



## Seychellois courts and the protection of the right to equal protection of the law

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### Abstract

Unlike the constitutions of other African countries such as Uganda, South Africa, Kenya, Mauritius, Zimbabwe and Namibia which expressly provide for grounds on which a person may not be discriminated against, the Constitution of Seychelles, although prohibits discrimination, does not provide for grounds on which a person may not be discriminate against. Article 27 of the Constitution of Seychelles provides for the right to equal protection of the law. In this article, the author analyses the jurisprudence of the Supreme Court and the Court of Appeal of Seychelles to illustrate how these courts have dealt with the following issues: defining ‘equal protection of the law’ and ‘discrimination’ and giving the grounds on which a person may not be discriminated against, alleging discrimination, *locus standi* to challenge discriminatory laws or programmes and permissible discrimination. The author recommends, inter alia, that the Constitution may have to be amended to enumerate the grounds on which a person may not be discriminated against.

### Introduction

Unlike the Constitutions of other African countries such as Uganda,<sup>1</sup> South Africa,<sup>2</sup> Kenya,<sup>3</sup> Mauritius,<sup>4</sup> Zimbabwe<sup>5</sup> and Namibia<sup>6</sup> which expressly provide for grounds on which a person may not be discriminated against, the Constitution of Seychelles, although prohibits discrimination, does not provide for grounds on which a person may not be discriminate against. Article 27 of the Constitution of Seychelles provides for the right to equal protection of the law in the following terms:

1. Every person has a right to equal protection of the law including the enjoyment of the rights and freedoms set out in this Charter without discrimination on any ground except as is necessary in a democratic society.
2. Clause (1) shall not preclude any law, programme or activity which has as its object the amelioration of the conditions of disadvantaged persons or groups.

Twomey has argued that Article 27(1) provides for ‘the right to be free from all forms of discrimination’.<sup>7</sup> In the preamble to the Constitution of Seychelles, the people of Seychelles reaffirm that the rights provided in the Constitution ‘include the rights of the

individual to life, liberty and the pursuit of happiness free from all types of discrimination'. Apart from Article 27, other constitutional provisions also prohibit discrimination.<sup>8</sup> The right to freedom from discrimination is also provided for in the regional and international human rights instruments ratified or acceded to by Seychelles.<sup>9</sup> These include the African Charter on Human and Peoples' Rights,<sup>10</sup> the African Charter on the Rights and Welfare of the Child<sup>11</sup> and the International Covenant on Civil and Political Rights.<sup>12</sup> In their endeavour to protect the right to equal protection of the law, Seychellois courts, in particular, the Supreme Court<sup>13</sup> and the Court of Appeal,<sup>14</sup> have dealt with the following issues: defining discrimination, providing for grounds on which a person may not be discriminated against, defining the concept 'equal protection of the law' and expanding the circumstances in which a person may approach court when his or her right has allegedly been violated. The purpose of this article is to analyse the jurisprudence of the Supreme Court and the Court of Appeal dealing with the above-mentioned endeavours and suggest ways in which the right to equal protection of the law may be better protected in Seychelles. The author will start with the definition of discrimination.

Defining 'equal protection of the law' and 'discrimination' and giving the grounds on which a person may not be discriminated against Unlike the constitutions of Uganda<sup>15</sup> and Mauritius,<sup>16</sup> for example, the Constitution of Seychelles does not define the term 'discrimination'. The Constitution does not also define or describe what 'equal protection of the law' means. The task to give meaning to these phrases has been undertaken by courts. The author will first examine the courts' attempt to define or describe the concept of 'equal protection of the law'. In *Bradburn & Anor v. Superintendent of Prisons & Anor* case the Supreme Court (sitting as a Constitutional Court) held that

[T]he Constitutional principles of "Equality before law" and "Equal Protection of Laws" emanate from two different concepts. The first is a negative concept which ensures that there is no special privilege in favour of anyone; that all are equally subject to the ordinary law of the land. All are equal before law and that no person, whatever be his rank or condition, is above the law ... The second concept "equal protection of laws" is positive in content. It does not mean that identically the same law should apply to all persons, or that every law must have universal application within the country irrespective of difference in circumstances. Equal protection of law does not mean or postulate equal treatment of all persons without distinction. What it postulates is the application of same laws alike and without discrimination to all persons similarly situated. It denotes equality of treatment in equal circumstances. It implies that among equals the law should be equal and equally administered, that like should be treated alike without discrimination. In other words the equals should be treated equally.<sup>18</sup>

However, the Constitutional Court and the Supreme Court<sup>19</sup> appear to have different understandings of the principle of 'equal protection of the law'. For example, in *Intershore*

*Banking Corporation Ltd v. The Central Bank of Seychelles*,<sup>20</sup> the Supreme Court observed that ‘Article 27 provides for the right to the equal protection of the law, that is, that all laws are applied equally to all people without discrimination’.<sup>21</sup> This interpretation equates ‘equality before the law’ with ‘equal protection of the law’ and consequently blurs the distinction between the two as drawn by the Constitutional Court above.

As mentioned above, the Constitution of Seychelles, unlike those of other African countries, is silent on the grounds on which a person may not be discriminated against. This could explain why some applicants have not mentioned grounds on which they have been discriminated against.<sup>22</sup> As a result, courts have had to define ‘discrimination’ and also come up with a list of the grounds on which a person may not be discriminated against. In *Hackl v. Financial Intelligence Unit*,<sup>23</sup> the petitioner argued that one of the sections of the anti-money laundering legislation was contrary to Article 27 of the Constitution and, therefore, unconstitutional because it granted ‘unfettered discretion to the Attorney-General not to take any action against any person in respect of an act that occurred outside of Seychelles’.<sup>24</sup> In rejecting that argument, the Supreme Court referred to Article 27 of the Constitution and held that

In order to claim to be the victim of discrimination under article 27 it is imperative that you provide a ground, or ‘any ground’ upon which you have suffered discrimination and therefore not offered equal protection of the law as available to other people. Discrimination denotes being treated differently, and often to one’s detriment, from others on the basis of a certain ground. The provisions set out above do not define or set out the grounds upon which discrimination is not permitted. It bars discrimination on any ground whatsoever without cataloguing a list of such grounds. If one alleges infringement of that provision it is necessary to assert, at the same time, the ground upon which one has suffered discrimination. Is it sex, sexual orientation, gender, race, colour, religion, age, height, or some other ground? It appears to me that the ground upon which someone has suffered discrimination must be articulated. The petitioner has not shown on its petition and supporting affidavit how he has been treated differently and to his detriment, by the Attorney General from persons who are in his situation or other citizens of Seychelles or those with dual nationality and thus denied equal protection of the law. Neither has he alleged a ground upon which he has been treated differently. Was it based on sex, colour, religion, nationality, or age? There must be a ground upon which the discrimination is alleged to have been based. The petitioner’s claim under this head is entirely without merit.<sup>25</sup>

The following should be noted about the Court’s reasoning above. Firstly, for an argument that a person has been discriminated against to succeed, the person has to point out the ground on which he has been discriminated against. Because the Constitution does not provide for those grounds, the person has to look for those grounds from somewhere else. It is argued that this ruling could open doors for people to allege any ground of discrimination

which is not prohibited in Seychellois law or in any regional or international human rights instrument ratified or acceded to by Seychelles. It is submitted that in the light of the fact that Article 27 does not enumerate the grounds against which a person may not be discriminated against, the prohibited grounds should be found in Seychelles national legislation or in international human rights instruments ratified or acceded to by Seychelles. There are pieces of legislation<sup>26</sup> and regional<sup>27</sup> and international human rights instruments<sup>28</sup> that have been ratified by Seychelles which provide for grounds on which a person may not be discriminated against. It should be recalled that Article 48 of the Constitution guides courts on the question of the approach to take in interpreting the rights in the Constitution. It is to the effect that

This Chapter shall be interpreted in such a way so as not to be inconsistent with any international obligations of Seychelles relating to human rights and freedoms and a court shall, when interpreting the provision of this Chapter, take judicial notice of – (a) the international instruments containing these obligations; (b) the reports and expression of views of bodies administering or enforcing these instruments; (c) the reports, decisions or opinions of international and regional institutions administering or enforcing Conventions on human rights and freedoms; (d) the Constitutions of other democratic States or nations and decisions of the courts of the States or nations in respect of their Constitutions.

Article 48 gives Seychellois a very large pool from which to draw authorities when interpreting the rights in the Constitution. The Supreme Court held that Article 48 is only applicable when the interpretation of a constitutional provision is in issue.<sup>29</sup> However, the application of Article 48 is not without its challenges. In *Platte Island Villa Resort Ltd v. EME Management Services Ltd*,<sup>30</sup> the Court of Appeal held that

Interestingly, the Constitution of the Republic of Seychelles makes special mention of the doctrine of judicial notice in its Article 48 which provides that the rights enshrined in Chapter III shall be interpreted in such a way as not to be consistent with any international obligations of Seychelles relating to human rights and freedoms and a Court shall, when interpreting the provision of this Chapter, take judicial notice of the Constitutions of other democratic States or nations in respect of their Constitutions ... The only difficulty with the application of this provision is how should the courts take judicial notice in any particular case that such and such a country is a democratic state.<sup>31</sup>

The Court of Appeal held that Seychellois courts refer to the decisions of courts from other countries ‘not for the purposes of precedents but for the sake of taking judicial notice thereof’.<sup>32</sup> Relying on Article 48,<sup>33</sup> Seychellois Courts have referred to regional and international human rights in interpreting the rights in the Constitution including the right to freedom from discrimination.<sup>34</sup> For example, in *Gill v. Registrar of Political Parties*,<sup>35</sup> the Court held that the Registrar of Political Parties had made the correct decision in

refusing to register a political party whose main objective was to propagate racial discrimination in Seychelles. In substantiating its judgment, the Court reasoned that

The purpose or object of [the political party in question] is not only unlawful and inconsistent with the Constitution and other laws of Seychelles but also it is repugnant to the Universal Declaration of Human Rights 1948 and International Convention on the Elimination of All Forms of Racial Discrimination 1965. The Universal Declaration of Human Rights proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set out therein, without distinction of any kind, in particular as to race, colour or national origin. All human beings are equal before the law and are entitled to equal protection of the law against any discrimination and against any incitement to discrimination. Any doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous, and there is no justification for racial discrimination, in theory or in practice, anywhere; the discrimination between human beings on the grounds of race, colour or ethnic origin is an obstacle to friendly and peaceful relations among nations and is capable of disturbing peace and security among peoples and the harmony of persons living side by side even within one and the same State; the existence of racial barriers is repugnant to the ideals of any human society and civilization.<sup>36</sup>

In this case, the Court limits the grounds on which the person may not be discriminated against to those enumerated in international human rights instruments. In *Brioche & Ors v. Attorney-General & Anor*,<sup>37</sup> the Supreme Court referred to Article 27 of the Constitution and held that

Equal protection is often invoked in respect of a person or groups of people who are denied certain rights and freedoms in preference to other persons on some clear ground as the basis for different treatment. The ordinary grounds of discrimination being race, gender, sex, religion, colour, age, disability, or any other ground. Contravention of art 27 would have to be linked not only to a denial of a right or freedom under the charter to the petitioners which another similarly situated person or persons are allowed to enjoy on account of a ground such as race, gender, sex, religion, colour, age, political or other opinion or persuasion, language, ethnicity, national or social group or any other recognisable ground.<sup>38</sup>

In his separate concurring judgment in *In Roger Mancienne v. The Attorney General*,<sup>39</sup> Venchard J.A held that The objection raised by [the appellant's lawyer that the relevant piece of legislation was discriminatory and therefore unconstitutional for allowing the executive to grant immunity from prosecution to some foreign investors] is misconceived. It stems from the erroneous belief that Article 27 of the Constitution creates an absolute right of equality. I readily concede that the courts can sanction any discrimination which

impinges on the fundamental rights of the citizen enshrined in the Constitution or on grounds of sex, race or religion. The appellant does not however invoke any of these grounds.<sup>40</sup>

The above jurisprudence shows different grounds on which a person may not be discriminated against are mentioned in different judgments. It is argued that it would be extending the ambit of Article 27 too far to interpret it as accommodating any ground in the world against which a person may not be discriminated against. Seychelles may not be at that stage where discrimination based on some grounds should be prohibited. For example, the Court's holding that sexual orientation is one of the grounds against which a person may not be discriminated is not supported by Article 32 of the Constitution which prohibits same-sex marriages.<sup>41</sup> The second point to note about the Supreme Court's decision in *Hackl v. Financial Intelligence Unit*<sup>42</sup> is that the Court attempts to define discrimination as 'being treated differently, and often to one's detriment, from others on the basis of a certain ground'. It is argued that the above definition of discrimination would have been enriched had the Court referred to international human rights instruments in which 'discrimination' has been defined. Apart from a general definition of discrimination, Seychelles is required to enact legislation that defines discrimination against women. While commenting on the combined initial to fifth periodic reports of Seychelles, the Committee on the Elimination of Discrimination against Women was 'concerned about the absence of a specific definition and prohibition of discrimination against women in all areas of life in the Constitution or in other appropriate legislation, in line with Articles 1 and 2 of the Convention'.<sup>43</sup> In *Roger Mancienne v. The Attorney General*,<sup>44</sup> the Court of Appeal held that

[i]n terms of Article 27(1), the right to equal protection of the law inheres in every person. The substance of the right is that except as permitted by law which is in accord with the Constitution every person has a right to equal treatment by the law.<sup>45</sup>

### **Alleging discrimination**

Although Article 27(1) does not enumerate grounds on which a person may not be discriminated against, some people have gone to court and argued that they have been discriminated against. Cases in which people have alleged discrimination show that they have adopted different approaches. In the first approach, the applicants have not mentioned the grounds on which they have been discriminated against. For example, in *Republic v. Bibi*,<sup>46</sup> the applicant's application for bail had been dismissed because of the seriousness of the offence (murder) he had allegedly committed. In declining to release the applicant on bail, the Court held that

In Seychelles the offences of murder and treason were brought under the general category of "serious offence" so that those offenders would not be singled out for discrimination in terms of the right to equal protection of the law. Hence the Court is now able to use its discretion generally. But although the death penalty has been abolished in Seychelles, the

possibility of an accused faced with a possibility of a sentence of life imprisonment absconding cannot be underestimated.<sup>47</sup>

In this case, the Court is silent on the ground on which the accused could have been discriminated against by a judicial officer for the purpose of bail application. In *Talma v. Michel*,<sup>48</sup> the petitioners submitted before the Constitutional Court that the government's refusal to allow them to construct a hotel at one of the islands in Seychelles contravened, among others, their right under Article 27 of the Constitution because 'other owners and developers have been granted permission to construct two restaurants' on the same island.<sup>49</sup> In their submissions, the respondents argued, inter alia, that the petitioners' right to equal protection of the law from discrimination under Article 27 of the Constitution has not been contravened as the petitioners have not been treated any differently from the owners of land at [the island] in similar circumstances.<sup>50</sup>

The Court found that there was no evidence to show that the petitioners had 'suffered any discrimination contrary to Article 27 of the Constitution on the facts before this court'.<sup>51</sup> There are at least two observations to make about this case. Firstly, the petitioner did not mention the ground on which he had been discriminated against. Neither the prosecutor nor the Court paid attention to this omission. Secondly, the Court does not motivate why it came to the conclusion that there was no evidence that the respondent's conduct had violated the petitioners' right under Article 27. This was the case although both the petitioner and the respondent made submissions of this issue. One would have expected the Court to explain the basis for its conclusion to the effect that the facts before it did not show that the respondent had violated Article 27. In *Brioche & Ors v. Attorney-General & Anor*,<sup>52</sup> the Supreme Court held that for a petition in terms of Article 27 of the Constitution to succeed, the petitioner must allege a ground on which he has been discriminated against.<sup>53</sup> The second approach, as will be shown in the jurisprudence below, is for applicants to allege a specific ground on which they have allegedly been discriminated against.

*Locus standi* to challenge discriminatory laws or programmes Article 46 of the Constitution provides for the procedure to be followed in challenging the constitutionality of any law that violates any right in the Constitution. Article 46 states that:

1. A person who claims that a provision of this Charter has been or is likely to be contravened in relation to the person by any law, act or omission may, subject to this article, apply to the Constitutional Court for redress.
2. An application under clause (1) may, where the Constitutional Court is satisfied that the person whose right or freedom has been or is likely to be contravened is unable to do so, be made by another person acting on behalf of that person, with or without that person's authority.

The Constitutional Court held that '[i]t is apparent on a reading of article 46(1) that it refers to two types of contraventions. Contraventions that have taken place and contraventions that

may take place'.<sup>54</sup> In *Herminie & Anor v. Pillay & Ors*,<sup>55</sup> the Constitutional Court held that the right under Article 46(1) of the Constitution is absolute because 'this is not subject to any other provisions of the Constitution. Article 46(1) is subject to the very article itself. The Constitution does not further curtailed [sic] or limit the absolutism of this right of action'.<sup>56</sup> The Constitutional Court will not entertain an application when it is 'satisfied that the applicant has obtained redress for the contravention under any law and where the applicant has obtained redress in the Constitutional Court for any matter for which an application may be made under clause (1)'.<sup>57</sup> For a person to approach the Constitutional Court, his or her right should not have been 'extinguished by statutory limitation' or 'time barred' and he/she should follow the Court's rules.<sup>58</sup> Article 46(5) provides for the various remedies that the Constitutional Court may award. In terms of Article 46(8), if a person who appears before the Constitutional Court alleging a contravention of a right or risk of contravening a right in the Charter 'establishes a prima facie case, the burden of proving that there has not been a contravention or risk of contravention shall, where the allegation is against the State, be on the State'.<sup>59</sup> At least two points should be noted about Article 46 at this stage. Firstly, an application alleging a contravention of a right or a risk of contravening a right in the Charter has to be brought by the victim or potential victim or on behalf of the victim or potential victim. This approach should be distinguished from the one adopted in countries such as Uganda where such applications do not have to be brought by the victim or on behalf of the victim.<sup>60</sup> Secondly, where an applicant has established a prima facie case, the burden is on the state to prove that there has not been a violation. This means that all the applicant has to do is to establish a prima facie case and then the state must prove that there has not been a contravention or a risk of contravention. The applicant does not have to prove that there has been a contravention or risk of contravention.<sup>61</sup> However, Article 46(8) is silent on the issue of the burden of proof in case an application has been brought against a private individual. It should be remembered that the rights in the Constitution may be violated by both the state and private persons.<sup>62</sup> For example, the Supreme Court observed that Islam does not permit a husband to discriminate against his wife.<sup>63</sup> It should also be remembered that the Constitutional Court held in *Herminie & Anor v. Pillay & Ors*,<sup>64</sup> a person can file a petition before the Constitutional Court against any person who has allegedly breached the Constitution.<sup>65</sup> It is argued that in case it is alleged that a private individual violated a constitutional right, it is the applicant to prove, on a balance of probabilities, that there has been a violation. In *Ah-Man v. Government of Seychelles and Others*,<sup>66</sup> the Supreme Court referred to Article 27(1) of the Constitution and held that

Where a statute is alleged to contravene Article 27 of the Constitution, which guarantees the right of every person to equal protection of the law, the institution of a Constitutional challenge by any person would not violate the Rule of standing contained in Article 46(1), as he would be alleging that he, as an individual, has been affected, or is likely to be



affected by such contravention. That would be the only exception to the general rule contained in Article 46(1). This is so as a statute is of general application. But for any person to challenge it, he still has to establish that that statute affects him or is likely to affect him.<sup>67</sup>

The Court added that in cases of alleged violation of the right under Article 27, any petitioner can ‘champion the cause of others’ if he or she is ‘alleging a contravention of Article 27 by any provision of a statute’.<sup>68</sup> This exception is only applicable to those alleging a violation of Article 27. It does not extend to those who allege a violation of other rights in the Constitution. Article 27 is only applicable where there is an allegation of discrimination.<sup>69</sup> This approach was also emphasized by the Court of Appeal in an earlier decision.<sup>70</sup>

Apart from declaring a statutory provision unconstitutional for violating Article 27 of the Constitution, courts may also, *mero motu*, declare a common law practice discriminatory and, therefore, unconstitutional. For example, at common law, the evidence of an accomplice has to be admitted with caution. In *Jean Francois Adrienne & Another v. R*,<sup>71</sup> the Court of Appeal referred to case law from different commonwealth jurisdictions in which the issue of admitting the evidence of an accomplice was dealt with and held that ‘[t]o say that every accomplice is less worthy of belief than another witness is an affront to their dignity and violates the right guaranteed under article 27(1) of the Constitution’.<sup>72</sup> Likewise, in *Graham Pothin v. R*,<sup>73</sup> the Court of Appeal held that

To draw a distinction between a vulnerable witness who recants the version at the very beginning of evidence or refuses to speak and a vulnerable witness who recants the version of evidence given in examination-in chief; both in cross-examination and re-examination would amount to discrimination between accused persons facing prosecutions [sic] and would be in violation of article 27 of the Constitution which guarantees to every person “the right to equal protection of the law without discrimination.” No trial court could or should in our view substitute its opinion contrary to what a victim has testified, to convict an accused. A person is convicted on the evidence before the court and depending on its credibility and the weight that could be attached to it.<sup>74</sup>

The Supreme Court, if it is of the view that a person’s right to equal protection of the law has been violated by a piece of legislation, may advise that person to challenge the constitutionality of that legislation before the Constitutional Court. For example, in *Mervin Jezabel Barbe v. Chief Officer of Civil Status*,<sup>75</sup> the applicant was born male and after undergoing a medical procedure, changed his sex from male to female. He applied to the Registrar of Civil Status to change his birth certificate to indicate his new status. The Registrar refused and argued that legislation did not allow him to do that. The applicant

challenged the Registrar's decision before the Supreme Court. In dismissing the application, the Court held that

[W]e acknowledge the plea and plight of the Appellant to have his change of gender recognised. To that extent we recommend to the Legislature to consider whether in the Seychelles of today there is a justification for the recognition of gender change, at least in conformity with the Charter of Human Rights in our Constitution... Article 27(1) provides for equal protection under the law and in particular 27(2) states: ... The Appellant may also consider pursuing the matter in the Constitutional Court along those lines and/or in the alternative in terms of the breach of her inherent right to the respect of her private life and dignity.<sup>76</sup>

The Court's reasoning should be understood against the background that in Seychelles, it is only the Constitutional Court and the Court of Appeal with jurisdiction to find that legislation or conduct contravenes the Charter of rights.<sup>77</sup>

### **Permissible discrimination**

Article 27(2) of the Constitution provides that clause 1, which prohibits discrimination, does 'not preclude any law, programme or activity which has as its object the amelioration of the conditions of disadvantaged persons or groups'. This is what is referred to as affirmative action in the constitutions of some African countries such as South Sudan,<sup>78</sup> Sudan,<sup>79</sup> Uganda,<sup>80</sup> Kenya,<sup>81</sup> Zimbabwe<sup>82</sup> and Namibia.<sup>83</sup> In simple terms, in Seychelles, there are two circumstances in which discrimination is permissible: if the law or conduct 'is necessary in a democratic society', under Article 27(1); or if the law, programme or activity has the object of ameliorating the conditions of disadvantaged persons or groups, under Article 27(2). The first permissible ground, the one under Article 27(1), that is, where the programme, activity or law 'is necessary in a democratic society' is broader than the second ground (the one under Article 27(2)). For the programme, activity or law to be constitutional under the second test, it has to be shown that it is aimed at achieving the one and only purpose: ameliorating the conditions of disadvantaged persons or groups. It has to be proved that the people or group in question are still disadvantaged and that the measures in question are needed to ameliorate their condition. Under the first ground, all that has to be shown is that the discriminatory law or activity is 'necessary in a democratic society'. In *Roger Mancienne v. The Attorney General*,<sup>84</sup> in which the applicant challenged the constitutionality of a piece of legislation which granted foreign investors immunity from prosecution for some offences on the ground that it was discriminatory because the same immunity was not granted to local investors, the Court of Appeal referred to Article 27(1) of the Constitution and held that

The true purport of the equal protection provisions of Article 27 of the Constitution and similar provisions in other Constitutions is prone to be lost in rhetorics [sic] and emotive language stemming from the universal abhorrence of inequality based on racial origin.

However, now, equal protection clauses have extended beyond the racial discrimination origins that gave them popularity. A much clearer approach to understanding and applying Article 27 of the Constitution is to understand the true meaning and purport of its provisions as can be gathered from its text interpreted with the aid of the interpretation guidelines contained in the constitution itself.<sup>85</sup>

The Court added that

Article 27(1) guarantees a general right of equal protection of the law. Its plain meaning is that all persons must have equal access to law's benefits and privileges and be equally subject to its obligations. In practical and meaningful terms, equal access must be read as equal opportunity of access. This, unqualified, means that the state either by executive or legislative act must not put one person at an advantage over the other or another at a disadvantage to which the other is not subject. The exception to the generality of the guarantee of equality which permits differential treatment (discrimination) "as is necessary in a democratic society" is an acknowledgement that absolute equality is unattainable. However, discrimination to be acceptable must be trammelled along certain lines. There are discriminations which by current universally accepted norms can never be judged in a democratic society. Examples of such are those based on race or religion and those which impinge on fundamental rights of personal liberty and freedom.<sup>86</sup>

Discriminatory legislation which cannot be justified as 'necessary in a democratic society' will be declared unconstitutional by the Constitutional Court. In *Roger Mancienne v. The Attorney General*,<sup>87</sup> the Court of Appeal held that

In the context of Article 27 of the Constitution and permissible discrimination and in fashioning a test of acceptable differentiation, the word "necessary" has been used to describe a factor that must be present. The word "necessary" is not used in the absolute as indicating something that cannot be done without, but something useful to the promotion of an end or an objective . . . Whether the context of Article 27 of the Constitution or as a test of constitutionality of a disputed classification the word "necessity" should be understood in the mitigated, rather than in the absolute, sense.<sup>88</sup>

In *Seychelles National Party & Ors. v. Government of Seychelles & Anor. // Dhanjee v. Michel & Anor*,<sup>89</sup> the petitioners challenged the constitutionality of statutory provision<sup>90</sup> which prohibited victims of police action at public gatherings from seeking any redress against the police. In holding that the statutory provision in question was unconstitutional, the Constitutional Court observed that

The only reasonable objective for this provision is that it is designed to enable policemen and women to be able to fulfil their duties without concern about being held responsible for damages caused in the course of fulfilling these duties. However, we cannot see how this is a

necessary limitation of liability in a democratic country. The police are able to use their usual police powers, including the use of force, where reasonable and necessary, and the power to arrest. If they exceed these powers, and cause damage to private persons or their property, this should be able to be brought to a courtroom for a judge to decide on whether the individual is entitled to claim compensation. We therefore, find that this blanket immunity is not necessary in a democratic society.<sup>91</sup>

The second ground, under Article 27(2), could also be easily collapsed in the first one, under Article 27(1). This is because it is necessary in a democratic society to pass laws or implement programmes aimed at ameliorating the conditions of people who are disadvantaged. Regional and international human rights bodies such as the African Commission on Human and Peoples' Rights,<sup>92</sup> the Committee on Economic, Social and Cultural Rights<sup>93</sup> and the Committee on the Elimination of All Forms of Discrimination against Rights of Women<sup>94</sup> have also supported affirmative action measures.

The Court of Appeal appears to be of the view that the yardstick to be used in determining whether the law passed in terms of Article 27(1) is discriminatory is not whether the law is 'necessary in a democratic society' but rather whether it is in line with the Constitution. In *Roger Mancienne v. The Attorney General*,<sup>95</sup> the Court of Appeal held that

[i]n terms of Article 27(1), the right to equal protection of the law inheres in every person. The substance of the right is that except as permitted by law which is in accord with the Constitution every person has a right to equal treatment by the law.<sup>96</sup>

It is submitted that this interpretation narrows that ambit of Article 27(1). This is so because of the fact that not every constitution embodies the principles of a 'democratic society'.

In the combined cases of *Azemias v. R* and *Napoleon v. R*,<sup>97</sup> in which the appellants challenged the constitutionality of a Penal Code provision which required courts to impose minimum sentences on those convicted of serious offences on the basis that it discriminated against them and therefore violated Article 27 of the Constitution, the Constitutional Court explained the circumstances in which discrimination may be permissible under Article 27. The Court held that

Article 27 permits reasonable classification which necessarily causes distinction or discrimination between persons so classified and others. The basis of classification being inequality, mere inequality alone is not forbidden. Dissimilar treatment does not necessarily offend the guarantee of equality in Article 27. What is prohibited is invidious or hostile discrimination which is arbitrary, irrational and not reasonably related to a legitimate objective. There must therefore be a rational basis for the discrimination.<sup>98</sup>

The Court added that '[h]ence what is prohibited is discrimination of persons in one class or similarly circumstanced. Thus, those who stand in substantially the same position in respect of the law should be treated alike'.<sup>99</sup> The Court concluded that

As a nation develops and expands, social, economic and political changes become imperative. Hence classification becomes necessary to administer various spheres of activities of the state. However, the provisions of Article 27 cannot be applied with mathematical precision and perfect equality. Similarity, rather than identity treatment is what is expected.<sup>100</sup>

Therefore, in the light of the Court's ruling, Article 27 permits classification. In *Roger Mancienne v. The Attorney General*,<sup>101</sup> the Court of Appeal held that the contentions against classification 'can be subsumed under the rules against arbitrariness and unreasonableness'.<sup>102</sup> The Court gave detailed criteria that have to be used to assess whether the classification is permissible.<sup>103</sup> In *Bouchereau & Anor v. Superintendent of Prisons & Anor*,<sup>104</sup> in which the petitioners alleged that a piece of legislation which prohibited prison officials from granting remission of sentences to offenders convicted of dealing in drugs was discriminatory and therefore contrary to Article 27 of the Constitution, the Constitutional Court, in dismissing the petition, held that The classification of such persons based on the serious nature of the offence including offences under the Misuse of Drugs Act and differentiating between them and those other persons committing less serious offences is reasonable in the circumstances and would in the view of this court achieve the objective of the amendment which is to serve as a deterrent [sic] to persons dealing in drugs. Therefore this court is satisfied [sic] that the classification of persons set out in the law . . . is acceptable and not discriminatory in nature as contended by learned counsel for the petitioner . . .<sup>105</sup>

In *Seychelles National Party & Ors. v. Government of Seychelles & Anor. // Dhanjee v. Michel & Anor*,<sup>106</sup> the Constitutional Court held that a piece of legislation will be contrary to Article 27 of the Constitution and therefore unconstitutional if it permits 'discrimination with no checks on the Minister's discretion'.<sup>107</sup> The Court also found that legislation which empowers a senior government official to either allow or disallow citizens to organize meetings or processions in public places 'with no intelligible criteria on how any such differentiation would be acceptable' is capable of being invoked discriminatorily and therefore contrary to Article 27 of the Constitution.<sup>108</sup>

## **Conclusion**

In this article, the author has demonstrated the measures being taken by the courts in Seychelles to protect the right to freedom from discrimination. This discussion has shown, inter alia, that although Article 27 of the Constitution prohibits discrimination, it does not enumerate the grounds on which a person may not be discriminated against. Courts have come up with different grounds on which a person may not be discriminated against.

However, courts do not refer to any treaty or law as the basis of those suggested grounds. It is recommended that the Constitution may have to be amended to enumerate the grounds on which a person may not be discriminated against. This would be in line with the constitutions of other African countries such as South Africa, Uganda, Mauritius, Kenya and Zimbabwe. Some of the grounds that may be included in the Constitution are mentioned by the courts in the cases discussed above and others have been suggested by other states under the Universal Periodic Review mechanism<sup>109</sup> and international human rights bodies such as the Committee on the Rights of the Child.<sup>110</sup> Clearly stipulating the grounds upon which a person may not be discriminated against would enable the courts to assess whether or not a given piece of legislation is discriminatory in the light of an enumerated ground(s) and would also enable the petitioners to know exactly which arguments to advance in court. Jurisprudence from some African countries such as Kenya,<sup>111</sup> Zimbabwe,<sup>112</sup> Uganda<sup>113</sup> and South Africa<sup>114</sup> show that those challenging discriminatory laws or policies have clearly stated the constitutional grounds against which they have been discriminated against. The existence of clear grounds upon which a person may not be discriminated against would also enable the legislature to know which conduct or activities to regulate and how to do so.

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## Notes

1. Article 21 of the Constitution of Uganda (1995) provides that ‘(1) All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law. (2) Without prejudice to clause (1) of this article, a person shall not be discriminated against on the ground of sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability. (3) For the purposes of this article, “discriminate” means to give different treatment to different persons attributable only or mainly to their respective descriptions by sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability. (4) Nothing in this article shall prevent Parliament from enacting laws that are necessary for – (a) implementing policies and programmes aimed at redressing social, economic, educational or other imbalance in society; or (b) making such provision as is required or authorised to be made under this Constitution; or (c) providing for any matter acceptable and demonstrably justified in a free and democratic society. (5) Nothing shall be taken to be inconsistent with this article which is allowed to be done under any provision of this Constitution’.
2. Section 9(3) of the Constitution of South Africa (1996) provides that ‘The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth’.
3. Article 27(4) of the Constitution of Kenya (2010) provides that ‘The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth’.
4. Sections 3 and 16 of the Constitution of Mauritius, GN 54/1968.
5. Article 4(3) of the Constitution of Zimbabwe (2010) provides that ‘Every person has the right not to be treated in an unfairly discriminatory manner on such grounds as their nationality, race, colour, tribe, place of birth, ethnic or social origin, language, class, religious belief, political affiliation, opinion, custom, culture, sex, gender, marital status, age, pregnancy, disability or economic or social status, or whether they were born in or out of wedlock’.
6. Article 10(2) of the Constitution of Namibia provides that ‘No persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status’.
7. Mathilda Twomey, *Legal Metissage in a Microjurisdiction: The Mixing of Common Law and Civil Law in Seychelles*. (Wellington, New Zealand: City Print, 2017), p. 125.
8. See Schedule 5 of the Constitution, giving effect to Article 143 of the Constitution and in particular sections 6(1)(a)((ii) and (viii)), (f) of the Schedule.
9. In *Vijay Construction (Proprietary) Ltd v. Eastern European Engineering Ltd* (Civil Appeal SCA 15 & 18/2017) [2017] SCCA 41 (13 December 2017) para. 96, the Court of Appeal held that ‘consonant with the balance of powers principle, the Constitution has set up a dualist as compared to a monist system of treaty making. The monist

- system exists only in matters of Chapter III relating to constitutional enforcements. Hence, though the President receives, executes or causes treaties and conventions to be executed, it is the constitutional role of the National Assembly to ratify them and cause them to be domesticated and be made applicable in the domestic law of Seychelles. This ratification, however, applies only in instances where the instruments would affect international relations'. In *Roble & Ors v. R* (SCA CR 19/2013) [2015] SCCA 24 (28 August 2015) para. 10, the Court of Appeal held that '[i]n connection with the relationship of its national law with international law, Seychelles has always applied a dualist system in preference to a monist system'. See also *MD v. BL* (CA 26/2016 appeal from Family Tribunal Decision 141/2016) [2017] SCSC 196 (01 March 2017); the Supreme Court of Seychelles held that Seychelles is a dualist state.
10. Article 2.
  11. Article 3.
  12. Article 2.
  13. For the jurisdiction of the Supreme Court, see Article 125 of the Constitution.
  14. For the jurisdiction of the Supreme Court, see Article 124 of the Constitution.
  15. Article 21(3).
  16. Article 16(3) of the Constitution of Mauritius provides that 'In this section, "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, caste, place of origin, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages that are not accorded to persons of another such description.
  17. *Bradburn & Anor v. Superintendent of Prisons & Anor* (CP 9/2010) [2012] SCCC 4 (12 June 2012).
  18. *Ibid.*, p. 7.
  19. Article 129 of the Constitution distinguishes between the Supreme Court and the Constitutional Court. It provides that '(1) The jurisdiction and powers of the Supreme Court in respect of matters relating to the application, contravention, enforcement or interpretation of the Constitution shall be exercised by not less than two judges sitting together. (2) Where two or more Judges sit together for the purposes of clause (1), the most senior of the Judges shall preside. (3) Any reference to the Constitutional Court in this Constitution shall be a reference to the Court sitting under clause (1)'. For the jurisdiction of the Constitutional Court, see Article 30 of the Constitution.
  20. *Intershore Banking Corporation Ltd v. The Central Bank of Seychelles* (CA 34/2013 and MA 249/2014) [2016] SCSC 329 (17 May 2016).
  21. *Ibid.*, para. 41. However, on appeal, the Court of Appeal does/did address the issue of discrimination, see *Intershore Banking Corporation LTD v. Central Bank of Seychelles* (Civil Appeal SCA13/2016) [2018] SCCA 4 (11 May 2018).
  22. See, for example, *Suleman & Ors v. Faure & Anor.* (CS 9/2015) [2017] SCSC 284 (27 March 2017) para. 1.
  23. *Hackl v. Financial Intelligence Unit* (2010) SLR 98.
  24. *Ibid.*, p. 21.



25. Ibid., p. 21. See also *Jeffrey Gonthier v. Paquerette Denousse* (Civil Appeal SCA 17/2016) [2018] SCCA 20 (31 August 2018) para. 20, in which Court of Appeal refers to gender as one of the grounds upon which a person may not be discriminated against.
26. For example, section 7(2) of the Political Parties (Registration and Regulation) Act (Chapter 173) provides that ‘A political party shall be deemed to have a purpose or object which is unlawful for the purposes of this Act if – (a) it seeks, directly or indirectly, to further ethnical, racial or religious discrimination or discrimination on the ground of colour’. In *R v. Monthy and Ors* (CO 39/2015) [2015] SCSC 199 (26 June 2015) para. 12, the Supreme Court observed that the accused had not alleged ‘political discrimination’. Section 4(2) of the Red Cross Society of Seychelles Act (Cap 200) provides that ‘In pursuing its objects the Society shall, subject to any written law ... (c) not discriminate on the ground of nationality, race, religious belief, class, political opinion or sex’. Section 36 of the Industrial Relations Act (Cap 96A) provides that ‘An employer shall not refuse to engage a person or dismiss, penalise or otherwise discriminate against an employee because the person or employee is a member or officer of a trade union or refuses to become a member of a trade union or take part in the activities of a trade union’.
27. For example, the African Charter on Human and Peoples’ Rights.
28. For example, the ICCPR.
29. *R v. Nancy* (CN 73.2012) [2014] SCSC 396 (28 October 2014); *R v. Charles* (CN 33.2013)
30. [2014] SCSC 347 (25 September 2014). See also *Roble & Ors v. R* (SCA CR 19/2013) [2015] SCCA 24 (28 August 2015) para. 14, in which the Court of Appeal held that Article 48 does not confer on a court jurisdiction it does not have.
31. *Platte Island Villa Resort Ltd v. EME Management Services Ltd* (SCA 17/2013) [2015] SCCA 20 (28 August 2015).
32. Ibid., para. 11.
33. *Karunakaran v. Constitutional Appointment Authority* (Civil Appeal SCA 33/2016) [2017] SCCA 9 (14 April 2017) para. 47.
34. In *Alcindor v. R* (SCA 28/2013) [2015] SCCA 7 (17 April 2015) para. 14, the Court of Appeal held that ‘Article 48 of the Constitution defines the status of international human rights law in Seychelles domestic Law. It provides that Courts must interpret our charter of fundamental rights in such a way so as not to be inconsistent with any international obligations of Seychelles relating to human rights. We cannot therefore shy away from Article 48 of the Constitution, and neither can the court ignore the International Covenant on Civil and Political
35. Rights of 1966 whenever it is applicable. Both are applicable in the instant case’.
36. See, for example, *Intershore Banking Corporation Ltd v. The Central Bank of Seychelles* (CA
37. 34/2013 and MA 249/2014) [2016] SCSC 329 (17 May 2016) para. 43 (the Court referred to the African Charter on Human and Peoples’ Rights). In the following cases, courts refer to the ICCPR when dealing with various elements of the right to a fair trial: *Alcindor v. R* (CN 49/ 2012) [2013] SCSC 145 (23 September 2013); *Bouchereau & Ors v. Supt of Prisons & Ors*

38. (SCA 01/2013) [2015] SCCA 3 (17 April 2015); *R v. Nancy* (CN 73.2012) [2014] SCSC 396
39. (28 October 2014); *Rose v Republic* (CN 42/2013) [2015] SCSC 515 (05 November 2015);
40. *R v. Charles* (CN 33.2013) [2014] SCSC 347 (25 September 2014); *R v. Adeline* (CN 29.2013)
41. [2014] SCSC 365 (03 October 2014); *Sagwe v. R* (SCA cr. 02/2015) [2016] SCCA 15 (12 August 2016); *Sullivan v. Attorney-General & Anor* (CP 13/2011) [2012] SCCC 5 (31 July 2012); *R v. Joseph & Ors* (CO 52/2016) [2016] SCSC 892 (15 November 2016); *In Re: R v. Ladouceur; Ladouceur v. R* (CO 49/2001) [2009] SCSC 47 (07 September 2009); *R v. Esparon* (Co 54/20) [2016] SCSC 863 (27 October 2016).
42. *Gill v. Registrar of Political Parties* (2011) SLR 69.
43. 36. *Ibid.*, p. 14.
44. *Brioche & Ors v. Attorney-General & Anor* (CP 6/2013) [2013] SCCC 2 (22 October 2013).
45. *Ibid.*, para. 26.
46. *Roger Mancienne v. The Attorney General* (Civil Appeal No. 15 of 1996) (Judgment of 3 April 1997).
47. *Ibid.*, p. 20 (of the combined judgment and p. 2 of the 1 of the separate judgment).
48. Article 32 provides that '(1) The State recognises that the family is the natural and fundamental element of society and the right of everyone to form a family and undertakes to promote the legal, economic and social protection of the family. (2) The right contained in clause (1) may be subject to such restrictions as may be prescribed by law and necessary in a democratic society including the prevention of marriage between persons of the same sex or persons within certain family degrees'. However, the official view in Seychelles is that Article 27 prohibits discrimination on the ground of sexual orientation. See Report of the Working Group on the Universal Periodic Review: Seychelles, A/HRC/18/7 (11 July 2011) para. 63.
49. *Hackl v. Financial Intelligence Unit* (2010) SLR 98.
50. Concluding observations on the combined initial to fifth periodic reports of Seychelles, CEDAW/C/SYC/CO/1-5 para. 30.
51. *Roger Mancienne v. The Attorney General* (Civil Appeal no. 15 of 1996).
52. *Ibid.*, p.18. See also *Ah-Man v. Government of Seychelles and Others* (1/2002) (of) [2003] SCCC 1 (05 May 2003), p. 6.
53. *Republic v. Bibi* (1999) SLR 9.
54. *Ibid.*, p. 2.
55. *Talma v. Michel* (2010) SLR 477.
56. *Ibid.*, p. 2.
57. *Ibid.*, p. 3
58. *Ibid.*, p. 9.
59. *Brioche & Ors v. Attorney-General & Anor* (CP 6/2013) [2013] SCCC 2 (22 October 2013).
60. *Ibid.*, para. 27.

61. In *Electoral Commission v. Attorney General* (CP No:04/2015) [2015] SCCC 5 (06 October 2015) para. 6. In *Morin v. Minister of Land Use and Habitat and Another* (9 of 2005) (of) [2005] SCCA 18 (24 November 2005) para. 8, the Court of Appeal held that ‘The words “has n .. contravened” in Article 46(1) ... , are a reference to a completed contravention of the Constitution as opposed to a “likely” contravention. It follows ... , therefore, that a person who alleges that any Article of the Constitution has already been contravened, for example by way of actual acquisition of land . . . is entitled to apply to the Constitutional Court for redress under Article 46(1)’.
- 62.55. *Herminie & Ano v. Pillay & Ors* (CP02/2017 CP06/2017 CP07/2017) [2018] SCCC 6 (13 March 2018).
- 63.56. *Ibid.*, p.15.
64. Article 46(3). For a discussion of the procedure to be followed under Article 46, see *R v. Georges* (CO 26/1998) [1998] SCSC 13 (03 September 1998), *Aimee v. Simeon and another* Constitutional Cause 4/1997 (Judgment of 4 December 1998).
65. *Aimee v. Simeon and another* Constitutional Cause 4/1997 (Judgment of 4 December 1998) p. 8.
66. Article 46(8).
67. Article 50 of the Constitution of Uganda provides that ‘(1) Any person who claims that a fundamental or other right or freedom guaranteed under this Constitution has been infringed or threatened, is entitled to apply to a competent court for redress which may include compensation. (2) Any person or organisation may bring an action against the violation of another person’s or group’s human rights’.
68. However, in *Roger Mancienne v. The Attorney General*, Civil Appeal No. 15 of 1996 (Judgment of 3 April 1997), p. 9, the Court of Appeal held that if a person challenges that validity of a legislation, which does not impinge ‘on the personal freedom or liberty of the citizen or human being’ on the ground that it embodies a classification which is arbitrary or unreasonable, ‘[w]hile the suggested differentia approach does not oust the jurisdiction of the courts to submit disputed classification to scrutiny, it does throw on the person who impugns the validity of such classification to scrutiny, it does throw on the person who impugns the validity of such classification the burden of establishing its validity. In doing so, argument which appeals to mere sentiments or is founded on morality or on ethical consideration will not suffice’.
69. Cases in which the rights have been allegedly violated by private individuals include: *Chetty v. Chetty and Another* (14 of 2008) [2010] SCSC 6 (14 February 2010); *Louange & Anor v. Hervieu* (CS 154/2005) [2008] SCSC 3 (28 January 2008); *Sunset Beach (Pty) Ltd v. Dorsi Raihl and another* (Civil Suit No. 176 of 2011) [2012] SCSC 39 (16 November 2012).
70. In *Majah v. Majah* (2010) SLR 327, p. 5, the Court held that ‘Islam does not oppress women in any manner whatsoever; nor does it grant a license to any man for that matter – let alone a husband – to discriminate, exploit, mistreat or ill-treat any woman either in one’s family or in society’.
71. 64. *Herminie & Ano v. Pillay & Ors* (CP02/2017 CP06/2017 CP07/2017) [2018] SCCC 6 (13 March 2018).
72. 65. *Ibid.*, p. 15.

73. *Ah-Man v. Government of Seychelles and Others* (1/2002) (of) [2003] SCCC 1 (05 May 2003).
74. *Ah-Man v. Government of Seychelles and Others* (1/2002) (of) [2003] SCCC 1 (05 May 2003), p. 7.
75. *Ibid.*, p. 7.
76. *Republic v. Hoareau* (CR SCA No: 28/2010) [2011] SCCA 23 (01 September 2011) para. 8.
77. In *Roger Mancienne v. The Attorney General*, Civil Appeal No. 15 of 1996 (Judgment of 3 April 1997), p. 18, the Court of Appeal held '[i]n terms of Article 46(1) of the Constitution, there may be cases in which a contravention or likely contravention of a provision of the Charter may be alleged only where a person can show that his interest has been injured by the impugned law act or omission, but it is not in all cases that such injury must be shown in order that contravention or likelihood of contravention may be alleged. In terms of Article 27(1), the right to equal protection of the law inheres in every person. The substance of the right is that except as permitted by law which is in accord with the Constitution every person has a right to equal treatment by the law. As must be evident, standing to seek a remedy must be distinguished from the merits of the claim. The issue of locus standi has nothing to do with the merits of the case but only with the right to seek a remedy. A person who alleges an invalid classification and that by reason thereof everyone else has been made inferior by a law which grants special benefits to others and not to him may allege a contravention of Article 27 in regard to him just as can one who alleges an imposition of special burdens on him. A person who belongs to a class on whom discriminatory benefit has been conferred cannot allege that he has been deprived of an equal protection of the law and so he cannot claim contravention or likelihood of contravention in relation to himself, but if his allegation is of discriminatory treatment within that class, he must show that he belongs to that class'(emphasis in the original).
79. *Jean Francois Adrienne & Another v. R* (Criminal Appeal SCA25 & 26/2015) [2017] SCCA 25 (11 August 2017).
80. *Ibid.*, para. 37. See also *Nicholas Brian Julie v. R* (Criminal Appeal SCA21/2017) [2018] SCCA 18 (31 August 2018) para. 41, where the Court of Appeal makes a similar observation with respect to witnesses in sexual offences.
81. *Graham Pothin v. R* (Criminal Appeal SCA 13/2017) [2018] SCCA 17 (31 August 2018).
82. *Ibid.*, para. 24.
83. *Mervin Jezabel Barbe v. Chief Officer of Civil Status* (Civil Appeal SCA 08/2015) [2017] SCCA 23 (11 August 2017).
84. *Ibid.*, paras 31–33.
85. See Article 46 of the Constitution generally.
86. Article 16(4).
87. Article 32(2).
88. Article 32(1).

89. Article 27(6).
90. Article 14(1).
91. Article 23.
92. *Roger Mancienne v. The Attorney General*, Civil Appeal No. 15 of 1996 (Judgment of 3 April 1997).
93. *Ibid.*, p. 5.
94. *Ibid.*, p. 5.
95. *Roger Mancienne v. The Attorney General*, Civil Appeal No. 15 of 1996 (Judgment of 3 April 1997)
96. 88. *Ibid.*, p. 13.
97. 89. *Seychelles National Party & Ors. v. Government of Seychelles & Ano. // Dhanjee v. Michel & Ano.* (CS 03/2014) [2015] SCCC 2 (07 July 2015). 90. Section 22 of the Public Order Act.
98. *Seychelles National Party & Ors. v. Government of Seychelles & Ano. // Dhanjee v. Michel & Ano.* (CS 03/2014) [2015] SCCC 2 (07 July 2015) para. 186.
99. See, for example, Resolution on the Status of Women in Africa and the Entry into Force of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, para. 6. Available at <http://www.achpr.org/sessions/38th/resolutions/85/>. The African Commission on Human and Peoples' Rights called upon Ethiopia to '[t]ake steps to create an effective affirmative action to guarantee female participation in all spheres of government, and also enact at the Federal level, legislation prohibiting FGM, violence and discriminatory practices against women', see Concluding Observations and Recommendations on the Initial, 1st, 2nd, 3rd and 4th Periodic Report of the Federal Democratic Republic of Ethiopia para. 60, Adopted at the 47th Ordinary Session of the African Commission on Human and Peoples' Rights held from 12 to 26 May 2010, Banjul, The Gambia. Available at [http://www.achpr.org/files/sessions/47th/conc-obs/1st-to-4th-1998-2007/achpr47\\_conc\\_staterep1234\\_ethiopia\\_2010\\_eng.pdf](http://www.achpr.org/files/sessions/47th/conc-obs/1st-to-4th-1998-2007/achpr47_conc_staterep1234_ethiopia_2010_eng.pdf). The African Commission on Human and Peoples' Rights called upon Niger to '[t]ake concrete steps to protect the rights of minorities living in Niger and put in place affirmative action in their favour if the need arises', see Concluding Observations and Recommendations on the Initial Report of the Republic of Niger, para. 31, Adopted at the 35th Ordinary Session of the African Commission on Human and Peoples' Rights held from 21 May to 4 June 2004, in Banjul, The Gambia. Available at [http://www.achpr.org/files/sessions/35th/conc-obs/1st-7th-1988-2002/achpr35\\_conc\\_staterep1\\_niger\\_2004\\_eng.pdf](http://www.achpr.org/files/sessions/35th/conc-obs/1st-7th-1988-2002/achpr35_conc_staterep1_niger_2004_eng.pdf). The African Commission on Human and Peoples' Rights called upon Sudan to take 'measures to ensure female participation at all levels of decision making, including considering enacting a law on affirmative action', see Concluding Observations and Recommendations on the 4th and 5th Periodic Report of the Republic of Sudan, para. 70, Adopted at the 12th Extra-ordinary Session of the African Commission on Human and Peoples' Rights held from 29 July to 4 August 2012, Algiers, Algeria. Available at [http://www.achpr.org/files/sessions/12th-eo/conc-obs/4thand5th-2008-2012/concluding\\_observation\\_.pdf](http://www.achpr.org/files/sessions/12th-eo/conc-obs/4thand5th-2008-2012/concluding_observation_.pdf). The African Commission on Human and Peoples'

- Rights called upon Malawi to '[e]nact a legislative framework that provides for affirmative action for women including the stipulation of specific female representation quotas in decision making positions, to increase women's representation', see Concluding Observations and Recommendations on the Initial and Combined Periodic Report of the Republic of Malawi on the Implementation of the African Charter on Human and Peoples' Rights (1995 – 2013) para. 103, Adopted at the 57th Ordinary Session of the African Commission on Human and Peoples' Rights, held from 4 to 18 November, 2015, in Banjul, Republic of The Gambia. Available at [http://www.achpr.org/files/sessions/57th/conc-obs/1-1995-2013/concluding\\_observations\\_\\_initial\\_\\_combined\\_\\_state\\_report\\_malawi.pdf](http://www.achpr.org/files/sessions/57th/conc-obs/1-1995-2013/concluding_observations__initial__combined__state_report_malawi.pdf). See also Concluding Observations and Recommendations on the 5th Periodic Report of the Federal Republic of Nigeria on the Implementation of the African Charter on Human and Peoples' Rights (2011–2014), para. 115, Adopted at the 57th Ordinary Session of the African Commission on Human and Peoples' Rights held from 04 to 18 November, 2015, in Banjul, The Gambia, available at [http://www.achpr.org/files/sessions/57th/conc-obs/5th-2011-2014/concluding\\_observations\\_nigeria\\_5th\\_sr\\_eng.pdf](http://www.achpr.org/files/sessions/57th/conc-obs/5th-2011-2014/concluding_observations_nigeria_5th_sr_eng.pdf); and Concluding Observations and Recommendations on Sixth Periodic Report of the Republic of Namibia on the Implementation of the African Charter on Human and Peoples' Rights Periodic Review: Seychelles, A/HRC/32/13 (8 April 2016) paras 120.30, 120.45–120.53, 120.95–120.102.
100. Committee on the Rights of the Child, Concluding observations on the second, third, and fourth periodic report of Seychelles (CRC/C/SYC/2-4), CRC/C/SYC/CO/2-4 (23 January 2012) para. 34.
101. See, for example, *Mohamed Fugicha v. Methodist Church in Kenya* (suing through its registered trustees) & 3 others [2016] eKLR (on the issue of whether Muslim girls could wear hijab in schools); and *Centre for Rights Education and Awareness & 2 others v. Speaker the National Assembly & 6 others* [2017] eKLR (on the issue of the equality between men and women); and *S v. Mufema & S v. Chavhunduka & S v. Ruzvidzo & S v. Baundi* (CRB No. BNR457/14) [2015] ZWHHC 409 (26 April 2015) (on the issue of discrimination on the grounds age, gender and sex).
102. See, for example, *Bhila v. Master of the High Court & Others* (HC 4396/13) [2015] ZWHHC 549 (27 May 2015) (the right not to discriminate against children born out of wedlock).
103. See, for example, *Law Advocacy for Women in Uganda v. Attorney General* ((Constitutional Petitions Nos. 13 /05 /& 05 /06)) [2007] UGCC 1 (5 April 2007) (on the constitutionality of a penal provision that discriminated against women); *Ebiju & Anor v. Echodu* (CIVIL APPEAL NO. 43 of 2012) [2015] UGHCCD 122 (17 December 2015) (on the issues of equality between men and women in marriage).
104. Currie, I and De Waal, J, *The Bill of Rights Handbook* (2013 – 6th Edition) (especially the chapter on equality).