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Protected areas, community rights and affirmative action: The plight of Uganda's Batwa people

*Alexander Paterson**

Professor, Institute of Marine and Environmental Law, Faculty of Law, University of Cape Town, South Africa
<https://orcid.org/0000-0002-5101-2648>

Summary: *The intersection between protected areas, community rights, statutory legal frameworks and customary law and practice is complex. Several cases heard by members of the African judiciary over the last decade have dealt with this intersection and provided valuable guidance on forging solutions promoting the contemporary conservation discourse that recognises the role of local communities and indigenous peoples in the governance and management of protected and conserved areas. The recent claim brought by the Batwa people of Uganda to land and resources situated in three protected areas provided the judiciary with another opportunity to draw from and contribute to the emerging relevant jurisprudence. This contribution overviews this jurisprudence and its strong link to the contemporary conservation discourse, and critically reflects on the latest contribution to it. It ultimately concludes that while the Ugandan Constitutional Court in the Batwa case missed a clear opportunity to draw from and develop the existing relevant jurisprudence, it did add a new dimension to it in the form of forging solutions through affirmative action redress.*

Key words: *protected areas; community rights; land claim; affirmative action*

* BSocSci LLB LLM PhD (Cape Town); Alexander.Paterson@uct.ac.za

1 Introduction

Over the past decade some landmark cases brought before the judiciary in Africa have compelled judges to deal with the often complex intersection between protected areas, community rights, statutory legal frameworks and customary law and practice. These highlight the key role of the judiciary in forging solutions and shifting the often rigid domestic legal discourse from the colonial exclusionary fortress approach to conservation, to a more human-centred and inclusive approach recognising both the land and resource rights of indigenous peoples and local communities (IPLCs) in protected areas, and the valuable role played by these IPLCs in conserving these. The number of cases seems to be growing and some of the more important cases are briefly mentioned below.

In *Centre for Minority Rights Development & Others v Kenya*¹ the African Commission on Human and Peoples' Rights (African Commission) held that the Kenyan government had violated the African Charter on Human and Peoples' Rights² (African Charter) by evicting the Endorois community from the Lake Bogoria area to create a game reserve; and ordered the government to recognise the community's rights of ownership, restore the land to them and allow them unrestricted access to it.³ In *Mosetlhanyane v Attorney-General of Botswana*⁴ the Botswanan Court of Appeal brought to a close a protracted dispute concerning the Kalahari Bushmen's struggle to secure, first, their land rights and, second, their water rights in the Central Kalahari Game Reserve, finding in their favour.⁵ In *African*

1 (2009) AHRLR 75 (ACHPR 2009).

2 African Charter on Human and Peoples' Rights (1982) 21 ILM 58.

3 See generally H Smith & W Wicomb 'Customary communities as "peoples" and their customary tenure as "culture": What we can do with the Endorois decision' (2011) 11 *African Human Rights Law Journal* 422; E Ashamu 'Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya: A landmark decision from the African Commission' (2011) 55 *Journal of African Law* 300; L Juma 'Protection of development-induced internally displaced persons under the African Charter: The case of the Endorois community of Northern Kenya' (2013) 46 *Comparative and International Law Journal of Southern Africa* 211.

4 Unreported judgment of Ramodibedi JA in the Court of Appeal of the Republic of Botswana under Case CACLB-074-10 27 January 2011. Two prior cases relating to this matter were *Sesana v Attorney General of Botswana* 2006 (2) BLR 633; *Matsipane Mosetlhanyane v Attorney General of Botswana* (unreported judgment of Walia J in the High Court of Botswana under Case MAHLB-000393-09 21 July 2010).

5 See generally R Hitchcock, M Sapignoli & W Babchuk 'What about our rights? Settlements, subsistence and livelihood security among Central Kalahari San and Bakgalagadi' (2011) 15 *International Journal of Human Rights* 62; A Paterson 'The endless struggle of indigenous peoples in protected areas: Considering the Bushman's struggle for water rights in the Central Kalahari Game Reserve' in A Iza et al (eds) *Water and the law: Towards sustainability* (2014) 349.

*Commission on Human and Peoples' Rights v Republic of Kenya*⁶ the African Court on Human and Peoples' Rights (African Court) ruled that the Kenyan government had violated several articles of the African Charter through the arbitrary forced evictions of the Ogiek community from the Mau forest complex, a formally-gazette forest reserve.⁷ In *Gongqose v Minister of Agriculture, Forestry and Fisheries*⁸ the South African Supreme Court of Appeal set aside the criminal conviction of various members of the local community caught fishing in the Dwesa-Cwebe Marine protected area, on the basis that they were lawfully exercising their customary rights to fish in the area.⁹ Other unresolved cases currently are before the courts, such as the ancestral land rights claim of the Hai||om San to the Etosha National Park in Namibia.¹⁰

These cases have been comprehensively canvassed by academics elsewhere, and it is not the purpose of this contribution to rehash these debates. Similarly, the nature and form of the shift in conservation ideology regarding IPLCs and their key role in managing protected and conserved areas have similarly been discussed extensively elsewhere, and it is not the purpose of this contribution to repeat this discussion.¹¹

6 (2007) 2 AfCLR 9.

7 See generally R Rösch 'Indigenoussness and peoples' rights in the African human rights system: Situating the Ogiek judgment of the African Court on Human and Peoples' Rights' (2017) 50 *Verfassung und Recht in Übersee* 242; L Claridge 'Litigation as a tool for community empowerment: The case of Kenya's Ogiek' (2018) 11 *Erasmus Law Review* 57.

8 2018 (5) SA 104 (SCA). The matter had previously been heard in both the magistrate's court and the High Court: *S v Gongqose* (unreported Case E382/10); *S v Gongqose* 2016 (1) SACR 556 (ECM).

9 See generally K Lehmann 'Fishing in protected waters: Balancing customary rights and conservation imperatives' (2011) 18 *South African Journal of Environmental Law and Policy* 77; L Feris 'A customary right to fish when fish are sparse: Managing conflicting claims between customary rights and environmental rights' (2013) 16 *Potchefstroom Electronic Law Journal* 555; A Paterson 'The interface between customary rights and environmental legislation: Lessons from *Gongqose & Others v Minister of Agriculture, Forestry and Fisheries & Others* (SCA) 2018' (2020) 26 *South African Journal of Environmental Law and Policy* 134; M Bishop 'Asserting customary fishing rights in South Africa' (2021) 47 *Journal of Southern African Studies* 291.

10 On the status of the court proceedings, see <https://www.lac.org.na/index.php/projects/land-environment-development-lead/indigenous-peoples/> (accessed 1 November 2021). On the history of the community's original occupation and eviction, see U Diekmann 'The impact of nature conservation on the San: A case study of the Etosha National Park' in T Hohmann (ed) *San and the state: Contesting land, development, identity and representation* (2003) 37.

11 For an overview of the shift and the international law, policy and scholarship relevant to the shift, see M Colchester 'Indigenous peoples and protected areas: Rights, principles and practice' (2003) 7 *Nomadic Peoples* 33; S Stevens 'A new protected areas paradigm' in S Stevens (ed) *Indigenous peoples, national parks, and protected areas: A new paradigm linking conservation, culture and rights* (2014) 47; Paterson (n 5) 350-365.

Prior to outlining what the purpose of this contribution is, it is worth noting that the key role of IPLCs in the context of conserving biodiversity, generally, and in managing protected and conserved areas, specifically, continues to attract significant global recognition. The recently published *Local Biodiversity Outlooks 2*,¹² which complements the *Global Biodiversity Outlook 5*,¹³ expressly states that IPLCs are

contributing significantly to the increase in equitable and effective protected and conserved areas, through community-led conservation and innovative collaborative management arrangements, and also by challenging human rights violations in broader conservation practice and promoting equity and justice.¹⁴

However, the publication proceeds to highlight the fact that upscaling these approaches will require further transformation

towards conservation approaches that are positively rights-affirming, going beyond outreach and collaboration towards full recognition of IPLCs' rights and increased support for the huge contribution of sustainably managed lands and territories that protect nature, often more effectively than state-run protected areas.¹⁵

This type of sentiment is echoed in the *Protected Planet Report 2020*,¹⁶ which recognises that 'there remains a need for equitable recognition of the contributions of diverse groups to conservation, notably those of indigenous peoples, local communities and private actors' and that 'the designation and governance of protected areas has sometimes been harmful to indigenous peoples and local communities, including by violating their rights, removing them from their lands, and revoking their access to culturally-important natural resources'.¹⁷

It accordingly is not surprising that the first official draft of the *Post-2020 Global Biodiversity Framework*,¹⁸ prepared under the auspices of the Convention on Biological Diversity¹⁹ and released in June 2021,

12 See generally Forest Peoples Programme et al *Local Biodiversity Outlooks 2: The contributions of indigenous peoples and local communities to the implementation of the Strategic Plan for Biodiversity 2011-2020 and to renewing nature and cultures. A complement to the fifth edition of Global Biodiversity Outlook* (2020).

13 Secretariat of the Convention on Biological Diversity *Global Biodiversity Outlook 5* (2020).

14 Forest Peoples Programme (n 12) 19.

15 As above.

16 UNEP-WCMC, UNEP & IUCN *Protected Planet Report 2020* (May 2021) ch 7, <https://livereport.protectedplanet.net> (accessed 1 November 2021).

17 See further S Stevens et al *Recognising and respecting ICCAs overlapped by protected areas* (2016) 43-47.

18 CBD *First Draft of the Post-2020 Global Biodiversity Framework* (5 July 2021) UN Doc UNEP/CBD/WG2020/3/3.

19 (1992) 31 *ILM* 818.

reaffirms the key role of IPLCs in the context of biodiversity, generally, and protected areas, specifically. It indicates that the successful implementation of what effectively is the next 'global biodiversity plan' requires the 'full and effective participation' of IPLCs,²⁰ and several of its 2030 Action Targets refer directly to IPLCs.²¹ Target 3, referring specifically to protected areas and effectively constituting the replacement for Aichi Target 11 contained in the *Strategic Plan in Biodiversity (2011-2020)*,²² the expired 'global biodiversity plan', ratchets up the coverage commitment for protected and conserved areas to at least 30 per cent and retains reference to the vital role of other effective area-based conservation measures as contributors towards this target. This is of key relevance to IPLCs, as territories and areas conserved by them, otherwise known as indigenous and community conserved areas, constitute good potential candidates for recognition as other effective area-based conservation measures.²³

With this context in mind, this contribution focuses on the latest addition to this trail of cases dealing with the complex intersection between protected areas, community rights, statutory legal frameworks and customary law and practice, namely, *United Organisation for Batwa Development in Uganda v Attorney-General (Batwa case)*.²⁴ This matter dealt with the eviction, exclusion and/or dispossession by the Ugandan government of the Batwa peoples (the Batwa) from their ancestral forest lands, which were subsequently formally proclaimed in three protected areas.

As with prior cases on the trail, this case raised issues of jurisdiction; the interpretation and application of constitutional rights; claims based on aboriginal or native title; attempts to be recognised as indigenous peoples; seeking to found community interests and rights on customary law and practice; and, unique to this case, the use of constitutional provisions providing for affirmative action to provide redress to marginalised communities. The purpose of this contribution is to reflect on the judgment and highlight the extent to which it adds to the existing trail of jurisprudence. It is divided into

20 CBD (n 18) 4, 9 & 12.

21 CBD (n 18) target 9, 20 & 21.

22 CBD *Strategic Plan for Biodiversity 2011-2020* (29 October 2010) UN Doc UNEP/CBD/COP/DEC/X/2.

23 C Eghenter 'Indigenous effective area-based conservation measures: Conservation practices among the Dayak Kenyah of North Kalimantan' (2018) 24 *Parks* 69; P Dearden et al 'Biodiversity outcomes of community conservation' in A Charles (ed) *Communities, conservation and livelihoods* (2021) 24-29. See generally on OECMs IUCN-WCPA Task Force on OECMs *Recognising and reporting other effective area-based conservation measures* (2019).

24 Unreported judgment of Elizabeth Musoke JCC in the Constitutional Court of Uganda at Kampala under Constitutional Petition 3 of 2013 19 August 2021 (*Batwa case*).

four main parts. It begins by providing an overview of the factual and legal context. It then focuses on how the Court circumscribed its jurisdiction over constitutional matters. It subsequently proceeds to consider the manner in which the Court addressed the constitutional provision providing for affirmative action, specifically circumscribing its purpose, form and nature; its application to the factual matrix; and available redress measures. Embedded in the above parts is both an overview of and critical reflection on the Court's approach. It concludes by reflecting on the extent to which the case contributes to the growing regional jurisprudence and the possible way forward for the litigants in this matter.

2 Factual and legal context

As a signatory to the Convention on Biological Diversity, the Ugandan government has over the past few decades sought to fulfil its commitments under the Convention, most notably in the context of protected areas, Aichi Target 11. At last count, approximately 18,87 per cent of Uganda's territory fell within formally-gazetted protected areas.²⁵ These include ten national parks, seven wildlife sanctuaries and 13 community wildlife management areas gazetted and currently managed in terms of the Ugandan Wildlife Act,²⁶ and 192 local forest reserves and 506 central forest reserves gazetted and currently managed in terms of the National Forestry and Tree Planting Act.²⁷ Some of the major concerns identified by Uganda's conservation authorities in the context of these protected areas are the reduction of forested areas in national parks, wildlife reserves and central forest reserves,²⁸ and the need to improve connectivity and corridors between protected areas.²⁹ Notwithstanding the global discourse to recognise the vital role of IPLCs in protected areas governance and management, according to the *World Database on Protected Areas*, but for 13 protected areas in respect of which the governance arrangement is not reported, all the other 700 odd protected areas in Uganda are governed by government authorities.³⁰ Central government control of protected areas accordingly would seem to be the dominant protected areas governance paradigm in Uganda, notwithstanding the prevalence of many innovative legal

25 National Environmental Management Authority (NEMA) & Ministry of Water and Environment (MWE) *Sixth national report to the CBD for Uganda* (2019) 77.

26 Act 17 of 2019.

27 Act 8 of 2003.

28 NEMA & MWE (n 25) 78-79.

29 NEMA & MWE (n 25) 80-84.

30 UNEP-WCMC *Protected area profile for Uganda from the World Database of Protected Areas* (2021), <https://www.protectedplanet.net/country/UGA> (accessed 1 November 2021).

mechanisms available in its relevant legislation to facilitate more collaborative and decentralised modes of governance by IPLCs³¹ and the adoption of a Community Conservation Policy³² by the Ugandan Wildlife Authority in 2019.

The recent case involving the Batwa's plight to secure their ancestral lands currently incorporated within three protected areas situated in South-Western Uganda should be considered in the above contemporary conservation context. However, the history of the dispute spans back almost a century and provides a further important context.

The Batwa are commonly characterised as the first peoples (forest peoples) of the Central African Forests spanning the Albertine Rift Valley.³³ Their historic occupation of the area, strong cultural connection to the forests, systematic eviction from the area and subsequent marginalisation have been comprehensively canvassed by many scholars,³⁴ and only the salient components of this history relevant to the dispute are canvassed below.

More than half of the estimated 6 200 Batwa currently situated in Uganda³⁵ reside in the south-western region of the country, bordering Rwanda and the Democratic Republic of the Congo (DRC).³⁶ This area is characterised by rich biodiversity, notably including areas of largely undisturbed Afro-montane forest that form the home for almost half of the world's endangered Mountain Gorillas.³⁷ During pre-colonial

31 See part 5 below.

32 UWA *Community conservation policy* (2019).

33 P Zaninka 'The impact of (forest) nature conservation on indigenous peoples: The Batwa of South-Western Uganda' in J Nelson & L Hossack (eds) *Indigenous peoples and protected areas in Africa: From principles to practice* (2003) 165; C Kidd & P Zaninka *Securing indigenous people's rights in conservation: A review of South-West Uganda* (2008) 3-4; N Mukasa 'The Batwa indigenous people of Uganda and their detachment from forest livelihood: Land eviction and social plight' (2012) 19 *Yearbook of Humanitarian Action and Human Rights* 71; N Mukasa 'The Batwa indigenous people of Uganda and their traditional forest land: Eviction, non-collaboration and unfulfilled needs' (2014) 24 *Indigenous Policy Journal* 1; J Gilbert & K Sena 'Litigating indigenous peoples' cultural rights: Comparative analysis of Kenya and Uganda' (2018) 77 *African Studies* 204; M Twinamatsiko, M Infield & A Mugisha 'Father forest – Batwa culture and the management of national parks in Uganda's Albertine Rift' in B Verschuuren & S Brown (eds) *Cultural and spiritual significance of nature in protected areas: Governance, management and policy* (2020) 238; C Ampumuzu, M Duineveld & R van der Duim 'The most marginalised people in Uganda? Alternative realities of Batwa at Bwindi Impenetrable National Park' (2020) 20 *World Development Perspectives* 1; P Satyal, M Byskov & K Hyams 'Addressing multi-dimensional injustice in indigenous adaptation: The case of Uganda's Batwa community' (2021) 13 *Climate and Development* 529.

34 As above.

35 Uganda Bureau of Statistics *National population and housing census 2014* (2016) 71.

36 P Kakuru *Batwa population census report* (2016) vii.

37 Mukasa (n 33) 74.

times, the Batwa occupied this area as forest-dwelling hunter-gatherers with customary rules and practices regulating hunting, the collection of medicinal plants and other natural resources. The arrival of the British and the subsequent establishment of the Protectorate of Uganda under British administration from 1894 to 1962 had a significant impact on the Batwa. Acting under the Game Ordinance (1926), the British declared the Mgahinga Forest a game sanctuary in 1930. Shortly thereafter, the British declared various forests in the area in which the Batwa resided and/or traversed on their hunting and gathering forays as crown forest reserves in terms of the Forests Ordinance 1913. The Mgahinga Forest was accorded a second designation as the Mgahinga Crown Forest Reserve in 1930. The Bwindi Forest was designated as the Kayonza and Kasatoro Crown Forest Reserves in 1932, which were subsequently amalgamated to form the Bwindi Impenetrable Central Crown Forest in 1942. The Echuya Forest was designated as the Echuya Central Forest Reserve in 1939. While the Forests Ordinance enabled the authorities to strictly regulate activities in forest reserves,³⁸ it appears that the Batwa's access to the forests and the resources situated therein was not significantly restricted.³⁹

Over the forthcoming years the regulation of access to the crown forest reserves tightened somewhat under the Forests Act (enacted in 1947 and amended in 1964) and Game (Preservation and Control) Act (enacted in 1959 and amended in 1964). In 1961 the Bwindi Forest was additionally gazetted as a game reserve under the latter Act, and following the 1964 amendment, the boundaries of the Mgahinga Game Sanctuary were extended and the area was re-gazetted as a game reserve in 1964.⁴⁰ The situation worsened for the Batwa in 1991 when the government, operating under the auspices of the National Parks Act 1952, formally declared the forests around Bwindi and Mgahinga as the Bwindi Impenetrable National Park and the Mgahinga Gorilla National Park respectively. This triggered their eviction from these areas with tight restrictions imposed on their ability to access and use the resources situated in these. The Bwindi Impenetrable National Park and Mgahinga Gorilla National Park currently are regulated in terms of the Uganda Wildlife Act 2019 and managed by the Ugandan Wildlife Authority. The Echuya Central Forest Reserve falls under the administration of the National Forestry Authority (NFA) and currently is regulated under the National Forest

38 N Turyahabwe & A Banana 'An overview of history and development of forest policy and legislation in Uganda' (2008) 10 *International Forestry Review* 644.

39 Mukasa (n 33) 6.

40 W Adams & M Infield *Community conservation research in Africa: Principles and comparative practice* (1998) 7-8.

and Tree-Planting Act 2003, which repealed the Forests Act 1964. There have been recent calls for the Echuya Central Forest Reserve to be formally designated as a national park.⁴¹

The above developments cumulatively led to the eviction of the Batwa from the areas incorporated within the Bwindi Impenetrable National Park, the Mgahinga Gorilla National Park and the Echuya Central Forest Reserve (cumulatively referred to as the 'contested land' for the remainder of this article) from the 1990s, without their free, prior and informed consent. While various initiatives have been undertaken by conservation authorities and non-governmental organisations (NGOs) to assist the Batwa over the past two decades, most scholarly commentary reflecting on these initiatives depicts their outcomes as highly inadequate, leaving the Batwa a marginalised, exploited and exceedingly vulnerable community removed from their land to which they have a strong cultural attachment and upon which they historically relied for their livelihoods. The Batwa have been characterised as suffering 'conservation injustice' in both a distributional and procedural sense.⁴² They generally are regarded as having been excluded from any meaningful participation in the governance and management arrangements for these protected areas, with any form of redress, rights of access and benefit sharing regarded as wholly inequitable and insufficient.⁴³ The treatment of the Batwa has also been deemed to illustrate Uganda's failure to promote key relevant decisions and recommendations emerging from the Convention on Biological Diversity and the *International Union for Conservation of Nature* advocating a 'new protected areas paradigm' providing for the recognition and participation of IPLCs in protected areas.⁴⁴

Interestingly, in their recent *Sixth National Report* to the Convention on Biological Diversity, the Ugandan Wildlife Authority itself expressly acknowledged the Batwa as a vulnerable minority group of people residing near the Bwindi Impenetrable National Park, the Mgahinga Gorilla National Park and the Echuya Central Forest Reserve, which they regarded as their 'ancestral homes' and to which they had a 'strong attachment'.⁴⁵ It furthermore noted that they 'lost their original home lands' when they were evicted without compensation, but then simultaneously categorises them as having 'no concept of

41 S Amana 'Conservationists want UWA to take over Echuya Forest Reserve' *The Independent* (Kampala) 28 May 2020.

42 Satyal et al (n 33) 533-539.

43 See generally Twinamatsiko et al (n 33) 243-247; Gilbert & Sena (n 33) 213-214; Mukasa (n 33) 73-83; Zaninka (n 33) 173-185.

44 Kidd & Zaninka (n 33) 7-23.

45 NEMA & MWE (n 25) 247.

land ownership because they never stayed in one place for a long time'.⁴⁶

No doubt frustrated by the failure of the Ugandan Constitution to provide recognition and protection to specific groups of indigenous peoples;⁴⁷ thwarted by the failure of the Constitution to provide adequate recourse to those unfairly dispossessed of land rights prior to its adoption in 1995,⁴⁸ buoyed by the success of several IPLCs in neighbouring states in similar matters,⁴⁹ drawing valuable lessons from this jurisprudence on the nuances of bringing claims based on the common law doctrine of indigenous title, on the merits of linking claims to the protection of cultural rights, on how to frame claims to territory originally held by indigenous peoples on the basis of reliance on regional and international human rights instruments and the potential pitfalls of governments not giving domestic effect to decisions emerging from regional courts and tribunals,⁵⁰ facilitated through the formation of the United Organisation for the Batwa Development in Uganda in 2000,⁵¹ and frustrated by the failure of

46 As above.

47 The Constitution of the Republic of Uganda 1995 (Constitution) accords citizenship to an array of people, including those born of a member of the 75 indigenous communities listed in the Third Schedule to the Constitution (art 10). The list of indigenous communities encapsulates all living within Uganda's borders as of February 1926, thereby effectively deeming all non-colonial settlers indigenous peoples, and according no special recognition to any specific group. See further J Gilbert 'Litigating indigenous peoples' rights in Africa: Potentials, challenges and limitations' (2017) 66 *International and Comparative Law Quarterly* 664-665; Gilbert & Sena (n 33) 215.

48 The cumulative effect of the Crown Land Ordinance 1903 and the Land Reform Decree 1975 was that communities occupying land in terms of customary law were effectively regarded as tenants of the land, occupying it at 'sufferance' of the government. The introduction of the Constitution vested all land in the citizens of Uganda and provided four ways in which land could be owned, including under customary land tenure systems through the acquisition of certificates of ownership (art 237(1) read with art 237(3)) acquired in terms of the Land Act 16 of 1998. However, one had to be occupying the land under a customary land tenure system at the time the Constitution entered into force. As the Batwa had been dispossessed of the land prior to the commencement of the Constitution, and owing to the Constitution providing no direct remedies available to those dispossessed of land rights in the past, the Batwa could not avail themselves of any of the property protections accorded to citizens in terms of art 26 read with art 237 of the Constitution. See further on Uganda's land legislation relevant to customary rights: S Coldham 'Land reform and customary rights: The case of Uganda' (2000) 44 *Journal of African Law* 65.

49 See, eg, the cases brought by indigenous communities mentioned in the introduction to this article, most notably the Ogiek, Endorois and Kalahari Bushmen.

50 See generally Gilbert & Sena (n 33) 204-222; Gilbert (n 47) 657-686; K Lehmann 'Aboriginal title, indigenous rights and the right to culture' (2004) 20 *South African Journal on Human Rights* 86; J Gilbert 'Historical indigenous peoples' land claims: A comparative and international approach to the common law doctrine of indigenous title' (2007) 56 *International and Comparative Law Journal* 583; A Barume *Land rights of indigenous peoples in Africa* (2010); V Couillard, J Gilbert & L Tchalenko *Indigenous peoples' land rights in Tanzania and Kenya: The impact of strategic litigation and legal empowerment* (2017).

51 Gilbert & Sena (n 33) 214; Gilbert (n 47) 677-678.

the Ugandan government to address their plight notwithstanding extensive lobbying of international, regional and national institutions,⁵² the United Organisation for the Batwa Development in Uganda, together with 11 members of the Batwa, approached the Constitutional Court for relief in 2013.

The Batwa alleged that the respondents had violated the Constitution in four main respects. These respondents were the Attorney-General (the first respondent and the Cabinet Minister responsible for representing the government in court proceedings), the Ugandan Wildlife Authority (the second respondent and the government authority tasked with administering the Ugandan Wildlife Act) and the National Forestry Authority (the third respondent and responsible for administering the National Forestry and Tree Planting Act). First, the Batwa alleged that the first respondent's failure to recognise the Batwa as 'indigenous peoples' within the meaning of international law and as a 'minority' and 'marginalised group' was inconsistent with or a contravention of various articles of the Constitution⁵³ and several regional and international human rights instruments.⁵⁴ Second, they argued that the actions of the respondents in evicting, excluding and dispossessing them from their ancestral Batwa forest lands compromised their physical and cultural integrity and survival as an indigenous people, and were inconsistent with or a contravention of various articles of the Constitution⁵⁵ and several regional and international human rights and conservation instruments.⁵⁶ Third, they posited that by preventing and denying the Batwa access to the contested land, the respondents had further contravened various articles of the Constitution⁵⁷ and several regional

52 As above.

53 These were art 2(1) (dealing with the supremacy of the Constitution); art 20(2) (dealing generally with human rights and freedoms); art 36 (protection of rights of minorities); art 45 (additional human rights and freedoms); art 287 (international agreements, treaties and conventions).

54 These were 1986 African Charter on Human and Peoples' Rights (arts 19-24); 1966 International Covenant on Civil and Political Rights (ICCPR) (arts 1 & 27); 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR) (art 1); 1965 International Convention on the Elimination of all Forms of Racial Discrimination (ICERD) (arts 1 & 5); 1989 United Nations Convention on the Rights of the Child (CRC) (arts 8 & 30); 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) (arts 2, 3, 8 & 33).

55 These were art 2(1); art 21 (equality and freedom from discrimination); art 22(1) (protection of the right to life); art 25 (protection from slavery, servitude and forced labour); art 26 (protection from the deprivation of property); art 32 (affirmative action in favour of marginalised groups); art 36; art 37 (right to culture); art 45; art 237(2) (land ownership); art 287; objective XXVIII(b) of the National Objectives and Directive Principles of State Policy (respect for international law and treaty obligations).

56 These were African Charter (arts 2, 14 & 19-24); 1966 ICCPR (arts 1, 26 & 27); ICESCR (arts 1, 2 & 15); ICERD (arts 2 & 5); CRC (arts 2, 8 & 30); CBD (arts 8(i) & 10(c)); UNDRIP (arts 3, 4, 7, 8, 19, 20, 26-28, 31 & 32).

57 These were art 2(1); art 29(1)(c) (freedom to practice religion); art 37; art 45; art 287; objective XXVIII(b) of the National Objectives and Directive Principles of

and international human rights and conservation instruments.⁵⁸ Fourth, the Batwa argued that the actions of the respondents that resulted in the widespread displacement, exploitation, exclusion and marginalisation of the Batwa in the communities in which they had subsequently been forced to settle, were also inconsistent with or contravened various articles of the Constitution⁵⁹ and several regional and international human rights and conservation instruments.⁶⁰ The Batwa prayed that they be recognised as the rightful owners of the contested land and that these lands be registered in their name; be paid just and fair compensation within 12 months of the judgment for the material and immaterial damages they had suffered as a result of their eviction, exclusion, dispossession or resultant impoverishment; and that negotiations commence with them within three months of the judgment with a view to concluding a revised regime for the management of the contested land, access to it and the equitable sharing of benefits derived from it, on ‘mutually-acceptable and human rights-compliant’ terms. In the alternative, they prayed for the provision of alternate land of equal size, type and value; the negotiation of a revised management arrangement for the contested land providing for joint collaborative and participatory management; and the negotiation of a fair and equitable access and benefit-sharing arrangement relating to it. These last two components of the alternate prayers were to be finalised within 12 months of the judgment.

3 Jurisdiction of the Constitutional Court

Prior to dealing with the substantive merits of the matter, the Court was tasked with ruling on the preliminary objection raised by the respondents to the effect that the Constitutional Court lacked jurisdiction to hear the matter. Article 50 of the Ugandan Constitution enables any person to approach a ‘competent court’ for redress alleging that a fundamental right or freedom entrenched in the Constitution has been infringed or threatened. The term ‘competent

State Policy.

- 58 These were African Charter (arts 8 & 17); ICCPR (arts 1, 18 & 27); ICESCR (art 15); 1989 CRC (arts 8 & 30); CBD (arts 8(j) & 10(c)); UNDRIP (arts 9, 11-13 & 25).
- 59 These were art 2(1); art 8A (governance based on principles of national interest and common good); art 21; art 30 (education); art 34 (rights of children); art 38 (civic rights); art 40 (economic rights); art 287; objectives II (democratic principles), X (role of people in development), XIV (general social and economic objectives), and XX (medical services) of the National Objectives and Directive Principles of State Policy.
- 60 These were Africa Charter (arts 2, 3, 11, 13-17 & 19-22); ICCPR (arts 6, 12 & 14); ICESCR (arts 1, 2, 5-7 & 11-13); ICERD (arts 2 & 5); CRC (arts 2, 24 & 27-29).

court' is not defined in the Constitution, with it feasibly including the High Court, Court of Appeal, Supreme Court and Constitutional Court. The jurisdiction of each of these courts is further detailed in the Constitution. The High Court has unlimited original jurisdiction in all matters.⁶¹ The Court of Appeal has jurisdiction to hear appeals from the High Court,⁶² with the Supreme Court of Appeal being the final arbiter on appeals from the Court of Appeal.⁶³ The Court of Appeal can also sit as the Constitutional Court and, when it does so, it has original jurisdiction over 'any questions as to the interpretation' of the Constitution.⁶⁴ Article 137 of the Constitution explicitly states that where a person alleges that an Act of Parliament, any other law, anything in or done under the authority of any law or any act or omission by any person or authority is 'inconsistent with or in contravention of a provision of the Constitution', they may petition the Constitutional Court for a 'declaration to that effect, and for redress where appropriate'.⁶⁵

The sum total of what some commentators have characterised as a 'strange'⁶⁶ and 'confusing'⁶⁷ jurisdictional arrangement appears to be that the competent court to enforce the human rights entrenched in the Constitution is the High Court, with the Constitutional Court being limited to deal with matters involving the interpretation of the Constitution, inclusive of these human rights. This has been confirmed in several decisions heard by both the Supreme Court of Appeal and Constitutional Court.⁶⁸ Not all commentators agree with the reasoning underpinning these decisions adopted over the years limiting the Constitutional Court's jurisdiction to interpreting the Constitution or petitions that cannot be resolved without first interpreting the Constitution.⁶⁹ Some commentators have very recently argued that the reasoning is incorrect both on a pure literal interpretation of the relevant provisions and when informed by the drafting history of article 137.⁷⁰ However, at the time the *Batwa*

61 Art 139(1) Constitution.

62 Art 134(2) Constitution.

63 Arts 132(1)-(2) Constitution.

64 Art 137(1) Constitution.

65 Art 137(3) Constitution.

66 J Mubangizi 'The protection of human rights in Uganda: Public awareness and perceptions' (2005) 1 *African Journal of Legal Studies* 175.

67 C Mbazira 'Uganda's hybrid constitutional protection of economic, social and cultural rights' in D Chirwa & L Chenwi (eds) *The protection of economic, social and cultural rights in Africa: International, regional and national perspectives* (2016) 459.

68 These cases are discussed directly below and accordingly are not listed here.

69 J Mujuzi 'The Constitutional Court of Uganda: Blurring/misunderstanding its jurisdiction' (2022) 9 *Journal of Comparative Law in Africa* 24.

70 As above.

matter was heard by the Court, the approach to its jurisdiction was very much informed and circumscribed by the prior judicial decisions.

The respondents argued that the matter did not raise any question of constitutional interpretation and, accordingly, that the Constitutional Court had no jurisdiction to hear it.⁷¹ In their opinion, the matter concerned alleged violations of several rights in the Constitution, amounting solely to the enforcement as opposed to the interpretation of these rights, with the High Court and not the Constitutional Court having jurisdiction over the matter.

In contrast, the Batwa argued that the matter did raise questions of constitutional interpretation. Referring to the decision of *Raphal Baku & Another v the Attorney-General*⁷² they posited that an application is deemed to raise questions of constitutional interpretation where it highlights the following three aspects: the acts complained of; the provisions in the Constitution that these acts are alleged to contravene or be inconsistent with; and prayers declaring these acts unconstitutional.⁷³ In their view, the application canvassed all these components. Relying on *Joyce Nakacwa v Attorney-General & Others*⁷⁴ they sought to convince the court that even though the matter could fall within the ambit of article 50, it could simultaneously fall within the ambit of the Constitutional Court's jurisdiction under article 137 where it necessitated constitutional interpretation.⁷⁵ Furthermore, they argued that in determining whether the acts of the respondents contravened the Constitution, the court would be required to 'examine the meaning and the scope' of a number of relevant constitutional rights, with *Alenyo v Attorney-General & Others*⁷⁶ constituting authority for this amounting to constitutional interpretation as envisaged in article 137 of the Constitution.⁷⁷ To substantiate this assertion, the Batwa highlighted an array of issues presented to the Court which they believed required constitutional interpretation, namely, whether the reference in article 26(2) of the Constitution precluding the compulsory deprivation of property 'or any interest in or right over property' included rights and interests derived from the Batwa's possession, occupation and/or customary ownership of their traditional lands over an extended period; whether such possession, occupation and/or customary ownership conferred upon the Batwa a right to sustainable entry, use and occupation of

71 *Batwa* case (n 24) 6-7.

72 Constitutional Appeal 1 of 2003 (unreported).

73 *Batwa* case (n 24) 8.

74 Constitutional Petition 2 of 2001 (unreported).

75 *Batwa* case (n 24) 8.

76 Constitutional Petition 5 of 2000 (unreported).

77 *Batwa* case (n 24) 8.

a protected area established without their prior informed consent; whether the freedom accorded to everyone in terms of article 29(1)(c) of the Constitution to practise any religion and manifest such practice, including the right to belong to and participate in the practices of any religious body or organisation, prohibited the exclusion of the Batwa from their traditional land in respect of which they had a strong spiritual and cultural attachment; whether the right entrenched in article 37 of the Constitution to belong to, enjoy, practise, profess, maintain and promote any culture, cultural institution, language, tradition, creed or religion in community with others, would similarly prohibit their exclusion; and, finally, whether on the basis of articles 20(2),⁷⁸ 36⁷⁹ and/or 45⁸⁰ of the Constitution the first respondent could be compelled to recognise the Batwa as 'indigenous peoples' within the meaning of international law.⁸¹

Against this context, the Court embarked on a detailed review of article 137 and two seminal Supreme Court of Appeal decisions specifically dealing with the jurisdiction of the Constitutional Court, namely, *Attorney-General v Major General Tinyefuza*⁸² and *Ismail Serugo v Kampala City Council & Another*.⁸³ The Court concluded that to found jurisdiction before the Constitutional Court, the matter must satisfy both components set out in articles 137(1) and (3).⁸⁴ In other words, the petitioners must satisfy the court that an Act of Parliament, any other law, anything in or done under the authority of any law or any act or omission by any person or authority is inconsistent with or in contravention of a provision of the Constitution. In addition, the petitioners must satisfy the court that that the resolution of the matter requires them to engage in constitutional interpretation. Quoting from the judgment in *Charles Kabagambe v Uganda Electricity Board*⁸⁵ the Court confirmed that 'if the matter does not require an interpretation of a provision of the Constitution, then there is no juristic scope for the invocation of the jurisdiction of this Court'.⁸⁶ In other words, matters dealing solely with the enforcement of rights

78 Art 20(2) provides that 'rights and freedoms of the individual and groups enshrined in this Chapter shall be respected, upheld and promoted by all organs and agencies of government and by all persons'.

79 Art 36 provides that 'minorities have a right to participate in decision-making processes and their views and interests shall be taken into account in the making of national plans and programmes'.

80 Art 45 provides that the 'rights, duties, declarations and guarantees relating to the fundamental and other human rights and freedoms specifically mentioned in this Chapter shall not be regarded as excluding others not specifically mentioned'.

81 *Batwa* case (n 24) 8-9.

82 Constitutional Appeal 1 of 1997 (unreported).

83 Constitutional Appeal 2 of 1998 (unreported).

84 *Batwa* case (n 24) 14.

85 Constitutional Petition 2 of 1999 (unreported).

86 *Batwa* case (n 24) 14.

do not fall within the jurisdiction of the Constitutional Court.⁸⁷ It furthermore confirmed that ‘constitutional interpretation is to be understood as distinct from enforcement of the Constitution’, with interpretation meaning ‘to explain or tell the meaning of’.⁸⁸

The Court then turned to consider the nature of the Batwa’s petition. It held that the second, third and fourth components of the petition alleged violations of a number of rights in the Constitution and, accordingly, dealt solely with the enforcement of these rights and not the interpretation thereof.⁸⁹ It acknowledged that the first component of the petition called upon the Court to ‘pronounce itself on aspects of international law concerning the concept of indigenous peoples’ and whether the concept of indigenous peoples could be ‘read into’ various constitutional provisions in the absence of the Constitution expressly referring to it.⁹⁰ While seemingly acknowledging that ‘reading words into a constitutional provision’ is a ‘legitimate method of interpretation’,⁹¹ the Court then sought to draw a distinction between ‘interpretation’, on the one hand, and ‘reading in’, on the other. It explained that the former involved having regard to the ‘plain and ordinary meaning of the words used in the provision’, and that once this exercise was complete, the court’s interpretative function was complete.⁹² It did observe that the court may ‘make reference’ to international law in ‘explicating the import of a constitutional provision’ but could not ‘rely on international law to “read words” into a constitutional provision’.⁹³ Traversing this seemingly fragile line, the Court ruled that the first component of the Batwa’s petition constituted the latter and not the former and, accordingly, similarly fell outside the jurisdiction of the Court.⁹⁴

The Court’s conclusion above seems to re-emphasise the ‘strange’ and ‘confusing’ jurisdictional arrangement in Uganda relating to constitutional matters, which some commentators have indicated has contributed to a ‘paucity’ of human rights litigation in the country.⁹⁵ It is somewhat puzzling why the Court so fleetingly and bluntly characterised the entire second, third and fourth components of the petition as dealing solely with enforcement and not interpretation. The Batwa had specifically identified a range of issues of interpretation relating to these components of

87 *Batwa* case (n 24) 15.

88 *As above*.

89 *Batwa* case (n 24) 15-16.

90 *Batwa* case (n 24) 16.

91 *As above*.

92 *Batwa* case (n 24) 17.

93 *As above*.

94 *As above*.

95 *Mbazira* (n 67) 459 474.

their petition, with which the Court unfortunately largely failed to engage in any detail. Surely each of these alleged examples of issues requiring interpretation warranted individual consideration by the Court, as they were so central to the issue of jurisdiction. Regarding the first component of the claim, having seemingly acknowledged 'reading in' as a form of interpretation, the Court then dismissed it drawing a distinction between 'reading in', on the one hand, and 'interpretation', on the other. Clearly weary of encroaching into the turf of Parliament, the Court drew a distinction between referring to international law to 'explicate the import of' a constitutional provision as opposed to relying on international law to 'read words into' a constitutional provision. Where the line sits between these two 'forms of interpretation' appears to be an uncomfortably fuzzy one, and something probably deserving more precise judicial delineation, given its centrality to issues of jurisdiction. This lack of clarity may further exacerbate the already 'strange' and 'confusing' jurisdictional arrangement. Finally, it is rather quizzical how, when dealing with the affirmative action clause in the Constitution, canvassed in detail below, the Court dealt with some interpretation issues the Batwa had specifically raised in respect of the second, third and fourth components of the petition. Having initially dismissed these as not constituting issues of interpretation in order to preclude the Court having jurisdiction over these components of the petition, it seems strange that the Court was willing then to entertain them as issues of interpretation in another component of the judgment. This may provide evidence of what one commentator recently referred to as the Court on occasion blurring the distinction between its jurisdiction to interpret the Constitution and its mandate to enforce human rights.⁹⁶

4 Application of the affirmative action clause

Having effectively rejected all four components of the Batwa's petition, the Court seemingly did an about-turn. It held that 'implicit' in the petition 'were questions concerning affirmative action' governed by article 32(1) of the Constitution.⁹⁷ Why the Court deemed these questions to be implicit is somewhat puzzling, as the second component of the Batwa's petition made explicit reference to article 32. Nonetheless, the Court held that these questions were 'rightly before' the Court and 'ought to be determined'. These questions related to three main aspects. First, what was the meaning of affirmative action as referred to in article 32(1)? Second, did

⁹⁶ Mujuzi (n 69) 26.

⁹⁷ *Batwa case* (n 24) 17.

affirmative action have any application in the context of the Batwa's petition? Third, if so, what forms of redress measures should be taken in favour of the Batwa?

4.1 What does affirmative action mean?

With the Constitution containing no definition of affirmative action, the Court turned to various dictionary definitions, concluding that the concept could generally be understood as 'remedial action which, in any given circumstances, is required to be done in order to rectify effects of past discrimination or historic injustice'.⁹⁸ The Court confirmed that looking at the wording reflected in article 32(1), two things had to be satisfied in order to trigger affirmative action. First, the group must have been 'marginalised on the basis of gender, age, disability or any other reason created by history, tradition and custom'.⁹⁹ Second, the affirmative action must be for the 'purpose of redressing imbalances' existing against such marginalised groups.¹⁰⁰ In interpreting the meaning of this wording reflected in article 32, the Court emphasised the need to recognise the interests the provision was meant to protect and accord the wording its 'primary, plain or natural meaning' where the wording was 'clear and unambiguous'.¹⁰¹ Again drawing from dictionary definitions, the Court deemed 'marginalise' to mean 'to relegate to an unimportant or powerless position within a society or group'.¹⁰² The Court also confirmed that the need for and form of affirmative action 'depends on the facts of each case'.¹⁰³

This distillation of the thresholds necessary to trigger the Constitution's affirmative action provision no doubt will be of interest to future litigants bringing claims based on alleged violations of constitutional rights before the Constitutional Court. It would seem that many claims of this nature may well fall within the above thresholds. Take, for instance, a future litigant (for argument's sake a community) bringing a petition to court alleging that the actions of the government constituted a violation of, among others, article 21 (equality and freedom from discrimination); article 36 (protection of rights of minorities); and article 37 (right to culture). In the absence of any arguments about the interpretation of these provisions, the Constitutional Court may well dismiss the application on the basis

98 *Batwa case* (n 24) 18.

99 *Batwa case* (n 24) 38-39.

100 *Batwa case* (n 24) 39.

101 *As above*.

102 *As above*.

103 *As above*.

that the matter does not fall within its jurisdiction as it relates to enforcement and not interpretation. However, the potential violation of these rights may well simultaneously 'relegate' the community 'to an unimportant or powerless position within a society or group' on the basis of 'gender, age, disability or any other reason created by history, tradition and custom', thereby triggering the application of article 32(1). Furthermore, the apparent willingness of the Constitutional Court to consider the application of article 32(1) even in the absence of the petition making explicit reference to this article, would appear to indicate the willingness of the Constitutional Court to consider the application of the affirmative action provisions *mero motu*. Do the above provide future petitioners with a potential opportunity to broaden the jurisdiction of the Constitutional Court to hear matters involving rights violations?

Some may argue that as the Constitutional Court has already interpreted these thresholds inherent in article 32(1) in this matter, subsequent courts would simply have to apply and not reinterpret these, thereby effectively precluding this opportunity. However, the Constitutional Court did indicate that the need for and form of affirmative action 'depends on the facts of each case', and does this not involve some interpretation of the precise meaning of these thresholds in so far as they relate to each distinct factual scenario? For example, would a future petition alleging a violation of a community's right to culture constitute 'marginalisation' for 'any other reason created by history, tradition or custom'? Furthermore, do opportunities not exist for the court in the future to further interpret the contents of the complementary provision contained in article 32(2) providing that 'laws, cultures, customs and traditions which are against the dignity, welfare or interest of women or any other marginalised group to which clause (1) relates or which undermine their status, are prohibited by this Constitution'? Does this open up the potential for a future petition to be characterised as one involving both interpretation and enforcement, with the court needing to further interpret the wording and thresholds reflected in articles 32(1) and (2) in order to determine whether or not a specific factual matrix triggers them? The answer to these questions naturally can only be provided by future litigation of this nature.

Some may also argue that the above debate is purely academic as the community in any event could preclude the jurisdictional issue by simply approaching the High Court as opposed to the Constitutional Court as the court of first instance. However, there may well be strategic benefits occasioned by approaching the Constitutional Court directly as the court of first instance. One specific example

of such a strategic advantage would be precluding the need to go through an additional appeal process through the Court of Appeal should the matter be dismissed by the High Court sitting as the court of first instance.¹⁰⁴

4.2 Does affirmative action have application in the current circumstances?

Having outlined the affirmative action thresholds, the Court considered whether the concept of affirmative action had any application in relation to the Batwa, specifically whether the Batwa had been 'marginalised'; and if so, on what basis?

In this context the Court deemed it appropriate to outline, without pronouncing on their validity, a range of arguments that the petitioners had raised in the context of the four main components of their application:¹⁰⁵ first, that the Batwa had been the indigenous people in occupation of the contested land since time immemorial, and that this accorded them an interest in or right to the land protected in terms of article 26 of the Constitution; second, that the Batwa were indigenous peoples within the meaning of international law, and drawing on the outcome in the *Endorois* case, that this gave rise to property rights over the contested land; third, in accordance with the common law doctrine of aboriginal title, the Batwa had an interest in or right to the contested land; fourth, that this interest in or right to the contested land had not been extinguished by legal reform introduced over the last century in Uganda; fifth, drawing from a range of international and regional cases,¹⁰⁶ that the Batwa should not be deemed to constitute trespassers on the contested land they previously occupied; sixth, that their unlawful eviction from the contested land under the guise of safeguarding the public interest (specifically conservation) was unnecessary as the respondents had failed to adduce evidence that the Batwa's continued occupation of the contested land had or would undermine conservation; seventh, that the conservation benefits accrued from evicting the Batwa from the contested land were disproportionate when measured against the associated negative impacts on the community, and that the respondents, in line with the tenets of the Convention on Biological

¹⁰⁴ Appeals from the High Court lie to the Court of Appeal and then to the Supreme Court (art 132(2) read with art 134(2) of the Constitution). Appeals from the Court of Appeal sitting at the Constitutional Court lie directly to the Supreme Court (art 132(3) of the Constitution).

¹⁰⁵ *Batwa* case (n 24) 19-23.

¹⁰⁶ These cases were *Mabo v Queensland (No 2)* (1992) 175 CLR 1; *Sesana v The Attorney General* 2006 (2) BLR 633; *Richtersveld Community v Alexkor Ltd* 2003 (12) BCLR 1301 (CC).

Diversity and the principles espoused in the *Ogiek* case, could have adopted far less restrictive measures to conserve the forests situated on the contested land without needing to evict the Batwa; eighth, that the Batwa had not received any or adequate compensation for the contested land following their eviction. Finally, the respondents had never disputed the fact the Batwa were indigenous forest peoples originally inhabiting the contested land in respect of which they had a very strong cultural attachment.

The Court similarly highlighted the main arguments of the respondents to the effect that the government had always considered the contested land to be public land held by it; the Batwa had failed to produce evidence to prove that they owned the contested land and, accordingly, no compensation was due; the constitutional protection accorded to property rights in terms of article 26 did not apply retrospectively, and even if a valid claim did arise in terms of the Limitation Act,¹⁰⁷ it had prescribed.¹⁰⁸

Thereafter, the Court systematically surveyed the evidence tendered by the parties by way of affidavit in support of the above-mentioned arguments. The Court was careful to indicate that the rationale for looking at the evidence relating to whether or not the Batwa had an interest in the contested land, and whether this interest had been unlawfully extinguished, was solely to determine whether the provisions relating to affirmative action enshrined in article 32(1) were applicable to the Batwa.¹⁰⁹ The breadth of issues the Court deemed relevant to take into account in making this determination may again be of key interest to future litigants, spanning arguments relating to all four components of the Batwa's petition. Furthermore, as highlighted above, should these arguments be framed in a manner as relevant to both interpreting the scope and nature of the thresholds embedded in the affirmative action provision, and informing the provision's application to the specific factual matrix, future litigants may preclude potential jurisdictional hurdles.

Evidence for the petitioners took two main forms. First, affidavits deposed to by several of the petitioners whose ancestors had occupied and owned the contested land prior to their eviction.¹¹⁰ These affidavits traced the Batwa's historic occupation of the contested land prior to the establishment of colonial rule in Uganda, chartered how this inhabitation amounted to ownership and possession in

¹⁰⁷ Cap 80 of 1959.

¹⁰⁸ *Batwa* case (n 24) 23-24.

¹⁰⁹ *Batwa* case (n 24) 24.

¹¹⁰ *Batwa* case (n 24) 24-27 & 39-42.

a manner that vested some sort of interest in the Batwa over the contested land; outlined the close link between the contested land, the forests and the livelihoods of the Batwa; emphasised the very strong cultural, spiritual and religious connection between the Batwa, the contested land and the forests; highlighted the events leading to their systematic forced dispossession and eviction from the contested land from 1920 through to 1991; outlined the rather perilous state in which this had placed them currently, existing as a marginalised and vulnerable community very much dependent on others; and linked their current reality to their eviction from the contested land without compensation or, alternatively, without adequate compensation. Second, affidavits from two foreign academic experts who had lived and/or worked in the area, whose evidence confirmed the contentions reflected in the affidavits of members of the Batwa community.¹¹¹

Evidence for the respondents took the form of various affidavits from the principal State Attorney in the Attorney-General's office and various officials working for the second and third respondents.¹¹² The focus of these affidavits mainly was on the era post-1962, when the Public Lands Act¹¹³ vested all public land in the Crown. In the words of the Court, the evidence attempted to 'paint the Batwa as people who merely encroached on' the contested lands always owned by the Crown.¹¹⁴ However, the court seemingly was not impressed with this painting and referred to the evidence of the respondents as 'merely evasive',¹¹⁵ 'not verified at all' in certain respects,¹¹⁶ unduly focussed on the 'situation the Batwa find themselves in the present day'¹¹⁷ and not 'insightful' about the historical connection of the Batwa to the contested land.¹¹⁸

In contrast, the Court found the evidence of the petitioners mutually reinforcing,¹¹⁹ 'cogent' and more accurately and comprehensively 'charting the history of the Batwa people' in respect of the contested land.¹²⁰ Not surprisingly, the Court did not accept the respondents' assertion that the Batwa had not historically occupied the land and had only 'migrated to the land to source fruits and other food' in

111 *Batwa case* (n 24) 27-33.

112 *Batwa case* (n 24) 33-37.

113 Cap 201 of 1962.

114 *Batwa case* (n 24) 35.

115 *Batwa case* (n 24) 33.

116 *Batwa case* (n 24) 35.

117 *Batwa case* (n 24) 37.

118 *As above*.

119 *Batwa case* (n 24) 27.

120 *Batwa case* (n 24) 33.

relatively recent times.¹²¹ The Court seemingly trod another careful line at this point of the judgment when concluding on the veracity of the parties' respective evidence, specifically referring to the Batwa's 'inhabitation' of the contested land as opposed to their 'ownership, rights and interests' to or in the contested land.¹²² It accepted that the Batwa had 'inhabited' the contested land before the process commenced to incorporate it within different forms of protected areas around 1929.¹²³ Continuing to tread on the cautious side of the line, the Court was disinclined to express an opinion on the validity of the petitioners' arguments relating to the application of the common law doctrine of aboriginal title in order to found some right over and/or interest in over the contested land.¹²⁴ It deemed this enquiry to fall outside the remit of the affirmative action enquiry.¹²⁵

This evidence of judicial restraint unfortunately precluded the Court from contributing to the African jurisprudence on the common law doctrine. Perhaps the plight suffered by the Batwa in this matter was so patently clear that it was not necessary for the Court to expressly pronounce, when dealing with the issue of marginalisation, on whether the Batwa had historically inhabited or in fact held rights over and/or an interest in the contested land. However, could questions be raised in the context of future similar litigation relating to how far down the inquiry into land rights and/or interests a court should go when determining the issue of marginalisation? In other words, when looking into the history to determine whether or not a group has been marginalised, could or should a court consider and pronounce on issues of land rights and/or interests when these are raised by petitioners? There may well be instances where this is not necessary, but there equally may be instances where it is necessary for a court to pronounce on issues of land rights and/or interests where historic interference with these constitutes the very reason for the group being relegated 'to an unimportant or powerless' position in society.

Notwithstanding the above, having considered the totality of evidence before it, the Court held that the Batwa had been left marginalised following their eviction from the contested land. As for the basis of this marginalisation, the Court deemed this to have been for 'any other reason created by history', with this history including the fact that the ancestors of the Batwa had 'lived for years, centuries

121 *Batwa case* (n 24) 37.

122 *As above.*

123 *As above.*

124 *Batwa case* (n 24) 38.

125 *As above.*

or even millennia' on the contested land; the Batwa had been evicted from the contested land by 'agents of the government'; and this eviction had occurred without both the consent of the Batwa and the payment of adequate or, alternately, any compensation.¹²⁶

The Court's choice of wording in this part of the judgment is interesting. Having seemingly been so careful up to this point of the judgment not to tread across the line into the realm of land rights and interests, the use of wording such as 'eviction', 'consent' and 'compensation', characteristically used in the context of persons holding rights and/or interests in land, appears to provide some evidence of the Court beginning to straddle the line.

4.3 What forms of redress measures are available?

With both components of the test necessary to trigger the application of the affirmative action clause embedded in article 32(1) of the Constitution having been satisfied, the Court then turned to consider what measures would be appropriate to redress the marginalisation suffered by the Batwa. While acknowledging the prayers of the petitioners, the Court indicated that its remit in the context of determining redress was limited to what measures should be taken to achieve 'substantive equality'.¹²⁷ It emphasised that the purpose of redress measures should be to ensure that the marginalised group 'feel secure and confident in the knowledge that they are recognised in society as human beings equally deserving of concern, respect and consideration'.¹²⁸ The Court further indicated that these redress measures should be tailored to the 'peculiar facts of each case'.¹²⁹ The above would appear to accord courts vast discretion as to the scope and nature of redress measures they can compel the government to implement in fulfilment of article 32.

Looking at possible redress received by the Batwa in the past, the Court was satisfied that while certain amounts may have been paid to the Batwa over the years, this did not constitute compensation for the contested land from which they were evicted.¹³⁰ The Court acknowledged that their eviction had left the Batwa disadvantaged, landless and 'living as squatters in land adjoining the protected area'.¹³¹ The Court indicated that this 'severely affected not only

¹²⁶ *Batwa case* (n 24) 40-41.

¹²⁷ *Batwa case* (n 24) 40-41 & 43-44.

¹²⁸ *Batwa case* (n 24) 41.

¹²⁹ *As above*.

¹³⁰ *Batwa case* (n 24) 41-43.

¹³¹ *Batwa case* (n 24) 46.

their livelihoods' but also 'destroyed their identify, dignity and self-worth as a people and as equal citizens with other Ugandans'.¹³² When considering possible redress measures, the Court indicated that as the petition was dealt with by way of affidavit, there was insufficient information and evidence before it to determine what redress measures should be taken in favour of the Batwa.¹³³ It accordingly referred the matter to the High Court to investigate and determine what would constitute appropriate affirmative action measures for the Batwa, in terms of article 137(4)(b). It indicated that the High Court needed to 'expeditiously' hear evidence and determine the appropriate affirmative action measures,¹³⁴ crucially given the protracted period of almost eight years that it took the Constitutional Court to finalise the matter. The Constitutional Court also provided some guidance to the High Court on what were important considerations for it when framing this redress, specifically that the 'vulnerable and appalling situation' of the Batwa must be improved and be ameliorated.¹³⁵

In concluding its declaration, and in stark contrast to the apparent judicial restraint shown by the Court throughout the preceding parts of the judgment, the Court expressly in closing declared that the ancestors of the current Batwa not only inhabited but also had an 'interest in and/or owned, in accordance with the customs and/or practices' the whole or a part of the contested land.¹³⁶ It further declared that the descendants of these Batwa ancestors had similarly 'so inhabited' the land until about 1991, prior to their eviction without their consent or compensation being paid to them, in order to incorporate the land into these protected areas.¹³⁷

The above declarations, particularly the former component, would appear to provide evidence of the Court clearly stepping over the line it had so carefully held in prior parts of the judgment between inhabitation and/or occupation of the contested land, on the one hand, and the holding of an interest in and/or ownership of the contested land, on the other. Constituting part of the Court's closing declarations, it would appear to indicate the Court's acceptance that the ancestors of the current Batwa held some form of interest over or ownership of the contested land, with their descendants (the current petitioners) having similarly done so prior to their eviction. The precise legal foundation of this interest and/or

132 *Batwa case* (n 24) 43.

133 *Batwa case* (n 24) 45.

134 *Batwa case* (n 24) 47.

135 *Batwa case* (n 24) 45-46.

136 *Batwa case* (n 24) 46.

137 *Batwa case* (n 24) 46-47.

ownership, however, unfortunately was left hanging. The practical legal ramifications of this declaration were similarly left hanging and will hopefully be clarified by the High Court in the context of determining appropriate redress. Seeking to rely on this declaration as a basis on which subsequently to 'convert' it into a realisable and enforceable property right through recourse to potentially relevant provisions in the Constitution may well hit a stumbling block.¹³⁸ The Batwa may accordingly have to rely on the High Court adopting a broad interpretation of redress under the affirmative action clause to restore their legal title to the land. Whether it does so remains to be seen. Some commentators have recently explored potential alternate legal avenues for the Batwa to follow other than the above court process, with their conclusion being that these are 'weak and lack biting teeth' and offer 'only frugal protection of minority rights and indigenous peoples rights'.¹³⁹ Much of the hope for meaningful redress for the Batwa accordingly may be pinned on the judiciary.

5 Conclusion

As evidenced by the extensive academic debate preceding the matter being heard by the Constitutional Court, expectations seemingly were high that the Court would not only rule in favour of the petitioners, but that its judgment would build upon and contribute to the African jurisprudence on the nuances of bringing claims based on the common law doctrine of indigenous title, linking claims to the protection of cultural rights/integrity and on how to frame claims to territory originally held by indigenous peoples on the basis of reliance on regional and international human rights instruments. The judgment clearly did not deliver on these latter expectations and, furthermore, highlighted the ongoing complications associated with the fudgy distinction between interpretation and enforcement when determining the jurisdiction of the Constitutional Court in Uganda.

Nonetheless, the judgment does provide valuable guidance to future litigants in Uganda on the potential of relying on article 32 to achieve substantively equitable redress where they have been relegated to an 'unimportant or powerless position within a society or group' on the basis of 'gender, age, disability or any other reason created by history, tradition and custom'. It highlights the thresholds that need to be met, the breadth of issues the judiciary

¹³⁸ See n 48 above.

¹³⁹ R Kakungulu-Mayambala 'Reinvigorating the struggle for the Batwa in Uganda: A case for the domestication of international indigenous peoples rights and standards' (2014) 20 *East African Journal of Peace and Human Rights* 301.

seem willing to consider when determining 'marginalisation', and the broad discretion the court retains in determining the form of redress. The outcome also highlights the importance for these litigants in tendering specific evidence on possible redress options when bringing the matter to court to stave off further delays when, in its absence, the precise redress options are left for future determination. As highlighted in this article, various issues relating to the interpretation of article 32 seem to remain outstanding, highlighting the potential for future litigants wishing to strategically approach the Constitutional Court as the court of first instance, the possible option to do so.

The outcome of the matter does fortunately provide some potential solace to the Batwa, potential in the sense that they await the determination of the precise nature of the redress measures by the High Court. Whether the High Court exercises its seemingly broad discretion when fashioning these redress measures to return title to the contested land to the Batwa remains to be seen. So too does the extent to which the judiciary, bearing in mind Uganda's international commitments under the Convention on Biological Diversity, outlined at the beginning of this article, and its contemporary domestic policies specifically geared towards promoting community conservation,¹⁴⁰ tailor these measures to promote the effective and equitable participation of the Batwa within the management and governance arrangements for the three protected areas forming the subject of the dispute.

The relevant domestic legislation seemingly is littered with legal mechanisms to promote the contemporary conservation ideology embedded in these international commitments and domestic policies. In the context of the Bwindi Impenetrable National Park and Mgahinga Gorilla National Park, options provided for in the Ugandan Wildlife Act include re-designating the national parks or portions of these as community wildlife areas;¹⁴¹ entering into a suitable commercial or collaborative arrangement with the Batwa to manage the conservation areas or portions of them;¹⁴² recognising the historic rights of the Batwa in respect of the conservation areas;¹⁴³ granting wildlife use rights to the Batwa that permit community resource access;¹⁴⁴ and ensuring the establishment and active

140 The following policies contain many references to the importance of promoting community conservation initiatives: UWA *Community conservation policy* (2019); Ministry of Tourism, Wildlife and Antiquities *Uganda wildlife policy* (2014).

141 Secs 25-26 Ugandan Wildlife Act (n 26).

142 Sec 22 Ugandan Wildlife Act.

143 Sec 32 Ugandan Wildlife Act.

144 Secs 35-50 Ugandan Wildlife Act.

participation of the Batwa within the relevant community wildlife committees.¹⁴⁵ In the context of the Echuya Central Forest Reserve, options provided by the National Forestry and Tree Planting Act include reclassifying the area or a portion of it as a joint management forest reserve with the area jointly managed by the National Forestry Authority and the Batwa;¹⁴⁶ concluding a collaborative forest management arrangement with the Batwa to manage the forest reserve;¹⁴⁷ re-declaring the area or parts of it as a community forest and appointing the Batwa as the responsible authority to manage it;¹⁴⁸ allowing the Batwa to access and use forest produce in the area for domestic purposes;¹⁴⁹ and granting a licence to the Batwa to harvest and remove forest produce from the area or sustainable use and manage it.¹⁵⁰ In the context of the Bwindi Impenetrable National Park, Mgahinga Gorilla National Park and Echuya Central Forest Reserve, options provided under the National Environmental Act¹⁵¹ include re-gazetting the three protected areas or portions thereof as special conservation areas.¹⁵²

It is fully acknowledged that the viability of these options no doubt will be informed by whether or not title to the contested lands is restored to the Batwa. The viability of each will also need to be informed by careful scoping and detailed planning. It will also need to be informed by the extensive critique levelled against the attempts over the past decade to accord the Batwa limited access, use and benefits associated with the Bwindi Impenetrable National Park, the Mgahinga Gorilla National Park and the Echuya Central Forest Reserve.¹⁵³ Several options seemingly are open to the High Court when framing the ultimate redress measures for the Batwa. It is hoped the High Court will fully engage in all options, and perhaps it would be wise for the Batwa in the next leg of their court journey to comprehensively remind the court of the government's international commitments to promote a more inclusive and participatory approach to conservation in the context of protected and conserved areas, the domestic policies advocating this approach and the myriad legal mechanisms available in the relevant domestic laws to give effect to it.

145 Sec 20 Ugandan Wildlife Act.

146 Sec 6(2)(c) read with sec 16 National Forestry and Tree Planting Act (n 27).

147 Sec 15 National Forestry and Tree Planting Act (n 27).

148 Sec 17 National Forestry and Tree Planting Act.

149 Sec 33 National Forestry and Tree Planting Act.

150 Sec 41 National Forestry and Tree Planting Act.

151 Act 5 of 2019.

152 Sec 51 National Environmental Act (n 151).

153 See n 43.