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Construing pre-1995 laws to bring them in conformity with the Constitution of Uganda: Courts' reliance on article 274 of the Constitution to protect human rights

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Summary: *Article 274 of the Ugandan Constitution (1995) provides that laws that existed at the time of the entry into force of the Constitution 'shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it in conformity with this Constitution'. The jurisprudence from Ugandan courts shows that they have adopted three approaches to give effect to article 274 and, as a result, protected human rights such as the right to equality (freedom from discrimination), property, human dignity, liberty and the right to bail. The first approach is for the court to read word(s) into the impugned legislative provision without any deletions. This is done in one of the two ways: by either reading these words expressly into the impugned legislation, or by doing so impliedly. The second approach is for the court to strike out words from the impugned provision and replace these with new words. According to this approach, the court either adds a few words or overhauls the entire provision. It is argued that overhauling a legislative provision is beyond the mandate of the court's power under*

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article 274 and it ignores the principle of separation of powers in terms of which Parliament has the role to make laws. The third approach is for the court to 'strike out' or 'read out' words from the impugned legislation without replacing them. Although the Constitutional Court is the only court with the mandate to declare legislation inconsistent with the Constitution (under article 137), other courts have invoked article 274 to declare legislation unconstitutional, thus usurping the powers of the Constitutional Court. Is it argued that the Constitution may have to be amended so that other courts, other than the Constitutional Court, are also empowered to declare legislation unconstitutional on condition that such declaration takes effect after it has been confirmed by the Constitutional Court. A similar approach has been followed in other African countries such as South Africa.

Key words: *Uganda; article 274; Constitution; human rights; constitutional law; modification*

1 Introduction

In 1995 Uganda adopted a new Constitution. Article 2(1) of the Constitution provides that the Constitution is the supreme law of the land.¹ Article 2(2) is to the effect that '[i]f any other law or any custom is inconsistent with any of the provisions of this Constitution, the Constitution shall prevail, and that other law or custom shall, to the extent of the inconsistency, be void'. Notably, the entry into force of the 1995 Constitution found in place a number of existing pieces of legislation, some of which included provisions that were contrary to the Constitution, generally, and the Bill of Rights, in particular. Therefore, some of these pieces of legislation had to be repealed or amended. The Constitution provided for ways in which the pre-Constitution laws that have not been repealed or amended can be dealt with. The first approach was to empower the Constitutional Court to declare such legislation unconstitutional under article 137 of the Constitution.² There indeed are many cases in which the Constitutional Court has declared legislation enacted before or after

1 This means, among others, that no person, arm of government or state organ is above the Constitution and the Constitution is the yardstick against which all other laws are judged. See, generally, *Severino Twinobusingye v Attorney General* Constitutional Petition 47 of 2011 [2012] UGCC 1 (20 February 2012); *Arnold Brooklyn & Company v Kampala Capital City Authority & Another* Constitutional Petition 23 of 2013 [2014] UGCC 9 (4 April 2014).

2 The Constitutional Court can also invoke art 137 to declare unconstitutional pieces of legislation enacted after the entry into force of the Constitution.

the entry into force of the 1995 Constitution unconstitutional.³ It is beyond the scope of this article to discuss this approach.

The second approach, which is the focus of this article, is to empower courts to interpret the laws that existed before the entry into force of the Constitution for the purpose of bringing them in conformity with the Constitution. Through this approach, courts have protected human rights such as the right to equality (freedom from discrimination), property, human dignity, liberty and the right to bail. Thus, article 274 was included in the Constitution and it provides:

- (1) Subject to the provisions of this article, the operation of the existing law after the coming into force of this Constitution shall not be affected by the coming into force of this Constitution but the existing law shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with this Constitution.
- (2) For the purposes of this article, the expression 'existing law' means the written and unwritten law of Uganda or any part of it as existed immediately before the coming into force of this Constitution, including any Act of Parliament or statute or statutory instrument enacted or made before that date which is to come into force on or after that date.

In *Bukenya v Attorney General*⁴ the Supreme Court held that article 274 saves laws that were enacted before the promulgation of the Constitution but that those laws have to be interpreted to bring them in conformity with the Constitution.⁵ Article 274 can be invoked by any court or authority.⁶ The purpose of this article is to ensure that '[c]ourts in Uganda cannot enforce a law which is inconsistent with the Constitution'.⁷ It is also meant to 'empower courts to move away from obsolete to progressive jurisprudence'.⁸ Indeed, this was the intention of the drafters of article 274.⁹ The laws in question

3 See, generally, JD Mujuzi 'The Constitutional Court of Uganda: Blurring/misunderstanding its jurisdiction?' (2022) 9 *Journal of Comparative Law in Africa* 24.

4 *Bukenya v Attorney General* Constitutional Appeal 3 of 2011 [2017] UGSC 18 (22 May 2017).

5 *Bukenya* (n 4) 14-15. See also *Balaba & 2 Others v Kagaba & 2 Others* Civil Suit 1417 of 1999 [2015] UGHCLD 25 (20 August 2015); *Andrew Mujuni Mwenda & Another v Attorney General* Constitutional Petition 12 of 2005 [2010] UGSC 5 (25 August 2010).

6 *Unwanted Witness Uganda and Another v Attorney General* Constitutional Petition 16 of 2017 [2021] UGCC 40 (27 April 2021) 23 (Justice Madrama); *Nobert Mao & Another v Attorney General and Another* Constitutional Petition 4 of 2016 [2021] UGCC 36 (27 April 2021) 26.

7 *Attorney General v Salvatory Abuki* Constitutional Appeal 1 of 1998 [1999] UGSC 7 (25 May 1999) 64.

8 *Nampongo & Another v Attorney General* Constitutional Petition 43 of 2012 [2021] UGCC 37 (9 February 2021) 50.

9 Proceedings of the Constituent Assembly (1994-1995) 2493, 3134, 4139.

include Acts of Parliament (both substantive and procedural,¹⁰) subsidiary legislation¹¹ and, as the discussion below demonstrates, customary law. Notably, article 274 does not apply to legislation that was enacted after the coming into force of the Constitution.¹² Such pieces of legislation must comply with the Constitution at the time of their enactment because the Constitution is the Supreme law of the land.¹³ In *Nalumansi v Kasande*¹⁴ the Supreme Court held that¹⁵ '[t]he essence of article 2 and article 274 of the Constitution is to enable a court faced with a partially unconstitutional law to sever and excise the unconstitutional provisions so that the remainder which complies with the Constitution can be enforced'.¹⁶

Both the Constitutional Court and the Supreme Court¹⁷ have held that they would declare a legislative provision unconstitutional if it 'cannot be modified as required' by article 274.

On the basis of article 274 any court can interpret any law to bring it in conformity with the Constitution. Article 137 of the Constitution provides that only the Constitutional Court can interpret the Constitution¹⁸ and declare any law or conduct inconsistent with the Constitution.¹⁹ Although only the Constitutional Court has the mandate to declare legislation unconstitutional, in practice other courts have invoked article 274 to declare some legislative provisions void or inconsistent with the Constitution – albeit without using the

10 *Bukenya Church Ambrose v Attorney General* Constitutional Petition 26 of 2010 [2011] UGCC 5 (20 March 2011).

11 See, eg, the case of *Kikonda Butema Farm Ltd v Attorney General* Constitutional Petition 10 of 2012 [2013] UGCC 11 (8 November 2013) where the Court dealt with the standing orders issued on the basis of the Public Service Act.

12 *Murisho & 5 Others v Attorney General & Another* Constitutional Application 2 of 2017 [2017] UGCC 1 (23 February 2017); *East African Development Bank v Eden International School Ltd & Another* Miscellaneous Application 630 of 2017 [2017] UGCOMMC 121 (2 October 2017).

13 *Goodman Agencies Ltd v Attorney General & Another* Constitutional Application 1 of 2012 [2014] UGSC 14 (3 July 2014) 32.

14 *Nalumansi v Kasande & 2 Others* Civil Appeal 10 of 2015 [2017] UGSC 21 (10 July 2017).

15 *Charles Onyango Obbo & Another v Attorney General* Constitutional Petition 15 of 1997 [2000] UGCC 4 (21 July 2000) 40.

16 *Nalumansi v Kasande* (n 14) 25.

17 *Charles Onyango Obbo and Another v Attorney General* Constitutional Appeal 2 of 2002 [2004] UGSC 1 (10 February 2004) 49.

18 In *Nathan Nandala Mafabi & 3 Others v Attorney General* Constitutional Petition 46 of 2012 [2021] UGCC 3 (1 April 2021) 87, the Constitutional Court held that '[a] question as to interpretation of the Constitution must necessarily be a dispute, or substantial question in which the court will be engaged in determining or resolving a doubt or dispute as to the meaning or application of an article of the Constitution so as to give directions to a competent court about how to apply the law'.

19 However, one of the justices of the Constitutional Court is of the view that all courts can interpret the Constitution. See *Foundation for Human Rights Initiative v Attorney General* Constitutional Petition 53 of 2011 [2020] UGCC 7 (3 July 2020) 34-35 (Madrama J). However, this approach is not supported by the drafting history of art 137 of the Constitution. See generally Mujuzi (n 3).

term ‘unconstitutional’ – before construing them with modification or adaptation.

The purpose of this article is to demonstrate how courts have invoked article 274 of the Constitution and to show the various approaches that have been adopted in this regard. It demonstrates that in some cases courts have gone beyond their mandate under article 274 and have usurped the power of legislators. The article illustrates the differences between construing legislation to bring it in conformity with the Constitution, on the one hand, and declaring such legislation unconstitutional, on the other. Although in some African countries, such as Sierra Leone,²⁰ Lesotho,²¹ Nigeria²² and Kenya,²³ courts are empowered to interpret legislation and develop the common law and bring it in conformity with the Constitution, it is beyond the scope of this article to deal with these countries. The discussion starts with what is required of a court under article 274.

2 Article 274 in practice: The task of the court

As mentioned above, article 274(1) provides, that ‘existing law *shall* be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with this Constitution’. The task of a court that has invoked article 274 is to interpret legislation with modification to bring it in conformity with the Constitution. Its task is not to interpret the Constitution.²⁴ An important question is whether a court that concludes that the existing law is contrary to the Constitution has the discretion whether or not to construe such legislation to bring it in conformity with the Constitution. The use of the word ‘shall’ implies that whenever a court comes to the conclusion that the existing law is contrary to the Constitution, it must be construed with such modifications, adaptations and qualifications as to bring it in conformity with the

20 Art 170(5) of the Constitution of Sierra Leone (1991). See, eg, *S v Jah* SC Misc App 1 of 1994 [1995] SLSC 3 (1 January 1995); *All People’s Congress v Nasmos & Another* SC Misc App 4 of 1996 [1999] SLSC 3 (26 October 1999).

21 Sec 156(1) of the Constitution of Lesotho (1993). See, eg, *Basotho National Party v Principal Secretary of Ministry of Law, Parliamentary and Constitutional Affairs & Others* CIV/APN/240/93 [1993] LSCA 69 (2 June 1993).

22 Sec 315 of the Constitution of Nigeria (1999). See, generally, *Attorney-General of Abia State & 35 Others v Attorney-General of the Federation* SC 227/2002 [2003] 3 (31 January 2003).

23 Sec 7(1) of the Sixth Schedule to the Constitution of Kenya (2010). See, eg, *Francis Karongo Wagana v National Union of Water & Sewerage Employees (NUWASE); Nyeri Water & Sanitation Company Ltd & 4 Others (Garnishee)* [2020] eKLR paras 5 & 6; *Philemon Koech v Republic* [2021] eKLR para 57; *In re Estate of Simion Robi Maroa (Deceased)* [2019] eKLR paras 10-11; *Republic v Hannah Ndung’u, CM Chief Magistrate’s Court, Nairobi Law Courts & Another Ex-Parte Nicholas Chege Mwangi & 3 Others* [2015] KLR paras 19-21.

24 *Nalumansi v Kasande* (n 14) 7-8.

Constitution. In *Foundation for Human Rights Initiatives v Attorney General*²⁵ the Constitutional Court held that existing law that is contrary to the Constitution 'may be construed with modification and adoption [*sic*] to bring it into conformity with the Constitution' and that such existing law 'would, therefore, be null and void to the extent it contravenes the Constitution'.²⁶

Two observations should be made about this holding. First, the use of the word 'may' creates the impression that a court has the discretion whether or not to construe such law to bring it in conformity with the Constitution. This approach would be contrary to article 274. Second, although existing law that is contrary to the Constitution is 'null and void to the extent it contravenes the Constitution', only the Constitutional Court or the Supreme Court, when dealing with an appeal from the Constitutional Court, can declare such law unconstitutional. This is so because article 137(3) of the Constitution provides that the Constitutional Court is the only court that has the mandate to declare any law or conduct unconstitutional. Therefore, any court relying on article 274 is limited to interpreting existing legislation to bring it in conformity with the Constitution. This explains why, for example, the High Court has labelled such existing law as 'inappropriate or out-dated'²⁷ but has not declared it unconstitutional.

When the Constitutional Court is called upon to declare a legislative provision unconstitutional, it will do so only if 'it cannot be adapted or modified in any way so as to be consistent with' the Constitution.²⁸ In other words, when the constitutionality of a legislative provision is challenged, the Constitutional Court will declare it unconstitutional only if it cannot invoke article 274 to interpret it and bring it in conformity with the Constitution. This means that declaring it unconstitutional is a measure of last resort.²⁹

25 *Foundation for Human Rights Initiatives v Attorney General* Constitutional Petition 20 of 2006 [2008] UGCC 1 (26 March 2008).

26 *Foundation for Human Rights Initiatives* (n 25) 28.

27 See, eg, *Bushoborizi v Uganda* HCT-01-CV-MC-0011 of 2015 [2015] UGHCCRD 14 (10 July 2015) 6 (dealing with the powers of the Minister to release mentally-ill prisoners).

28 *Zachary Olum & Another v Attorney General* (Ruling) Constitutional Petition 6 of 1999 [1999] UGCC 7 (2 December 1999) 33.

29 In *Mwesigye v Attorney General & Another* Constitutional Petition 31 of 2011 [2015] UGCC 14 (23 November 2015) the constitutionality of sec 5 of the Parliamentary (Remuneration of Members) Act was challenged and the Constitutional Court invoked article 274 to interpret it and bring it in conformity with the Constitution. See also *Major General David Tinyefuza v Attorney General* (Ruling) Constitutional Petition 1 of 1996 [1997] UGCC 2 (5 March 1997) 8, where the Court held that '[i]n applying any law in existence at the time of the promulgation of this Constitution, it has to be tested against the provisions of the Constitution under Articles 2(2) and 273 [which later became art 274] in order to ensure that it conforms to the Constitution'.

3 Declaring the law void or inconsistent with the Constitution and the effect of interpreting legislation under article 274

Article 137(3) of the Constitution provides:

A person who alleges that –

- (a) an Act of Parliament or any other law or anything in or done under the authority of any law; or
- (b) any act or omission by any person or authority, is inconsistent with or in contravention of a provision of this Constitution

may petition the constitutional court for a declaration to that effect, and for redress where appropriate.

Article 137(3) illustrates that only the Constitutional Court has the jurisdiction to declare any law ‘inconsistent with or in contravention of a provision of’ the Constitution. It can do so only on the basis of a petition. However, the jurisprudence shows that courts other than the Constitutional Court have relied on article 274 to declare legislation inconsistent with the Constitution before interpreting it to bring it in conformity with the Constitution. This demonstrates that courts are of the view that on the basis of article 274 they can declare laws inconsistent with or in contravention of a constitutional provision and, based on that declaration, construe such laws to bring them in conformity with the Constitution. This approach is justified by the fact that under article 2(2) the Constitution is the supreme law of the land and courts cannot enforce laws that are contrary to the Constitution. For example, in *Salvatory Abuki*³⁰ it was held:³¹

The impugned law is not to be declared void merely because one aspect of its application offends a provision of the Constitution. Otherwise the words ‘shall be void to the extent of the inconsistency’ are meaningless. Indeed, this will be in conformity with article 273(1) [which later became article 274] of the Constitution which provides that ...

In the same judgment another judge held:³²

Article 273(1) of our Constitution requires that all existing laws conform to the spirit and letter of 1995 Constitution. This means that laws ... which are inconsistent with the constitutional provisions must give way to the new Constitutional order. In my view, therefore, the exclusion provisions sub-sections (1) and (2) [of the Witchcraft Act] are unconstitutional in that they are inconsistent with article 24.

³⁰ *Salvatory Abuki* (n 7).

³¹ *Salvatory Abuki* (n 7) 29.

³² *Salvatory Abuki* (n 7) 66.

In *National Security Fund v Makerere University Guest House*³³ the issue before court was whether the sections of the National Security Fund Act that compelled the respondent to contribute to the Fund contravened the right to property under article 26 of the Constitution. The High Court invoked article 274 to hold:³⁴

The NSSF Act came into force on 1st December, 1985, before the promulgation of the 1995 Constitution of the Republic of Uganda. Accordingly, the NSSF Act is void to the extent of its inconsistency with the Constitution. The NSSF Act, specifically section[s] 7, 11, 12, 13 & 14 is [are] inconsistent with article 26 of the Constitution and is void to the extent of its inconsistency. Article 274 (1) of the Constitution provides ... The power to deprive any person of property has to be enshrined in the Constitution.

Similarly, in *Kironde v Kironde*³⁵ the High Court held that some provisions of the Divorce Act³⁶ were discriminatory against women and, therefore, contrary to the constitutional provisions on equality and those outlawing customary practices that undermine the dignity of women.³⁷ The Court of Appeal distinguished between the power of any court to modify the existing law and that of the Constitutional Court to declare legislation unconstitutional. In *Attorney General v Osotraco Ltd*³⁸ the Court of Appeal held that article 274³⁹

empowers all courts to modify existing unjust laws without necessarily having to refer all such cases to the constitutional court. This provision enables the court to expedite justice by construing unjust and archaic laws and bringing them in conformity with the Constitution, so that they do not exist and are void. This article does not oust the jurisdiction of the Constitutional Court under article 137 where it can later declare these laws unconstitutional.

This holding emphasises the fact that only the Constitutional Court has the mandate to declare legislation unconstitutional. The fact that legislation has been interpreted by a court to bring it in conformity with the Constitution does not necessarily mean that it will pass constitutional scrutiny. The Constitutional Court can still declare it unconstitutional. However, this has to be done through the petition procedure under article 137(3)(a) of the Constitution.

33 *National Security Fund v Makerere University Guest House* Civil Suit 525 of 2015 [2017] UGCOMM 27 (6 September 2017).

34 *Makerere University Guest House* (n 33) 11.

35 *Kironde v Kironde & Another* Civil Divorce Cause 6/2001 [2002] UGHCFD 2 (12 December 2002) (some provisions of the Divorce Act were discriminatory against women).

36 Divorce Act (ch 249) (1904).

37 This decision was followed in *Ajanta Kethan Thakkar v Kethan Thakkar* Divorce Cause 3 of 2002 [2003] UGHC 45 (26 June 2003).

38 *Attorney General v Osotraco Ltd* Civil Appeal 32 of 2002 [2005] UGCA 1 (30 June 2005).

39 *Osotraco* (n 38) 6.

4 Effect of interpreting legislation under article 274

As mentioned earlier, interpreting legislation on the basis of article 274 only saves that legislation from becoming null and void.⁴⁰ In other words, it has the effect of ‘sanitising’ such laws.⁴¹ However, its constitutionality can still be challenged before the Constitutional Court. A higher court’s interpretation of the existing law under article 274 binds lower courts.⁴² The High Court held that construing existing legislation to bring it in conformity with the Constitution on the basis of article 274 ‘has an amending effect on’ the modified legislation.⁴³ This should not be understood to mean that the court has assumed the legislative powers to amend legislation. The Constitutional Court held that once it has interpreted legislation to bring it in conformity with the Constitution, the executive has to initiate an amendment in Parliament to ensure that such laws comply with the Constitution.⁴⁴ This implies the fact that the Court is aware that its mandate under article 274 is not to make laws. Its mandate is to interpret existing law to bring it in conformity with the Constitution. After that interpretation, Parliament can amend the law in any way it deems fit as long as it complies with the Constitution.

Therefore, it is preferable that as soon as a court invokes article 274 to modify legislation, Parliament should amend the law. This is so because Parliament has law-making powers and consults widely before making legislation, hence coming up with a better alternative than that suggested by a judicial officer. A failure by Parliament to amend a law that has been modified under article 274 means that some judicial officers may not be aware of the judgment in which such a law was interpreted to comply with the Constitution and may still follow the ‘unmodified’ law. For example, as will be discussed below, in *Hon Sam Kuteesa*⁴⁵ the Constitutional Court held that section 168(4) of the Magistrate’s Courts Act, which provided that bail automatically lapsed when an accused was committed to the High Court for trial, was inconsistent with the Constitution and invoked article 274 to interpret it and bring it in conformity with

40 *Pyrali Abdul Rasul Esmail v Adrian Sibbo* Constitutional Petition 9 of 1997 [1998] UGCC 7 (23 June 1998).

41 *Kiiza Besigye v Uganda* Criminal Misc Application 228 of 2005 [2005] UGHCL 30 (25 November 2005) 4.

42 *Remo v Midia Sub-County Local Government* Civil Appeal 8 of 2014 [2017] UGHCLD 6 (20 July 2017).

43 *Uganda v Yiga Hamidu & Others* Criminal Session Case 5 of 2002 [2004] UGHCCRD 5 (9 February 2004) 9.

44 *Rubaramira Ruranca v Electoral Commission & Another* Constitutional Petition 21 of 2006 [2007] UGCC 3 (3 April 2007) 32.

45 *Hon Sam Kuteesa & 2 Others v Attorney General* Constitutional Reference 54 of 2011 [2012] UGCC 02 (4 April 2012).

the Constitution. However, almost four years after the Constitutional Court's interpretation, a magistrate relied on section 168(4) to revoke an accused's bail and the accused was only able to regain his freedom when the High Court referred to article 274 and to the Constitutional Court's decision which interpreted section 168(4).⁴⁶ The principle of precedent requires that in a case where a higher court modifies law on the basis of article 274, its interpretation binds lower courts.⁴⁷ Any subsequent decision by such lower court has to follow the higher court's interpretation, otherwise it will have no legal force.

The High Court is reluctant to invoke article 274 in cases where the impugned legislation has been relied on by several courts since the coming into force of the Constitution. For example, in *Karuhanga*⁴⁸ the applicants wanted the Court to order the respondents to hand over some documents to them in preparation for a suit. However, the legislation on which the applicants based their application provides that a court can only make that order if there is a pending suit and the documents are needed for the purpose of that suit. The applicant argued that this legislation was 'outdated and ancient history' and violated the applicants' constitutional right to access information and should be interpreted to conform to the Constitution.⁴⁹ In dismissing the application, the Court held:⁵⁰

This court is mindful of the provisions of Article 274 referred to by learned counsel for the applicant which provides that ... The fact that this application has been brought under provisions of Order 10 rules 12, 14 and 24, Sections 98 and 64 (e) of the Civil Procedure Act and Section 33 of the Judicature Act which have been severally interpreted many years after the promulgation of the 1995 Constitution suggests that the said interpretations have had Article 274 in mind. For example requirement that for one to seek discovery must have a suit before the court in which the application is made cannot be said to be against the Constitution.

46 *Yali v Uganda* Miscellaneous Criminal Application 4 of 2017 [2017] UGHCCRD 107 (15 June 2017); *Asea v Uganda* Miscellaneous Criminal Application 29 of 2016 [2016] UGHCCRD 125 (1 December 2016).

47 See art 132(4) of the Constitution which provides that 'all other courts shall be bound to follow the decisions of the Supreme Court on questions of law'. One is the issue of precedent; see, eg, *Habre International Trading Co Ltd v Francis Rutagarama Bantariza* Civil Application 7 of 2003 [2004] UGSC 16 (26 May 2004); *Abelle v Uganda* [2018] UGSC 10 (19 April 2018).

48 *Karuhanga & Another v Attorney General & 2 Others* Misc Cause 60 of 2015 [2015] UGHCCD 39 (28 May 2015).

49 *Karuhanga* (n 48) 5.

50 *Karuhanga* 9.

Although on facts of the case the Court was justified in not invoking article 274 to modify the relevant laws,⁵¹ it is argued that the mere fact that other courts have not found it necessary to interpret legislation to conform to the Constitution should not be the basis upon which a court in a subsequent matter fails to explain why the impugned legislation is not contrary to the Constitution. The language used in article 274 is imperative and, therefore, a court should use any available opportunity to interpret legislation and bring it in conformity with the Constitution.

5 Approaches taken by courts to construe legislation under article 274

Courts have adopted different approaches in their effort to construe legislation to bring it in conformity with the Constitution. In *Salvatory Abuki*⁵² Mulenga J relied on Canadian jurisprudence and suggested two ways in which a court could approach the question of an impugned legislation:⁵³

This court has to interpret the statutory provisions in the Witchcraft Act, in accordance with article 273 [later article 274] of Constitution with a view to promote the values expressed in the 1995 Constitution ... As I see it I have two options. The first option is to construe section 7 of the Witchcraft Act as if it does not authorise the making of an exclusion order, which would contravene any provision of the Constitution. That is the approach ...call[ed] 'reading down' a statute on the presumption that the legislature cannot intend to make a law that contravenes the Constitution. Under that option only Court orders of exclusion which contravene the Constitution would from time to time be declared invalid. The second option is to construe the provision to its full extent and hold that in as much as, and to the extent that, it authorises contravention of the Constitution, it is void under article 2(2) of the Constitution.

In the above judgment Mulenga J held that a court has a choice whether to save the existing legislation (by modifying it) or to declare it void (if it cannot modify it). Case law shows that courts have generally followed three different approaches to modify existing legislation and bring it in conformity with Constitution. These approaches will be discussed below.

51 The relevant Civil Procedure Orders had not been followed to institute the case and the Court referred to the application as a 'fishing expedition'.

52 *Salvatory Abuki* (n 7).

53 *Salvatory Abuki* (n 7) 95-96.

5.1 Reading words into the impugned legislation

The first approach is for the court to read word(s) into the impugned legislative provision without any deletion. This is done in one of the two ways, namely, by either reading these words expressly into the impugned legislation, or by doing so impliedly. For example, in *Advocates for Natural Resources*⁵⁴ the petitioner invoked article 137 of the Constitution and argued that section 7(1) of the 1965 Land Acquisition Act was contrary to article 26 of the Constitution. Article 26 of the Constitution provides:

- (1) Every person has a right to own property either individually or in association with others.
- (2) No person shall be compulsorily deprived of property or any interest in or right over property of any description except where the following conditions are satisfied –
 - (a) the taking of possession or acquisition is necessary for public use or in the interest of defence, public safety, public order, public morality or public health; and
 - (b) the compulsory taking of possession or acquisition of property is made under a law which makes provision for –
 - (i) prompt payment of fair and adequate compensation, prior to the taking of possession or acquisition of the property; and
 - (ii) a right of access to a court of law by any person who has an interest or right over the property.

Section 7(1) of the Land Acquisition Act provided:

Where a declaration has been published in respect of any land, the assessment officer shall take possession of the land as soon as he or she has made his or her award under section 6; except that he or she may take possession at any time after the publication of the declaration if the Minister certifies that it is in the public interest for him or her to do so.

On the basis of section 7(1) of the Land Acquisition Act, the government, without prior compensation, acquired the petitioners' land for the purpose of upgrading a road.⁵⁵ The petitioners argued that section 7(1) of the Land Acquisition Act was contrary to article 26 of the Constitution and null and void as it allowed the government to acquire people's land without prior compensation.⁵⁶ The government argued that the right to property was not absolute and that section 7(1) of the Land Acquisition Act had a legitimate objective to serve – to enable the government to acquire land

54 *Advocates for Natural Resources & 2 Others v Attorney General & Another* Constitutional Petition 40 of 2013 [2013] UGCC 10 (8 November 2013).

55 *Advocates for Natural Resources* (n 54) 5.

56 *Advocates for Natural Resources* 6.

in case of an emergency.⁵⁷ The Court outlined the principles of constitutional interpretation and held that the Land Acquisition Act had to be interpreted in conformity with the Constitution.⁵⁸ The Court referred to article 26 of the Constitution and to section 7(1) of the Land Acquisition Act and held that the Constitution ‘specifically provides for *prior payment* of compensation before taking possession or acquisition’.⁵⁹ The Court gave numerous examples to show that the history of Uganda ‘was characterised by compulsory acquisition of property without prior payment of compensation’ and that ‘in article 26(2), the Constitution intended to put that history to rest and to firmly assert the people’s rights to property’.⁶⁰ The Court held that section 7(1) of the Land Acquisition Act ‘does not provide anywhere for prior payment of compensation before government takes possession or before it acquires any person’s property’ and that ‘[t]o that extent therefore ... section 7(1) of Land Acquisition Act Cap 226 is inconsistent with and contravenes article 26(2)(b) of the Constitution’.⁶¹ The Court added that its conclusion above does not mean that section 7(1) ‘ceases to exist’.⁶² The Court observed that section 7(1) ‘is saved as an existing law under article 274 of the Constitution’.⁶³ The Court referred to article 274 and added:⁶⁴

The Constitution clearly envisages that existing laws would in one way or the other be inconsistent with its provisions. It is therefore not necessary that every time a law is found to be inconsistent with the Constitution, recourse is made to this court. Some of the inconsistencies such as the impugned section 7(1) of the Land Acquisition Act are too obvious and require no interpretation by this court. The purpose of article 274 of the Constitution was to avoid a situation where each and every provision of the old laws, those that pre-date the 1995 Constitution, found to be inconsistent with the Constitution had to end up in this court, for interpretation and for declarations to that effect. All courts of law have the power to do that. To enforce and put into effect article 274 of the Constitution.

The Court added that ‘every court, tribunal or administrative body is required to apply and enforce the provisions of article 274’.⁶⁵ The Court further held:⁶⁶

The petitioner in this matter should have filed a suit in any competent court and requested that court to construe section 7(1) of the Land

57 As above.

58 *Advocates for Natural Resources* 6-9.

59 *Advocates for Natural Resources* 11 (emphasis in original).

60 *Advocates for Natural Resources* 12.

61 *Advocates for Natural Resources* 13.

62 As above.

63 As above.

64 As above.

65 *Advocates for Natural Resources* 15.

66 *Advocates for Natural Resources* 16 (emphasis in original).

Acquisition Act in such a way as to bring it into conformity with the Constitution as provided for under article 274. This would have simply required court to read into that section, the phrase '*prior payment*'.

Against that background, the Court concluded that the government violated the petitioner's right to property, and that

[s]ection 7(1) of the Land Acquisition Act is hereby nullified to the extent of its inconsistency with article 26(2) of the Constitution. That is to say, to the extent that it does not provide for prior payment of compensation, before government compulsorily acquires or takes possession of any person's property.⁶⁷

In this case the Constitutional Court read words into section 7(1) of the Land Acquisition Act. The Constitutional Court has adopted a similar approach when dealing with other pre-Constitution legislation.⁶⁸ In this case the words were expressly read into section 7(1). Second, there are cases in which a court does not read the words expressly into the Act but leaves it open to accommodate future developments. For example, section 5(1) of the 1962 Oaths Act provides:

Whenever any oath is required to be taken under the provisions of this or any other Act, or in order to comply with the requirements of any law in force for the time being in Uganda or any other country, the following provisions shall apply, that is to say, the person taking the oath may do so in the following form and manner:

- (a) He or she shall hold, if a Christian, a copy of the gospels of the four evangelists or of the New Testament, or if a Jew, a copy of the Old Testament, or if a Moslem, a copy of the Koran, in his or her uplifted hand, and shall say or repeat after the person administering the oath the words prescribed by law or by the practice of the court, as the case may be;
- (b) in any other manner which is lawful according to any law, customary or otherwise, in force in Uganda.

Section 5 recognises three religions for the purposes of taking an oath, namely, Christians, Jews and Moslems. In other words, for a person to take an oath, he or she must profess one of the above faiths. In *Butime Tom v Muhumuza David*⁶⁹ one of the issues before the

67 *Advocates for Natural Resources* 21. See also *Uganda National Roads Authority v Irumba & Another* Constitutional Appeal 2 of 2014 [2015] UGSC 22 (29 October 2015).

68 See, eg, *Hon Sam Kuteesa & 2 Others v Attorney General* Constitutional Reference 54 of 2011 [2012] UGCC 2 (4 April 2012) where the Court held that a provision of the Magistrate's Court Act, which provided for the automatic expiration of the bail of an accused who was committed to the High Court for trial, was contrary to the Constitution.

69 *Butime Tom v Muhumuza David & Another* Election Petition Appeal 11 of 2011 [2012] UGCA 12 (21 May 2012).

Court of Appeal was whether a person could take an oath without holding the Bible or the Koran.⁷⁰ The Court of Appeal held that a person who professes another faith other than the three mentioned in section 5(1) of the Act should be asked if he could use his religious book for the purpose of taking an oath.⁷¹ The Court held further:⁷²

The Oaths Act, Cap 19 is a 1962 enactment. It is therefore an 'existing law' under article 274 of the Constitution, and as such it must be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with the 1995 Constitution ... Section 5(1)(a) of the Oaths Act restricts one taking the oath, if a Christian to use a copy of the gospels of the four evangelists or of the New Testament, or if a Jew, a copy of the Old Testament, or if a muslim [sic] a copy of the Koran. Given the non-restrictive language, spirit and intent of article 29(1)(b) and (c) of the Constitution, section 5(1)(a) of the Oaths Act must be interpreted in such a way that the holy books enumerated therein are not exhaustive, so that, depending on one's faith, another appropriate holy book or artifice can be used for taking an oath or affirmation as one's religion may require.

The Court added that section 5 was consistent with the constitutional right to practise one's religion.⁷³ In some cases a court does not hold that the impugned legislation is inconsistent with the Constitution but invokes article 274 to explain how the impugned legislation should be read to bring it in line with the Constitution. For example, in *Akayo*⁷⁴ the appellant, a district education officer (DEO), was dismissed from office by the chief administrative officer (CAO) based on a pre-1995 public service regulations and standing orders. He argued that under the 1995 regulations, the CAO did not have the power to dismiss him and that only the District Service Commission (DSC) could legally dismiss a DEO.⁷⁵ On the other hand, the CAO argued that he had those powers based on both the pre-1995 public service regulations and the Constitution.⁷⁶ The Court held that the regulations and orders had to be read in the light of article 274.⁷⁷ Against that background, the Court held:⁷⁸

70 *Butime Tom* (n 69) 7.

71 *Butime Tom* 21.

72 *Butime Tom* 23.

73 *Butime Tom* 24. See also *Tusingwire v Attorney General* Constitutional Petition 2 of 2013 [2013] UGSC 15 (20 December 2013) (the Court read words into the Interpretation Act, ch 3 (1976)).

74 *Akayo v Kamuli District Local Council* Civil Appeal 8 of 2011 [2014] UGCA 97 (23 July 2014).

75 *Akayo* (n 74) 4-6.

76 *Akayo* 6-7.

77 *Akayo* 11.

78 *Akayo* 12.

The Public Service Act and the Regulations/Standing Orders made thereunder, as the law existing before the 1995 Constitution was promulgated, must be interpreted and applied in matters of exercising disciplinary control over officers, like the appellant, employed in local governments with such modifications, adaptations, qualifications and exceptions as mandated by article 274. Bearing the above legal principles in mind ... we find that the CAO adamantly assumed powers he did not have to interdict and eventually to make submissions to the DSC to dismiss the appellant.

In this case the Court explained how the regulations and standing orders should be read to bring them in conformity with the Constitution. The Court did not expressly find these regulations or standing orders to be inconsistent with the Constitution.

5.2 Striking out words from the impugned legislation

The second approach is for courts to strike out words from the impugned provision and replace these with new words. According to this approach a court either adds a few words or overhauls the entire provision. For example, in *Karokora*⁷⁹ the petitioner argued that section 13(1) of the Pensions Act was contrary to article 254(1) of the Constitution. Article 254(1) provides that '[a] public officer shall on retirement receive such pension as is commensurate with his rank, salary and length of service'. Section 13(1) of the Pensions Act provides that '[e]xcept in cases provided for by sub-section (2), a pension granted to an officer under this Act shall not exceed 87 percent of the highest pensionable emoluments drawn by him or her at any time in the course of his or her service under the government'. Upon retirement the government invoked section 13(1) of the Pensions Act to pay out the petitioner's pension. He argued that according to article 254(1) of the Constitution, he was entitled to pension that was commensurate with his rank, salary and length of service. The Court found that section 13(1) of the Pensions Act was inconsistent with article 254(1) of the Constitution and held:⁸⁰

We should observe that pension can only be appropriate if it takes into proper consideration all the factors based on to calculate one's pension without any form of limitation. In that regard, we would allow this Petition and declare that section 13(1) of the Pensions Act contravenes article 254(1) in as far as it bases calculation of pension of a pensioner to only 87% of the length of service, instead of the whole period of service of that pensioner and so did the action of the Commissioner for

79 *Karokora v Attorney General* Constitutional Petition 45 of 2012 [2014] UGCC 16 (20 December 2013).

80 *Karokora* (n 79) 24-25.

Pensions in refusing to consider the petitioner's entire length of service when computing his pension.

Although the Court does not expressly state so, the inevitable outcome of its decision is that it replaced the relevant part of section 13(1) of the Pensions Act with the relevant part of article 254(1) of the Constitution. Similarly, in *Centre for Health, Human Rights and Development*⁸¹ the applicants challenged the constitutionality of, among others, section 130 of the Penal Code Act⁸² on the ground that it uses derogatory terms with respect to persons with mental disabilities and, therefore, is discriminatory and contrary to article 21 of the Constitution. Section 130 of the Penal Code Act provides:

Any person who, knowing a woman or girl to be an idiot or imbecile, has or attempts to have unlawful carnal knowledge of her under circumstances not amounting to rape, but which prove that the offender knew at the time of the commission of the offence that the woman or girl was an idiot or imbecile, commits a felony and is liable to imprisonment for fourteen years.

The Court agreed with the petitioners that the words 'idiot' and 'imbecile' were dehumanising and derogatory and, therefore, contrary to the Constitution and Uganda's international human rights obligations.⁸³ The Court added:⁸⁴

The words 'idiot' and 'imbecile' that appear in section 130 of the Penal Code Act, are declared to contravene articles 20, 21(1), (2), and (3), 23, 24 and 35 of the Constitution by reason of their being derogatory, dehumanising and degrading. They are accordingly struck out from section 130 of the Penal Code Act. The section is modified in accordance with article 274 of the Constitution to read as follows: Any person who, knowing a woman or girl to be mentally ill or mentally impaired, has or attempts to have unlawful carnal knowledge of her under circumstances not amounting to rape, but which prove that the offender knew at the time of the commission of the offence that the woman or girl was mentally disabled or mentally handicapped, commits a felony and is liable to imprisonment for fourteen years.

The Court added that it chose to invoke article 274 because 'striking out the section would leave mentally handicapped/disabled women and girls unprotected'.⁸⁵

The right to freedom from discrimination was also dealt with in another case. Section 82(6) of the Trial on Indictments Act provided

81 *Centre for Health, Human Rights & Development & Another v Attorney General* Constitutional Petition 64 of 2011 [2015] UGCC 14 (30 October 2015).

82 Penal Code Act (PCA) Cap 120.

83 *Centre for Health* (n 81) 25-27.

84 *Centre for Health* (n 81) 29.

85 *Centre for Health* (n 81) 27.

that 'if the accused is acquitted, he or she shall be immediately discharged from custody unless he or she is acquitted by reason of insanity'. In *Centre for Health, Human Rights and Development*⁸⁶ the applicants also challenged the constitutionality of, among others, section 82(6) of Trial on Indictments Act on the ground that it discriminated against accused with mental illnesses and could lead to their indefinite detention. The Court held:⁸⁷

We consider that the reason such person is detained is because he/she is found to have committed the act that would amount to an offence if he/she was of sound mind, but is only acquitted because he/she is deemed not to have known what he/she was doing or that it was wrong. This is different from someone acquitted, for example, for lack of evidence. It is therefore not discrimination to detain such a person, as the purpose for the detention is not punishment for any offence but it is for the person's security, safety and health care as well as the security of the community. What needs to be put in place is a process of review of the detention of such a person so that he/she is not detained indefinitely. We are therefore, constrained to construe section 82(6) of the Trial on Indictments Act in accordance with article 274 of the Constitution.

Against that background the Court held:⁸⁸

Section 82(6) of the Trial on Indictments Act is modified in accordance with article 274 of the Constitution to read as follows: (a) The trial Court is to order for the detention of such a person for a specific period, for purposes of care or treatment of that person by a qualified psychiatrist or other qualified medical officer, in accordance with article 23(1) of the Constitution. (b) The period of detention is to be specified in the order of detention and is to be periodically reviewed by Court to ascertain the mental status of the detained person based on medical evidence from a psychiatrist or other qualified medical officer. (c) When the court is satisfied that such a detained person is mentally fit and is no longer a danger to him/herself and/or to the community, it may order for his/her release.

The effect of this approach is for the court to practically rewrite the impugned provision. In *Hon Sam Kuteesa*⁸⁹ the Court dealt with the constitutionality of section 168(4) of the Magistrate's Courts Act which provided:

If a person committed for trial by the High Court is on bail granted by any court, without prejudice to his or her right to apply to the High

⁸⁶ *Centre for Health* (n 81).

⁸⁷ *Centre for Health* (n 81) 24.

⁸⁸ *Centre for Health* (n 81) 28-29.

⁸⁹ *Hon Sam Kuteesa & 2 Others v Attorney General* Constitutional Reference 54 of 2011 [2012] UGCC 2 (4 April 2012).

Court for bail, the bail shall lapse, and the Magistrate shall remand him or her in custody pending his or her trial.

The petitioners argued that the above provision was contrary to article 23 of the Constitution which provides for the right to personal liberty and, in particular, the right to apply for bail, and article 139 (which deals with the jurisdiction of the High Court). The Court held:⁹⁰

An examination of section 168(4) of the Magistrate's Courts Act, shows that it commands lapse of bail granted by any court to a person who is being committed for trial by the High Court. The lapse is solely based on the single fact that the person is being committed to the High Court for trial. It is irrelevant whether the committing court is inferior in hierarchy and jurisdiction to the court that granted the bail to the person being committed. It is also inconsequential that neither the person being committed nor the prosecutor is afforded any opportunity to be heard as to the issue of bail. It would appear there is no provision of law for appeal, Revision or Review of the Order of cancellation of bail made under the section. To the extent that section 168(4) allows an inferior court to cancel the bail granted to an accused by a superior court, such as the High Court, which has unlimited original jurisdiction in all matters and to which decisions of inferior courts go by way of appeal under article 139, is in our view, inconsistent with the said article 139. It is also in contradiction with section (4) of the Judicature Act, cap 13.

The Court added that the impugned provision was also inconsistent with article 23 of the Constitution.⁹¹ Against that background, the Court held:⁹²

Section 168(4) of the Magistrate's Courts Act must be construed in such a way as to provide that: (1) Bail granted, by a court of competent jurisdiction, to a person arrested in connection of a criminal case does not automatically lapse by reason only of the fact of that person being committed to the High Court for trial. (2) Subject to being competently seized of jurisdiction under the law, the court committing an accused person to the High Court for trial, has power derived from article 23(6) (a) of the Constitution to maintain bail already granted or to grant bail to an accused person, or to cancel bail for sufficient reason, after hearing the parties concerned on the matter.

In this case the Court 'deleted' the part of the section that provided for the lapse of the bail and added sentences that not only provided that the bail does not lapse, but also provided for the right of the accused and guided courts on how they should deal with the bail application. The High Court followed a similar approach when

⁹⁰ *Kuteesa* (n 89) 34.

⁹¹ *Kuteesa* 31-33.

⁹² *Kuteesa* 38.

dealing with the law that empowers the minister responsible for justice to release mentally-ill prisoners. In *Bushoborozi*⁹³ the applicant had murdered his child and the trial court found that he was insane at the time of the offence and acquitted him but ordered that he should be detained (as a 'criminal lunatic'). Section 48 of the Trial on Indictment Act provides that a person who has been detained under such circumstances can be released only on the order of the minister responsible for justice. It is to the following effect:

- (2) When a special finding is made under subsection (1), the court shall report the case for the order of the Minister, and shall meanwhile order the accused to be kept in custody as a criminal lunatic in such place and in such manner as the court shall direct.
- (3) The Minister may order a person in respect of whom a special finding has been made to be confined in a mental hospital, prison or other suitable place of safe custody.
- (4) The superintendent of a mental hospital, prison or other place which any criminal lunatic is detained by an order of the Minister under subsection (3) shall make a report to the Minister of the condition, history and circumstances of every such lunatic at the expiration of a period of three years from the date of the Minister's order and thereafter at the expiration of periods of two years from the date of the last report.
- (5) On the consideration of any such report, the Minister may order that the criminal lunatic be discharged or otherwise dealt with.
- (6) Notwithstanding subsections (4) and (5), the Commissioner of Prisons or the chief medical officer may, at any time after a criminal lunatic has been detained in any place by an order of the Minister, make a special report to the Minister on the condition, circumstances and history of any such criminal lunatic, and the Minister, on consideration of any such report, may order that the criminal lunatic be discharged or otherwise dealt with.
- (7) The Minister may at any time order that a criminal lunatic be transferred from a mental hospital to a prison, or from a prison to a mental hospital, or from any place in which he or she is detained to either a prison or a mental hospital.

While in prison, the applicant received treatment and recovered from his mental condition. However, all his attempts to be released were unsuccessful and as a result he spent 14 years in prison. The Court found that the release of a person from prison was a judicial function and that the applicant's constitutional rights had been violated by the continued imprisonment.⁹⁴ The Court added that a trial court retained the powers to make special orders relating to a person's

93 *Bushoborozi* (n 27).

94 *Bushoborozi* 7.

liberty.⁹⁵ Against that background the Court proposed the following procedure:⁹⁶

- (a) Where the trial court makes a special finding that the criminal lunatic is not guilty by reason of being insane, the judge must make special orders as to the discharge or continued incarceration of the prisoner in an appropriate place.
- (b) The trial court must order, in line with subsection (4) of section 48 of the TIA that the superintendent of the mental hospital, prison or other place detaining the prisoner makes periodic reports to the court which may issue appropriate special orders for the discharge of the criminal lunatic or otherwise deal with him or her.
- (c) The Registrar of the Court shall periodically, and in any case not later than three years from the date of the last court order or report from the institution keeping the prisoner, make a production warrant for the prisoner and present the case file before the High Court or any other Court of competent jurisdiction for appropriate special orders.
- (d) The Registrar may appoint Counsel on State briefs to assist court in revisiting the cases pending the judge's special orders.

The effect of the above holding is to transfer the powers of the minister under section 48 of the Act to the High Court. The Court held that its approach was informed not only by article 274 of the Constitution but also by 'judicial activism'.⁹⁷ The Court's bold step in this case could be explained by the fact that the judiciary on more than one occasion had highlighted the need for section 48 to be amended but its recommendations had been ignored by the law makers. As the Court put it:⁹⁸

The need for law reform in the law relating to criminal lunatics remanded pending the Minister's orders has been made by so many judges in their reports on criminal sessions and decisions. We need not lament more than that. The Deputy Registrar sitting at Fort Portal is hereby directed to serve a copy of my ruling to the Rules Committee and the Principal Judge with a view of prompting the development of some rules and or Practice Directions along what I have recommended in this ruling.

It thus is evident that article 274 could be used by judges as one of the ways to achieve what Parliament has failed to – amending legislation to bring it in conformity with the Constitution. In my

95 *Bushoborozi 8.*

96 *Bushoborozi 9.*

97 *Bushoborozi 5-6.*

98 *Bushoborozi 9.*

view, the Court went beyond what is permissible under article 274. The alternative approach would have been for the Court not to completely usurp the powers of the minister. For example, the Court could have held that the above powers should only be exercised by a court when there is evidence that an applicant had made at least two applications to the minister and the Minister has failed to act. In other words, the Minister should be given the first opportunity to exercise his powers and courts should only intervene when the minister has been unwilling or unable to exercise such powers. This is so because although courts can make special orders with regard to people in detention, the executive also has a stake in the administration of justice. In any case, it is the latter that is responsible for the well-being of the detainees and prisoners through the police or prison authorities.

Likewise, in *Uganda v Kamuhanda*⁹⁹ the High Court relied on article 274, as Parliament had not attempted to amend section 193(2) of the Penal Code Act to bring it in line with the Constitution. Section 192 of the Penal Code Act provides that a person who unlawfully kills another in circumstances that amount to provocation will be convicted of manslaughter. Section 193 defines provocation to include the following:¹⁰⁰

When such an act or insult is done or offered by one person –

- (a) to another; or
- (b) in the presence of another to a person –
 - (i) who is under the immediate care of that other; or
 - (ii) to whom that other stands in any such relation as aforesaid, the former is said to give to that other provocation for an assault.

The Court held that although section 193(2) is gender neutral, in reality it perpetuates domestic violence, especially violence against women and children. This is so because in Uganda most families are headed by men.¹⁰¹ The Court emphasised the fact that domestic violence was criminalised in Uganda and that the Constitution prohibits inhuman or degrading treatment and provides for gender equality.¹⁰² The Court added that experience in Uganda shows that ‘the law makers are reluctant to amend the laws governing domestic relations’.¹⁰³ Against that background, the Court held:¹⁰⁴

99 *Uganda v Kamuhanda* HCT-01-CR-SC-0024 of 2012 [2014] UGHCCRD 21 (13 February 2014).

100 Sec 193(2).

101 *Kamuhanda* (n 99) 6.

102 As above.

103 As above.

104 *Kamuhanda* (n 99) 6-7.

The courts of law should take it as their duty to harmonise the old law on provocation with the Domestic [V]iolence [A]ct and construe the [P]enal [C]ode provisions with such modifications as to bring it in conformity with the 1995 Constitution. This is legal and constitutional under article 274(2) of the Constitution. I am now setting a precedent by considering accumulated anger arising from repeated acts of domestic violence, and more so when they are committed with impunity, as a partial defence to murder in a domestic setting. It is also, in my opinion, a very serious mitigating factor for sentences in homicides and other crimes committed in a domestic sphere.

The effect of this holding is to indirectly amend section 193 of the Penal Code Act by providing for what is commonly known as ‘the battered women/wives/partners syndrome’ as a partial defence for murder in domestic settings. This partial defence has been recognised by courts in some African countries such as Zimbabwe,¹⁰⁵ South Africa¹⁰⁶ and Seychelles.¹⁰⁷ It is argued that overhauling a legislative provision is beyond the mandate of the court’s power under article 274. That is the mandate of the legislature. What article 274 requires a court to do is to interpret legislation and not to rewrite it. This can also be inferred from the drafting history of article 274 where it was stated that the existing law shall ‘continue until Parliament provides otherwise’.¹⁰⁸ If a court concludes that the impugned legislation requires an overhaul, it should declare it unconstitutional (if it is a Constitutional Court) or advise one of the parties to invoke article 137(3) and refer it to the Constitutional Court. The inability of other courts to declare legislation unconstitutional means that the Constitution may have to be amended to address this *lacuna*. This would mean, for example, that the High Court is empowered to declare legislation unconstitutional but the declaration only takes effect after it has been confirmed by the Constitutional Court. This approach has been followed in some countries, such as South Africa.¹⁰⁹

5.3 ‘Striking out’ and ‘reading out’

The third approach is for a court to ‘strike out’ or ‘read out’ words from the impugned legislation without replacing them. For example,

¹⁰⁵ See, eg, *S v Sweswe* HB 184/18, HC (CRB) 67/18 [2018] ZWBHC 184 (5 July 2018).

¹⁰⁶ *S v Marais* 2010 (2) SACR 606 (CC) 2011 (1); SA 502 (CC).

¹⁰⁷ *Labiche v R* [2006] SCCA 9 (28 November 2006).

¹⁰⁸ *Proceedings of the Constituent Assembly* (n 9) (submission by Mr Mulenga) (25 March 1995) 3466.

¹⁰⁹ See sec 167(5) of the Constitution of the Republic of South Africa 1996.

in *Kabandize*¹¹⁰ the Court of Appeal dealt with the constitutionality of section 2 of Civil Procedure and Limitations (Miscellaneous Provisions) Act (1969).¹¹¹ Section 2 provided:

- (1) After the coming into force of this Act, notwithstanding the provisions of any other written law, no suit shall lie or be instituted against –
 - (a) the Government;
 - (b) a local authority; or
 - (c) a scheduled corporation, until the expiration of forty-five days after written notice has been delivered to or left at the office of the person specified in the First Schedule to this Act, stating the name, description and place of residence of the intending plaintiff, the name of the Court in which it is intended the suit be instituted, the facts constituting the cause of action and when it arose, the relief that will be claimed and, so far as the circumstances admit, the value of the subject matter of the intended suit.
- (2) The written notice required by this section shall be in the form set out in the Second Schedule to this Act, and every plaint subsequently filed shall contain a statement that such notice has been delivered or left in accordance with the provisions of this section.

The Court held that section 2 should be interpreted in light of article 274 of the Constitution and article 21 of the Constitution – which provides for the right to equality before the law. The Court reasoned that a combined reading of articles 21 and 274 ‘requires that parties appearing before Courts of law must be treated equally and must enjoy equal protection of the law’.¹¹² Against that background, the Court held:¹¹³

Section 2 above is a law that gives preferential treatment to one party to a suit by requiring the other party to first serve it with a 45 days mandatory notice of intention to sue. The section is also discriminatory in that it requires one party to issue statutory notice to the other without a reciprocal requirement on the other. Non-compliance renders a suit subsequently filed by one party incompetent. Government and all scheduled corporations are under no obligation to serve statutory notice of intention to sue to intended defendants. On the other hand, ordinary litigants are required to first issue and serve a 45 days mandatory notice upon Government and scheduled corporations. We find that in view of Article 20(1) of the Constitution a law cannot impose a condition on one party to the suit and exempt the other from

¹¹⁰ *Kabandize & 20 Others v Kampala Capital City Authority* Civil Appeal 28 of 2011 [2014] UGCA 26 (4 March 2014).

¹¹¹ Civil Procedure and Limitations (Miscellaneous Provisions) Act Cap 72.

¹¹² *Kabandize* (n 110) 11.

¹¹³ *Kabandize* (n 110) 11-12.

the same condition and still be in conformity with Article 20(1) of the Constitution.

The Court held that ‘the requirement to serve a statutory notice of intention to sue against the government, a local authority or a scheduled corporation is no longer a mandatory requirement in view of articles 274 and 20(1) of the Constitution’ and that ‘non-compliance with that impugned section 2 does not render a suit subsequently filed incompetent’.¹¹⁴ In this case the Court removed the 45-day notice period without replacing it with another period. This would ensure that both parties have the same period within which to file the notice. This approach has been followed in other cases.¹¹⁵

6 Article 274 and unwritten laws

Although in most of the cases courts have invoked article 274 when dealing with written laws, there have also been cases where the article has been invoked to construe unwritten law and bring it in conformity with the Constitution. For example, in *Uganda v Nakoupuet*¹¹⁶ the accused wished to marry the complainant who objected to the proposed marriage. He approached her parents and paid dowry, and her brothers forcibly took her to the accused’s house and held her, and the accused raped her in their presence. This was so because according to their cultural practice, once a man had paid dowry to the parents of the woman, she became his ‘wife’.¹¹⁷ The Court observed:¹¹⁸

This court condemns the culture of forcefully chasing, abducting and raping girls and woman to make them wives. It is a brutal and backward culture promoting violence against women. Nobody and no one’s daughter, sister or mother deserves being raped in the name of marriage. This vice of cultural rape is a resilient, pervasive and persistent culture promoting gender stereotypes.

The Court referred to the relevant provisions of the Constitution and international human rights instruments that prohibit harmful cultural practices against women,¹¹⁹ and held:¹²⁰

¹¹⁴ *Kabandize* (n 110) 12.

¹¹⁵ See, eg, *Kawuki v Semaganyi* Civil Appeal 19 of 2014 [2017] UGHCLD 48 (2 May 2017).

¹¹⁶ *Uganda v Nakoupuet* Criminal Case 109 of 2016 [2019] UGHCCRD 14 (25 January 2019).

¹¹⁷ *Nakoupuet* (n 116) para 7.

¹¹⁸ *Nakoupuet* para 13.

¹¹⁹ *Nakoupuet* para 14.

¹²⁰ *Nakoupuet* para 16.

Article 274 of our Constitution provides for judicial activism to fight such backward customs and traditions found in the existing customary law. We are empowered by law to construe the existing law with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with the Constitution. We have the legal mandate to, and so must, question the rape culture. This is the time to break the culture of silence and condemn this negative culture in the strongest terms possible. The conviction and sentence must send a clear message to the accused person and anyone intending to abduct and rape the women of Uganda that it is a serious capital offence.

As a result, the accused was convicted of rape and sentenced to 15 years' imprisonment.

In *Uganda v Yiga Hamidu & Others*¹²¹ the High Court invoked article 274 to abolish a cultural practice in terms of which a married woman was always assumed to have consented to sexual intercourse with her husband. In effect, the Court introduced the concept of marital rape in Ugandan law.¹²² The Court's judgments have the effect of abolishing cultural practices instead of modifying these. This is understandable as such practices are prohibited by the Constitution¹²³ and the international human rights instruments ratified by Uganda.¹²⁴ However, the challenge is that the Court's judgment may have very little impact on the ground for the simple reason that many people who follow these cultural practices may not be aware that such judgments were handed down. Some of these people may even argue that the judges misunderstood their culture. This is one of the areas in which the legislature will have to intervene and enact the relevant legislation to stamp out such practices and also for the relevant government ministry to put in place measures to educate people on why such a cultural practice is unacceptable.

7 Contentious reliance on article 274

There have also been cases where courts have invoked article 274 of the Constitution in questionable circumstances. For example,

121 *Uganda v Yiga Hamidu & Others* Criminal Session Case 5 of 2002 [2004] UGHCCRD 5 (9 February 2004).

122 As above.

123 Art 32(2) of the Constitution provides that '[l]aws, cultures, customs and traditions which are against the dignity, welfare or interest of women ... or which undermine their status, are prohibited by this Constitution'.

124 See, eg, arts 2 and 4 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2005); art 2 of the Convention on the Elimination of All Forms of Discrimination against Women (1979).

in *Nabawanuka v Makumbi*¹²⁵ the petitioner, in a divorce matter, approached the High Court seeking, among others, a decree *nisi* dissolving the marriage to the respondent, maintenance and custody of the child. In reply the respondent argued that the matter was *res judicata* as the case had already been handled by the Shari'a Court of the Uganda Muslim Supreme Council.¹²⁶ In rebuttal, the petitioner argued that the Shari'a Court of the Muslim Supreme Council had not been established by law as required by the Constitution and that, therefore, it was not a court of competent jurisdiction.¹²⁷ The Court observed that the issue before it was whether

the Sharia Court of the Muslim Supreme Council is a Court of judicature as contemplated [u]nder Article 129 of the Constitution. The relevant sub-article of Art 129 provides: Such subordinate Courts as Parliament may by law establish including Qadh's Courts for marriage, divorce, inheritance of property and guardianship as may be prescribed by Parliament.¹²⁸

The respondent argued that Shari'a courts had not yet been established by Parliament, while the petitioner argued that Shari'a courts existed and 'are indeed envisaged under the Marriage and Divorce of Mohammedans Act'.¹²⁹ The Court held:¹³⁰

Whereas indeed it's true that Qadhis Courts envisaged under Art 129(1) (d) of the Constitution have not yet been established, I do not agree with [the petitioner's] view that the Sharia Courts currently operating are operating outside the law. My position is premised on the import of Article 274 of the Constitution which provides ...

The Court concluded:¹³¹

It is not in dispute that the Marriage and Divorce of Mohammedans Act Cap 252 is on our statute book. Section 2 thereof provides: 'All marriages between persons professing the Mohammedan religion and all divorces from such marriages celebrated or given according to the rites and observances of the Mohammedan religion customary and usual among the tribe and sect in which the marriage or divorce takes place shall be valid and registered as provided under the Act.' Consequently my view is that the Sharia Courts of the Muslim Supreme Council are operating within the law and are competent courts to handle divorce cases and grant relief.

¹²⁵ *Nabawanuka v Makumbi* Divorce Cause 39 of 2011 [2013] UGHCFD 3 (13 February 2013).

¹²⁶ *Nabawanuka v Makumbi* (n 125) 1.

¹²⁷ *Nabawanuka v Makumbi* 2.

¹²⁸ As above.

¹²⁹ *Nabawanuka v Makumbi* 3.

¹³⁰ *Nabawanuka v Makumbi* 4.

¹³¹ As above.

It is argued that the High Court's reliance on article 274 in this case is debatable for at least two reasons. First, the Court did not point out which law was inconsistent with the Constitution for it to invoke article 274. None of the parties had argued that the Marriage and Divorce of Mohammedans Act was inconsistent with the Constitution for the Court to interpret it on the basis of article 274. Second, the Marriage and Divorce of Mohammedans Act does not contain a provision on Shari'a courts. Much as it states that marriages and divorces of Muslims shall be governed by Muslim law, it does not establish Shari'a courts to administer such law. Therefore, the Shari'a Courts at the Uganda Muslim Supreme Council are not a creature of the Marriage and Divorce of Mohammedans Act.

8 Conclusion

In this article the author has demonstrated how Ugandan courts have relied on article 274 to interpret laws that existed before the coming into force of the Constitution to protect human rights. It has been illustrated that, although only the Constitutional Court has the mandate to declare legislation inconsistent with the Constitution, other courts have invoked article 274 to make such declaration before interpreting such laws to bring them in conformity with the Constitution. It has also been demonstrated that the Constitutional Court or the Supreme Court will only declare a legislative provision unconstitutional if it cannot be modified on the basis of article 274. This explains why in some cases a court will declare some sections unconstitutional but modify others.

It has been argued that although courts are empowered to interpret legislation to bring it in conformity with the Constitution, they lack the mandate to overhaul legislation. Where it becomes clear to the court that invoking article 274 would require it to overhaul a legislative provision, it should declare such a provision unconstitutional (if it has the jurisdiction to do so). It is commendable that courts have used their mandate under article 274 to protect the rights of, especially, the most vulnerable. However, for better protection of these rights, it is also recommended that there may be a need for the Ugandan Constitution to be amended so that other courts other than the Constitutional Court (the High Court and the Court of Appeal) are also empowered to declare legislation unconstitutional. However, such a declaration should only become effective after it has been confirmed by the Constitutional Court if there is no appeal to the Supreme Court. If there is an appeal to the Supreme Court, the declaration should only become effective after it has been confirmed by the Supreme Court.