advocacy can play the role of a catalyst for change. The three decisions summarised below therefore offer hope that Francophone courts, as well as the rest of Africa, will continue to advance towards the full realisation of sexual and reproductive rights.

ADULTERY

Decision DCC 09-081 of July 30, 2009
Benin, Constitutional Court

COURT HOLDING

The Constitutional Court of the Republic of Benin declares that sections 336 to 339 of the Penal Code of Benin, which criminalise adultery, are unconstitutional because they discriminate on the basis of sex.

Summary of Facts

This is the case of a constitutional trial of provisions of the Penal Code in the context of an ordinary trial. Specifically, the unconstitutional exception raised before the Cotonou Court of First Instance arises from the following context: In February 2007, Ms. Nelly HOUSSOU come before Porto-Novo's Trial Court in order to obtain a divorce on the grounds of serious abuse and mistreatment. The husband responds by bringing his wife before a criminal judge of the Cotonou Court of First Instance – more than a year after her application for divorce – accusing her of committing adultery. “While the procedure initiated by the wife had recorded no useful hearing because of the empty-chair policy adopted by the defendant [i.e. the husband's refusal to attend court hearings], the procedure instituted by the husband was conducted full speed ahead. The goal was simple: to get a criminal judgment noting the wife's adultery, and to have it added to the Porto-Novo file in order to obtain a divorce blaming solely the wife.”¹¹⁶ Therefore, on May 15, 2009, Ms. HOUSSOU and her alleged accomplice, Mr. Akanbi Kamarou AKALA, file, through their lawyers, a request to the Constitutional Court. The applicants claim that the provisions mentioned above are unconstitutional in that they constitute a different legal regime according to whether a man or a woman commits adultery.

Applicants' argument

Through the objection raised before the Cotonou Court of First Instance, the applicants submit that sections 336 to 339 of the Penal Code are contrary to the principle of equality guaranteed by section 26 of the Constitution of Benin and sections 2 and 3 of the African Charter on Human and Peoples' Rights. The alleged incompatibility between the provisions would result from the more favourable conditions for the man than for the woman, which are demonstrated in three different aspects: first, the elements of the offence, then, its prosecution, and lastly, the penalty incurred.

Issues

Whether sections 336 to 339 of the Penal Code are unconstitutional for infringing upon the principle of equality.

Decision of the Court

For the Constitutional Court of Benin, a reading of the challenged legal provisions shows that they have established a disparity of treatment between men and women as to the elements of the crime of adultery. Specifically, the Court notes that while the husband's adultery may be punished only when committed in the marital home, the woman is punished regardless of where the act is committed. Consequently, the Constitutional Court declares sections 336 to 339 to be unconstitutional.

Significance

The July 30 decision shows a constitutional court ingeniously open to current realities of the world and to the desired changes in a society concerned with the protection of human rights. Thus, the Court states that the criminalization or non-criminalization of adultery are not contrary to the Constitution, but that any different treatment between men and women who commit adultery is contrary to sections 26, 2, and 3 of the African Charter on Human and Peoples' Rights. In Benin,

the African Charter became law upon ratification and is of greater normative value than domestic laws.¹¹⁷ Consequently, this decision gets the provisions criminalizing adultery out of Beninese positive law. Since the date of the decision, no one can be prosecuted and convicted on the basis of the provisions that have been declared unconstitutional.

However, what the Constitutional Court of Benin censures is not the repression of adultery, but simply the fact of repressing it in a discriminatory manner. The distinction is important because it helps put the scope of the decision into perspective. We can thus assume that it is still possible for the Beninese legislature to criminalise adultery and even impose imprisonment as the sentence. The only limitation arising out of that decision is that it must provide the same rule for all, without discrimination between men and women. Another evaluation is also possible. One can consider this decision to be a call for the legislature to pay more attention, regarding criminal law, to certain fundamental principles such as equality and non-discrimination.

POLYGAMY

Decision DCC 02-144 of December 23, 2002
Benin, Constitutional Court

COURT HOLDING

The Constitutional Court of Benin, reviewing Law N° 2002-07 relating to the Code of Persons and Family (*Loi n° 2002-07 portant Code des personnes et de la famille*), found section 74, which relates to polygamy, unconstitutional because it discriminates on the basis of sex.

Summary of Facts

In this case, there are two applicants: the President of the Republic of Benin and Ms. Rosine VIEYRA-SOGLO, a member of Parliament.

The adoption of the Law N° 2002-07 regarding the Code of Persons and Family, on June 7, 2002, leads the President of the Republic of Benin to submit a request for review of the entire Act's compliance with the Constitution, on June 20, 2002. In parallel, the same day, Ms Rosine VIEYRA-SOGLO submits a request for the constitutional review of certain provisions of the Act.

Noting the similarities between the two applications, the Court considers them jointly and rules with a single decision.

Applicant's argument

We will only present Rosine VIEYRA-SOGLO's argument, because it is the only one to appear in the text of the decision. Before the Constitutional Court, the applicant argues that sections 126, 143, 168, 185, and 335 of the Code of Persons and Family of Benin are not in accordance with section 26 of the Constitution and sections 2, 3, and 5 of the African Charter on Human and Peoples' Rights. We

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

Issues

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

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

Decision of the Court

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

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

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

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

Significance

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

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

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

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

INFANTICIDE

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

COURT HOLDING

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

Summary of Facts

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

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

Issues

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

Decision of the Court

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

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

Ms. H. A.'s own statements, and medical expertise, the Court concluded that she had indeed given birth after nine months of a pregnancy which had progressed full term. Consequently, it could not have been an abortion.

Regarding the finding of the element of intent, the Court proceeded by cross-checking the recognised facts to characterise the infanticide: an unwanted pregnancy conceived outside of wedlock (which constituted the motive); childbirth alone without seeking assistance despite the risks involved; burial of the body of the newborn by the accused, even though burial should be done by men and according to established practices; and refusal to show the child's body in order to prevent officials from ascertaining the facts. The addition of all these elements leads the Court of Appeals of Niamey to consider the indictment of Ms. H. A. for the crime of infanticide to be appropriate.

However, with regards to Ms. F. B., accused of complicity in infanticide, the Court, basing itself on elements of the investigation, requalifies the facts alleged in the infraction of not reporting a crime. This requalification results from the observation of the weakness of the evidence of complicity.

Significance

This ruling illustrates the judge's delicate work in reaching an outcome in a family case raising social issues in an environment that is barely open to the outside world. Some facts as described by the Court are puzzling. However, the Court of Appeals was able to decide in law by specifically identifying the real legal issues raised by the case. Based on the evidence from the investigation, the Court ruled out abortion, highlighting precisely the distinction between abortion and infanticide: infanticide is the killing of a newborn child, while abortion is exercised only on the fetus. The Court's approach is also complemented and supported by expertise, both medical and psychological, regarding the accused.