The Human Rights Jurisdiction of the Constitutional Court of Seychelles

By *Jamil Ddamulira Mujuzi*[*]

Abstract: The jurisdiction of the Constitutional Court of the Seychelles, the Court, is provided for under different provisions of the Constitution. Article 46 deals with the circumstances in which a person may approach the Court to enforce human rights. It also deals with the powers of the Court in this context. In this article, I illustrate how the Court, when enforcing or applying Article 46, has dealt with the following issues: *locus standi* to petition the Court; circumstances in which the Court's jurisdiction is excluded or limited; powers of the Court in protecting human rights, circumstances in which other courts may refer matters to the Constitutional Court and procedural access to the Court and the burden to prove human rights violations. It is observed that for a person to have *locus standi* under Article 46(1), there has to be a real likelihood that his/her right will be violated. A remote possibility of a violation does not trigger Article 46(1). It is observed further that the right under Article 46(1) is not absolute; although the word 'may' is used under Article 46(3), the Court is obliged to decline being seized with a matter in case the applicant has obtained redress from another court; since the constitution is silent on the burden of proof in cases where a private individual is alleged to have violated a human right, the burden should be on the applicant to prove such a violation; and that the Rules of the Court which require that an action alleging a violation of human rights has to be filed within three months of the violation may have to be amended to create exceptions for continuing violations of human rights and for the violation of non-derogable rights.

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A. Introduction

The jurisdiction of the Constitutional Court of the Seychelles, the Court, is provided for under different provisions of the Constitution. This includes the jurisdiction 'to hear and determine whether a person has been validly elected to the office of President',[1] to investigate

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1 Article 51(3).

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whether the President has committed a violation of the Constitution or a gross misconduct,[2] to determine whether a person is still a member of the National Assembly,[3] to determine whether 'a person has been validly elected as a member of the National Assembly'[4] and to determine whether 'the seat of a member of a National Assembly has become vacant.'[5] The Court also has the jurisdiction to determine whether a Bill infringes the Constitution[6] or any act or omission infringes any provision of the Constitution.[7] Under Article 46, which is the focus of this article, the Court has the jurisdiction to determine whether a right in the Charter of Rights has been violated. Article 46 deals with the circumstances in which a person may approach the Constitutional Court to enforce human rights. It also deals with the powers of the Constitutional Court in this context. The Court's jurisdiction under Article 46 is limited to the protection of human rights under the Charter. It does not extend to its other functions.[8] In this article, I illustrate how the Court, when enforcing or applying Article 46, has dealt with the following issues: *locus standi* to petition the Court, circumstances in which the Court's jurisdiction is excluded or limited, powers of the Court in protecting human rights, other courts referring the matter to the Constitutional Court and procedural access to the Court.

B. *Locus standi* to petition the Court

Article 46(1) of the Constitution provides for the people who may have standing (*locus standi*) before the Court. It states that:

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

In 2008, the Constitutional Review Commission recommended that Article 46(1) should be amended so that it broadens the circumstances in which a person may petition the Court. The Committee recommended that it was:

2 Article 54.
3 Article 81(6).
4 Article 82(1)(a).
5 Article 82(1)(b).
6 Article 87.
7 Article 130.
8 Carpin v Seychelles National Party [2011] SCCC 12 p. 11.

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> *'[O]f the view that where a law contravenes the Constitution any person should have the right to apply to the Constitutional Court for redress. Otherwise if one were to wait until one's rights is affected in order to have standi to apply for redress unconstitutional laws may remain on the statue [sic] books (and may even be enforced) by default as some person may not want to be bothered to apply to the court or may be unable to do so for multiple reasons such as financial and health. It therefore recommends that the existing provision be deleted and replaced by the following- "(1) A person who claims that a provision of the Charter has been or is likely to be contravened by any law, or an act or omission relating to that person, may, within five years, apply to the Constitutional Court for redress."'*[9]

However, the above recommendation was not acted upon and Article 46(1) was not amended. This means, inter alia, that a person cannot invoke Article 46 to challenge the constitutionality of a law unless such a law contravenes or is likely to contravene any of his/her rights under the Charter. Therefore, under Article 46(1), for a person to have *locus standi* before the Court, he/she must claim that his/her right under the Charter 'has been or is likely to be contravened.'[10] Thus, Article 46(1) is applicable in two circumstances: (1) after a right in the Charter has been contravened or (2) where a right in the Charter is likely to be contravened. The first ground does not raise any problem. All that the complainant is required to show is past conduct - the violation of a right.[11]

In case of the second situation, the applicant must adduce evidence to convince the Court that if it does not intervene, his/her right is 'likely' to be contravened. In other words, there has to be a real possibility of contravening the right unless the Court intervenes. Speculation is not enough.[12] In other words, Article 46(1) draws a distinction between 'the present and the imminent acts and omissions.'[13] The Court of Appeal explained in Michel & Others v Dhanjee & Others[14] that:

> *'[U]nder article 46(1) an application can be made even when there is likely to be a contravention of the Constitution. A person defending his/her individual rights cannot wait until there is a contravention of the Fundamental Rights Charter in relation to him or her. The person has to make a move on the likelihood of a contravention because the contravention will affect him or her directly.'*[15]

9 Constitutional Review Commission Report (2009) p. 23.
10 Chow v Attorney General and Others [2007] SCCA 2 para 22.
11 Morin v Minister of Land Use and Habitat and Another [2005] SCCA 18 para 8.
12 Chow v Attorney General, note 10, para 15.
13 Chow v Attorney General, note 10, para 11.
14 Michel & Others v Dhanjee & Others [2012] SCCA 10.
15 Michel & Others v Dhanjee & Others, note 14, p. 39.

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However, in Electoral Commission v Attorney General,[16] the Constitutional Court appears to have lowered the threshold for the second leg of Article 46(1) to be applicable when it held that '[i]t is apparent on a reading of article 46(1) that it refers to two types of contraventions. Contraventions that have taken place and contraventions that may take place.'[17] In other words, the applicant does not have to show that the contravention is 'likely' to take place or 'will' take place. He/she only has to show that it 'may' take place. It is argued that the Court of Appeal's approach - that the second leg of Article 46(1) is only applicable if there is a 'likelihood' of the violation - is supported by the literal interpretation of Article 46(1) and is more convincing. This is because in case a person alleges that there is a 'likelihood' of violating his/her right, he/she adduces evidence to show that the process that will lead to the violation has already been set in motion and only the court's intervention can stop the violation. However, the opposite is true in case where a person alleges that his/her right 'may' be violated. They do not have to prove that the process to violate his/her rights has been set in motion. They meet the threshold if they allege that a violation may take place. The Constitutional Court and the Court of Appeal held that the right under Article 46(1) is a constitutional right. In other words, it is not a fundamental right. Rather, it is a procedure through which fundamental rights are enforced.[18] Likewise, the Court of Appeal held that Article 46 'deals with remedies for infringement of fundamental rights.'[19] The Constitutional Court has held that the right under Article 46(1) is not absolute.[20] It is subject to the conditions enumerated in subsequent provisions under Article 46. This is evident from the language of Article 46(1) itself which states that the right thereunder is 'subject to this article.'

For a person to invoke Article 46(1), there has to be a 'nexus' between the act or omission and the alleged contravention or likely contravention of the Charter.[21] In other words, '[i]n an application under Article 46(1) of the Constitution, a direct link must be shown between the contravention and its effect on the person making the application.'[22] Article 46 is only applicable to rights which are specifically provided for under the Charter.[23] It does not apply, for example, to civil rights (such as the right to reputation),[24] to 'non-Charter'

16 Electoral Commission v Attorney General [2015] SCCC 5.

17 Ibid.

18 Subaris & Ors v Perera & Anor [2011] SCCC 4 p. 10; Morin v Minister of Land Use and Habitat and Another [2005] SCCA 18 para 10; Volcere v Georges & Others [2018] SCCA 43 para 41.

19 Vijay Construction (Proprietary) Limited v Eastern European Engineering Limited and Anor [2021] SCCA 30 para 18.

20 Herminie & Anor v Pillay & Others [2018] SCCC 6 p 14–15; Vijay Construction (Pty) Ltd v Eastern European Engineering Ltd & Anor [2020] SCCC 881 para 8.

21 R v Agathine [2007] SCSC 128 p. 4.

22 Dubois & Others v Michel & Others [2016] SCCC 23 para 48.

23 Article 49 of the Constitution defines 'Charter' to mean Part 1 of Chapter III of the Constitution.

24 Karunakaran v Constitutional Appointments Authority & Another [2017] SCCC 10 paras 8 and 33.

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rights (such as the right to appeal to the Court of Appeal under Article 120(2) of the Constitution)[25] and to rights found in treaties ratified by Seychelles unless such rights have been incorporated in the Charter.[26]

As a general rule, for Article 46 to be triggered, it is the victim or potential victim of the contravention of the Charter to approach the Court. In other words, 'Article 46(1) provides a personal remedy for personal prejudice.'[27] It is only when such a person is 'unable to do so' that 'another person acting' on his or her behalf can approach the Court. This other person can do so with or without the consent of the victim or potential victim. However, before the Court can allow another person to act on behalf of the victim or potential victim, it has to be satisfied that the victim or potential victim himself is unable to approach the Court.[28] In other words, Article 46 does not patently promote public interest litigation.[29] It can only be triggered by a victim or potential victim unless the Court is satisfied that he/she is unable to do so.[30] The Court has allowed people to invoke Article 46(2) where, for example, the application is being made on behalf of a gravely ill person.[31]

Unlike some constitutional provisions which are only applicable to citizens,[32] Article 46 is applicable to any person. As the Constitutional Court held, Article 46 is 'applicable and available to every person regardless of status held or occupation.'[33] Therefore, the Court of Appeal's reasoning that Article 46 is one of two articles which 'form the very basis of the action whereby a citizen may seek redress before his Constitutional Court'[34]

25 Karunakaran v Attorney General [2020] SCCC 5 paras 58–59.

26 For example, Article 7 Convention on the Rights of the Child (1989) provides that every child has a right to a name. However, that right is not provided for in the Constitution of Seychelles.

27 Dubois & Others v Michel & Others, note 22, para 45. See also Talma & Anor v Michel & Others [2010] SCCC 6 p. 4.

28 The Constitutional Review Commission had suggested (at p. 23) that Article 46(2) should be amended to read as follows: 'A person may make an application to the Constitutional Court for redress on behalf of another person in relation to which a provision of the Charter has been or is likely to be contravened by an act or omission, with or without authority of the other person, if the other person is unable to personally make the application.' However, this recommendation was rejected.

29 Ah-Man v Government of Seychelles and Others [2003] SCCC 1. In Volcere v Georges & Others [2018] SCCA 43 para 51, the Court held that 'public interest litigation is alien' to Seychelles.

30 Austin v Attorney General [2016] SCCC 25 para 19.

31 Volcere v Ministry for Home Affairs and Local Government [2018] SCCC 12 para 17.

32 For example, Article 29 (the right to healthcare); Article 33 (the right to education); and Article 35 (the right to work).

33 Carpin v Seychelles National Party [2011] SCCC 12 p. 11.

34 Chow v Attorney General, note 10, para 9.

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should not be understood as excluding non-citizens.[35] Jurisprudence from courts shows Article 46 is applicable to both natural and juristic persons.[36]

C. Excluded jurisdiction?

Article 46(3) provides that:

> *'The Constitutional Court may decline to entertain an application under clause (1) where the Court is satisfied that the applicant has obtained redress for the contravention under any law and where the applicant has obtained redress in the Constitutional Court for any matter for which an application may be made under clause (1), a court shall not entertain any application for redress for such matter except on appeal from a decision of such court.'*

Under Article 46(3), the Court 'may' decline to entertain an application made under Article 46(1) on one ground - where 'the Court is satisfied that the applicant has obtained redress for the contravention under any law.' The use of the word 'may' suggests that the Court can still entertain an application even if the applicant obtained redress. Otherwise, the drafters of the Constitution would have used the word 'shall.' However, since courts do not concern themselves with moot issues,[37] there may not be a need for the Court to entertain an application in such cases unless the declaration of unconstitutionality is still relevant. In that case, the issue will not be moot. As the Court of Appeal explained, '[a] court cannot competently entertain a suit that has no "live and genuine issues" in controversy for its determination.'[38]

The Constitution does not expressly provide that the redress obtained from such a court has to be adequate for a person to be barred from approaching the Constitutional Court. The Constitutional Review Commission's recommendation that adequacy should be made a prerequisite in Article 46(3) was not acted upon.[39] Much as there is no express constitutional requirement that an applicant can only approach the Constitutional Court when the redress wasn't adequate, it can hardly be argued that a 'redress' which does not adequately reflect the applicant's concern is a true redress within the meaning of Article 46. In other words, for a redress to be properly so called, it should adequately address the

35 See also Dhanjee v James Alix Michel & Others [2014] SCCC 6 p. 1, where the Court observed that the petitioner, as a citizen, invoked Article 46(1).

36 Vijay Construction (Proprietary) Limited v Eastern European Engineering Limited, note 19, paras 20–28 (the court found that the right to a fair hearing had not been contravened); Subaris & Others v Perera & Anor [2011] SCCC 4.

37 Ernesta v Bastienne [2020] SCCA 37 para 52; Bacco & Anor v Bacco [2021] SCCA 25; R v Brioche & Others [2013] SCCA 19.

38 Duraikannu Karunakaran v The Constitutional Appointments Authority & Others [2019] SCCA 17 para 101.

39 Constitutional Review Commission Report pp. 23–24.

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applicant's concern(s). Otherwise it cannot be classified as a redress. The duty should be on the person opposing the application before the Constitutional Court to convince the Court that the applicant received adequate redress before another court. The Court of Appeal has held that when dealing with Article 46(3), the question is whether the appellant's alleged contravention or likely contravention of his/her right 'had been adequately dealt with by a competent court.'[40] This requires the court in question to address 'its mind to the complaint and come to the conclusion that there was no contravention' or there was a contravention of the applicant's right.[41] In other words, the relevant court's judgement should expressly address the applicant's allegation that his/her right under the Charter has been violated. The adequacy of the redress is also evident from Article 46(4). This provision also emphases the fact that the Constitutional Court doesn't have monopoly over granting redress for contravention or likely contravention of the Charter. It shares that jurisdiction with the Court of Appeal.

However, any court or tribunal is barred from entertaining an application for granting a redress for a contravention or likely contravention of the Charter 'where the applicant has obtained redress in the Constitutional Court for any matter for which an application may be made under clause (1).' This is inferred from the last part of Article 46(3) where the word 'shall' as opposed to 'may' is used. In other words, once the Constitutional Court has granted redress, the matter relating to a contravention or likely contravention of the Charter is closed. Although there are cases in which 'shall' may mean 'may', this isn't one of those cases.[42] This is understandable because the Constitutional Court is the main court with jurisdiction to deal with any allegation of contravention or likely contravention of the Charter. It also strengthens the principle of *res judicata*.[43]

Implied in Article 46(3) is that a contravention or likely contravention of the Charter can be remedied by other courts or tribunals other than the Constitutional Court. The difference being that in the case of the Constitutional Court, the complainant approaches the Court with a direct request to address a contravention or likely contravention of the Charter.

Article 46(4) provides that

> *'Where the Constitutional Court on an application under clause (1) is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned in any other court under any other law, the Court may*

40 Vijay Construction (Proprietary) Limited v Eastern European Engineering Limited, note 19, para 29.

41 Vijay Construction (Proprietary) Limited v Eastern European Engineering Limited, note 19, para 31.

42 Allisop v FIU [2016] SCCA 1.

43 See generally, Vijay Construction (Pty) Ltd v Eastern European Engineering Ltd & Anor, note 20. In Attorney General v Marzocchi & Others [1997] SCCA 5 p. 3, the Court of Appeal explains the meaning and legal purpose of the principle of res judicata.

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> *hear the application or transfer the application to the appropriate court for grant of redress in accordance with law.'*

This provision highlights the fact that other courts may also grant redress under other areas of substantive law which has the effect of addressing a contravention or likely contraventions of the Charter. The Constitutional Court has two options: either to hear the application or transfer the application to another court. On the basis of Article 46(4), the Constitutional Court has transferred cases to the Court of Appeal when it was of the view that the issues raised were of 'more appellant in nature than constitutional.'[44] The Court of Appeal held that Article 46(4) embodies 'the parallel remedies principle.'[45] In Hackl v Financial Intelligence Unit (FIU) & Anor[46] the Constitutional Court held that Article 46(4) means 'that where a petitioner has a remedy under any other law which he/she may have pursued or may still pursue the Constitutional Court will decline to hear the petition.'[47] In other words, where the petitioner has a remedy under another piece of legislation, he/she 'cannot blatantly circumvent this law and seek redress in another forum [the Constitutional Court].'[48] Article 46(4) does not bar a petitioner from approaching the Constitutional Court after exhausting other available avenues to ensure the protection of his/her rights. The Court requires a hearing on the merits to determine whether the petitioner has exhausted all the available avenues.[49]

D. Powers of the Court in protecting human rights

Article 46(5) provides for the powers of the Constitutional Court in case where a person alleges a contravention or likely contravention of the Charter. It states that:

> *'Upon hearing of an application under clause (1) the Constitutional Court may- (a) declare any act or omission which is the subject of the application to be a contravention of the Charter; (b) declare any law or the provision of any law which contravenes the Charter void; (c) make such declaration or order, issue such writ and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of the Charter and disposing of all the issues relating to the application; (d) award any damages for the purpose of compensating the person concerned for any damages suffered; (e) make such additional order under this Constitution or as may be prescribed by law.'*

44 Parcou v Laporte & Anor [2021] SCCC 2 para 21. See also Assemblies of God v Attorney General [2020] SCCC 975 where the Constitutional Court transferred the case to the Supreme Court.

45 Valentin v Planning Authority & Others [2021] SCCA 5 para 2.

46 Hackl v Financial Intelligence Unit (FIU) & Anor [2010] SCCC 1.

47 Hackl v FIU, note 46, p.13.

48 Austin v Attorney General, note 30, para 18.

49 Adrienne & Anor v Attorney General [2020] SCCC 1 para 20.

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Under Article 46(5), the Court has five powers only. Firstly, it has the power to 'declare any act or omission which is the subject of the application to be a contravention of the Charter.' These are declaratory powers and they relate to any act or mission. The act or mission could be that of a private individual or a government entity. The Court of Appeal has warned against declaratory orders in some circumstances because their effect 'is not only to deprive the Respondent of a meaningful remedy but to fetter the Court unnecessarily, given its wide powers under Article 46 of the Constitution.'[50] However, there are cases in which declaratory orders are effective especially when the petitioner specifically asks for them.[51] In other words, where the declaration does not have to be followed by a specific order for it to be effective.[52]

Secondly, the Court has the power to 'declare any law or the provision of any law which contravenes the Charter void.'[53] Schedule two of the Constitution (principles of interpretation) defines 'law' and provides that it 'includes any instrument that has the force of law and any unwritten rule of law.' This definition is not exhaustive.[54] The Constitution also provides for international law.[55] The Court's power to declare law void is limited to written Seychellois laws such as Acts of Parliament[56] and subsidiary legislation made under such Acts and unwritten rules of law such as common law rules.[57] It does not extend to international treaty law. This is so because Article 48 of the Constitution requires courts to interpret the Charter in accordance with Seychellois 'international obligations.' In other words, their duty is to apply international law. Those obligations are set out in the international treaties or in the jurisprudence or practice developed by the relevant treaty bodies. Since the Charter deals with human rights, it can be assumed that the international obligations in question mean international human rights obligations. Such obligations are to be found in treaties signed or ratified by or acceded to by Seychelles or in customary international law. There is no requirement that such treaties should have been domesticated in Seychelles before courts can invoke Article 48. Under Article 46(6) the Court is obliged, after declaring any law void, to 'send a copy of the declaration to the President and the

50 Electoral Commissioner and Others v Dhanjee [2011] SCCA 24 para 27.

51 Gappy & Ors v Dhanjee [2011] SCCA 18 paras 38–40; Woodlands Holdings Ltd & Anor v Ministry of Environment Energy and Climate Change & Ors [2023] SCCC 3

52 Ramkalawan v Republic and Another [2001] SCCC 1.

53 Ponoo v Attorney-General [2010] SCCC 4 p. 6.

54 For a detailed definition of 'law', see Cable and Wireless (Seychelles) Ltd v Innocente Gangadoo [2018] SCCA 129 paras 33–35.

55 Article 64.

56 Cases in which the Court declared Acts of Parliament unconstitutional include Seychelles National Party & Others v Government of Seychelles & Anor; Dhanjee v Michel & Another [2015] SCCC 2; Linyon Demokratik Seselwa v Government of Seychelles & Another [2016] SCCC 16.

57 In Lucas v R [2011] SCCA 38 the court held that the common law evidential rule that a complaint in sexual offences had to be corroborated was contrary to Article 27 of the Constitution (which protects the right to equality before the law).

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Speaker.' This is applicable to statutory law and not to unwritten. Indeed, in cases where the Court of Appeal has declared legislative provisions unconstitutional for contravening human rights, it has ordered that the notice of its decision be served on the President and Speaker.[58] The Constitutional Review Commission had recommended that Article 46(6) should be amended to provide that '[w]here the Constitutional Court makes a declaration under clause (5)(b), the Court shall send a copy of the declaration to the President and the Speaker who, subject to any decision on appeal therefrom, shall act upon the declaration.'[59] It explained that:

> *'The purpose of the suggested amendment is to ensure that there is a corrective follow-up action to a declaration of unconstitutionality made by the Constitutional Court in respect to any law and that the law does not remain on the statutes book and further contravention of the Charter is committed in pursuance thereof.'*[60]

The above recommendation was, however, not acted upon. Once the law has been declared unconstitutional, it ceases to have any effect and it can no longer be relied on to violate or threaten the violation of human rights. The legislature may have to initiative a process to give effect to the Court's ruling if that is required to ensure that the law complies with the Constitution. In the light of the above discussion to the effect that the Court can declare written and unwritten law to be unconstitutional, the Court of Appeal's view that Article 46(1) is applicable, when, inter alia, 'a law has been passed'[61] should not be understood as excluding unwritten law.[62]

Thirdly, the Court also has the power to 'make such declaration or order, issue such writ and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of the Charter and disposing of all the issues relating to the application.' This provision should be read with Article 46(5)(a). After declaring an act or omission to be in contravention of the Constitution, the Court can invoke Article 46(5)(c) to make orders that will explain the measures to be taken to ensure the protection of the right which has been violated or likely to be violated. In other words, Article 46(5)(c) is only applicable after the Court has found a contravention or likely contravention of the Charter. On the basis of Article 46(5)(c), the Court of Appeal has issued structural interdicts.[63] Fourthly, under Article 46(5)(d), the Court has the power to 'award any damages

58 President Faure & Others v Amesbury & Anor [2019] SCCA 3 (declaring 6(2) (b) of the Seychelles Human Rights Act unconstitutional for imposing 'an unjustifiable limitation on the right to equal protection of the law under Article 27').

59 Constitutional Review Commission p. 24.

60 Constitutional Review Commission p. 24.

61 Chow v Attorney General, note 10, para 11 (i).

62 For example, in Majah v Majah [2010] SCSC 65 the court mentioned that some Muslim cultures oppress women. This means that such a culture, were it to be practiced in Seychelles, courts would declare it unconstitutional.

63 Seychelles National Party v Michel [2010] SCCA 9 p. 16.

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for the purpose of compensating the person concerned for any damages suffered.' The Constitutional Review Commission had suggested that Article 46(5)(d) should be amended to substitute 'the word "damages" where it occurs in the second place in paragraph (d) by the words "loss or damage suffered"' and that '[t]he suggested amendment is more about the appropriate use of words rather one of substance.'[64] However, the recommendation was rejected. The Court's power under Article 46(5)(d) is limited to cases where a contravention of the Charter has taken place. It can award any type of damages. The Court of Appeal referred to Article 46(5)(d) and held that '[t]he wording is… very broad and would permit compensation under any head - pecuniary damage or moral damage…'[65] The applicant is expected to 'seek compensation for the damages suffered under article 46(5) (e) of the Constitution.'[66] In other words, he/she should specify the amount they would like to be awarded for the violation of their right(s).[67] If the applicant does not specifically plead and quantify the amount he/she should be awarded, the Court, on finding that his right was contravened, will award him any amount it finds appropriate.[68] It is very important that damages are pleaded and proved by the applicant.[69] The Court of Appeal has explained the principles governing the award of damages in cases of human rights violations.[70] This is so because damage can only be 'suffered' after a contravention. Since the amendment to include the word 'loss' was rejected, the Court does not have the power to award the applicant damages for the loss of, for example, future income unless such a loss can be proved as damage suffered.[71] Lastly, the Court has the power to 'make such additional order under this Constitution or as may be prescribed by law.' The order in question has to be relevant to an application under Article 46(1). The Constitutional Court held that in making orders under Article 46(5), it has to be sensitive to the doctrine of separation of powers.[72] Although sensitive to the issue of separation of powers, it has ordered the

64 Constitutional Review Commission p. 24.

65 Michel & Ors v Talma & Anor [2012] SCCA 36 para 16.

66 Francis Ernesta & Others v R [2017] SCCA 24 para 31. See also R v Esparon and others [2014] SCCA 19.

67 In Sandapin v Government of Seychelles & Anor [2012] SCCC 6 the petitioner asked the court to declare that his constitutional rights had been contravened and also to award him compensation for the violations. However, the Court did not find a violation of his rights.

68 Fanchette v The Attorney General [2012] SCCA 16.

69 In Heirs Bossy v Chow & Anor [2013] SCCA 7 para 7, the Court of Appeal held that '[d]amages are not speculative. They are actual. They are compensation for loss sustained. They have to be proved.'

70 Michel & Ors v Talma & Anor [2012] SCCA 36.

71 In some cases, courts use the words 'damage' and 'loss' interchangeably. See for example, Ramkalawan & Others v Government of Seychelles [2009] SCSC 59; Pillay v Labaleine [2014] SCSC 23.

72 Volcere v Ministry for Home Affairs and Local Government [2018] SCCC 12 para 20; Geers v Attorney General & Others [2018] SCCC 13 para 24.

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relevant ministries to make regulations giving effect to different rights.[73] The Court of Appeal held that once the Constitutional Court finds a contravention or likely contravention of the Charter, it is obliged to grant an effective relief.[74] However, it is better for the applicant to specify the remedy he/she would like the Court to grant. As the Constitutional Court held, 'despite the breadth of' Article 46, 'courts are reluctant to grant remedies that are not in the pleadings. If we do so we would be acting *ultra petita*…'[75]

E. Other courts referring the matter to the Constitutional Court

Article 46(7) of the Constitution provides that:

> *'Where in the course of any proceedings in any court, other than the Constitutional Court or the Court of Appeal, a question arises with regard to whether there has been or is likely to be a contravention of the Charter, the court shall, if it is satisfied that the question is not frivolous or vexatious or has already been the subject of a decision of the Constitutional Court or the Court of Appeal, immediately adjourn the proceedings and refer the question for determination by the Constitutional Court.'*

A reference under Article 46(7) can be made by the Supreme Court, magistrates' court or any tribunal and it applies to any proceedings. These could be criminal, civil, family (dealt with by the Family Tribunal) or labour related (by the Employment Tribunal). Article 46(7) is not applicable when the proceedings have been concluded.[76] Article 46(7) is only applicable where the referred question is relevant to the proceedings before the referring court.[77] However, the proceedings have to be before the referring court. The Court of Appeal has the power to remit the matter back to the Supreme Court with an order that the latter should refer the constitutional question to the Constitutional Court.[78] This emphasises the fact that it is the Constitutional Court with the primary jurisdiction to deal with allegations relating to the contravention or likely contravention of the Charter. Other

73 Volcere v Minister for Home Affairs & Local Government & Ors [2019] SCCC 2 (rights to health, life and dignity); Geers v Government of Seychelles & Others [2019] SCCC 3 (rights to the right to a fair trial, dignity, participate in government and health). However, the Court of Appeal, by majority, disagreed with the Constitutional Court on these orders, see Geers v Attorney-General [2019] SCCA 42.

74 Gappy & Ors v Dhanjee [2011] SCCA 18 para 37.

75 Faure v Prea & Ano [2019] SCCC 11 para 67.

76 For example, after the trial has been concluded and the judge is only left with pronouncing the verdict. See, R v Francois [2000] SCSC 11.

77 Government of Seychelles v Bordino [2019] SCCC 13 para 8 (the reference was dismissed).

78 Wavel Ramkalawan v Lizanne Reddy & Anor [2019] SCCA 27.

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courts can only deal with those allegations as ancillary issues.[79] In Verlaque v Seychelles International Mercantile Banking Corporation[80] the Supreme Court referred to Article 46(7) and held that there 'is a fundamental difference between' the constitutional question on the one hand and the jurisdictional question.[81] It held further that:

> *'(1) a jurisdictional question that arises from the very inception or institution of a proceedings or matter before a Court of law, which has no jurisdiction at all - ab initio - over that particular proceedings or matter…; and (2) a constitutional question that arises in the course of any proceedings in a Court, which otherwise has jurisdiction over that proceedings or matter... In the first scenario, the Court itself has the jurisdiction to determine its jurisdictional question and so it does so; whereas in the second, the court has no jurisdiction to determine the constitutional question and so refers it to the competent court for determination.'*[82]

Once such a court comes to the conclusion that the question raises an issue of contravention or likely contravention of the Charter (the constitutional question), it is obliged[83] to refer to the matter to the Constitutional Court unless it is of the view that one of the following factors are present: (1) the question is frivolous; (2) the question is vexatious; (3) the question has been a subject of a decision of the Constitutional Court; and (4) the question has been a subject of a decision of the Court of Appeal (as discussed below). The Court of Appeal held that:

> *'The referral Court does not play the role of an automatic transmission gear but one of judicious judicial screening. It should be satisfied in the first place that the application is one worth sending for a decision to the Constitutional Court. Only serious issues should be so sent such as those that have not been and those, albeit*

79 In Ernesta v Commissioner of Police [2002] SCSC 13 p. 2, the Supreme Court held that 'a distinction must be drawn between delictual actions which are adjudicated by the Supreme Court in the exercise of its original Civil Jurisdiction, and Constitutional matters that arise either under Article 46(1) or Article 130(1) of the Constitution, which are determined by the Constitutional division of the Court.' See also Bouchereau & Anor v Superintendent of Prisons & Anor [2013] SCCC 7 para 10.

80 Verlaque v Seychelles International Mercantile Banking Corporation [2009] SCSC 9. In Reference by Attorney-General [2004] SCCA 6, the Court of Appeal held that the word 'not' has to be included between the words 'has' and 'already' so that Article 46(7) reads 'has not already been the subject of the decision of a Constitutional Court or the Court of Appeal.' The Court added that '[t]o hold otherwise would defeat the whole purpose of the Article which...was to confine the Constitutional Court or the Court of Appeal to deserving Constitutional cases which have not been the subject of a decision of either of these two Courts.'

81 Verlaque v Seychelles International Mercantile Banking Corporation [2009] SCSC 9 p. 10.

82 Verlaque v Seychelles International Mercantile Banking Corporation [2009] SCSC 9 p. 10. Emphasis removed.

83 Registrar of the Supreme Court v Public Service Appeals Board and Ors [2021] SCCA 11 para 22.

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> *within the competence of the court, cannot be. Day to day matters should be resolved by the very jurisdictions where they are raised.'*[84]

Therefore, the holding by the Supreme Court that it has the discretion, once it has concluded that the facts before allege a contravention or likely contravention of the Charter and meets the conditions under Article 46(7), whether or not to refer a matter to the Constitutional Court under Article 46(7) is debatable.[85] The Constitutional Court held that when a court invokes Article 46(7), it must clearly explain why the reference meets the 'threshold' under Article 46(7).[86] Put differently, it should explain why any of the four grounds could not be relied on to decline to make a reference. In R v Agathine,[87] the Supreme Court referred to Article 46(7) and held that '[t]he terms "frivolous" and "vexatious," in their legal connotations mean, cases or issues that are obviously unsustainable.'[88] The Court of Appeal held that:

> *'[T]he words "not frivolous or vexatious" in the context of referrals under Article 46(7) of the Constitution, indicate that the makers of the Constitution sought to discourage busybodies in constitutional litigation thus leaving the Constitutional Court or the Court of Appeal with more deserving constitutional cases.'*[89]

Although closely related, frivolous and vexatious are different grounds under Article 46(7).[90] There are cases in which the Supreme Court has relied on Article 46(7) to refer cases to the Constitutional Court and the latter has resolved the relevant issues. These have included cases dealing with the right to property,[91] wrongful conviction and imprisonment,[92] and the violation of the right to a fair trial.[93]

84 Chow v Bossy [2016] SCCA 20 para 17.

85 Rene v Regar Publication & Ors and Rene v Seychelles National Party & Ors [2002] SCSC 16.

86 Government of Seychelles v Bordino, note 77, para 10.

87 R v Agathine, note 21.

88 R v Agathine, note 21, p. 2.

89 Vijay Construction (Pty) Ltd v Eastern European Engineering Limited [2020] SCCA 23, para 41.

90 Adeline v Talma [2020] SCSC 375 para 19 (the court relied on dictionaries to define the two terms).

91 Durup & Ors v Brassel & Anor [2013] SCCC 6 (the Constitutional Court interpreted the relevant provisions of the Civil Code dealing with inheritance); Green v Payet & Ors [2019] SCSC 33 para 5 (dealing with the right to dispose of property - inheritance).

92 Serret v Attorney-General [2013] SCCC 8 (the Constitutional Court awarded the petitioner damages for wrongful conviction and imprisonment).

93 Republic v Marie [2008] SCCC 1 (the court held that the violation was not attributable to the state).

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There are cases in which the Supreme Court has declined to refer matters to the Constitutional Court either because the issue is frivolous[94] or 'frivolous and vexatious',[95] where the applicant's alleged right to property was based on unlawfully acquired property,[96] and where the act or omission did not have a nexus with the alleged contravention of the Charter.[97] The Supreme Court has also declined to refer matters to the Constitutional Court on the grounds that the questions being raised was dealt with by the Constitutional Court in other cases[98] and that the question being raised was 'fundamentally flawed.'[99] However, in some cases, it does not explain which of the grounds under Article 46(7) it relied on to dismiss an application to refer the matter to the Constitutional Court.[100]

Although Article 46(7) does not require a court to hear submissions from parties before making a reference to the Constitutional Court, the Court of Appeal held that before making a reference, a court is 'obliged to hear the parties on whether the constitutional issue was frivolous or vexatious.'[101] This means that the parties have a right to be heard.[102] The Supreme Court held that:

> *'Litigants who genuinely believe that a constitutional issue arises in the course of their case must ensure that their request for a referral is sufficiently argued to enable the Court…to engage in "judicious judicial screening" of a constitutional questions [sic]. '*[103]

94 Adeline v Talma, note 90,para 22; Talma v Camille [2021] SCSC 367; Mancienne v Government of Seychelles [2005] SCCA 11 para 37.

95 Republic v Charles [2008] SCSC 105 (there was no evidence that the right to a speedy trial had been violated).

96 Adeline v Talma, note 90.

97 R v Agathine, note 21.

98 Green v Payet & Ors, note 91, paras 2–3 (dealing with the constitutionality of Article 913 of the Civil Code - the issue of inheritance); Government of Seychelles v Bordino, note 77, para 11.

99 Benoiton & Ors v Rene & Ors [2021] SCCC 6 para 23 (the plaintiffs had not refused to do a DNA test to prove paternity as alleged by the respondents). In Nowacki v Dabrowska [2022] SCSC 739 (the Supreme Court declined to refer the matter to the Constitutional Court as it found that it had the power to make a declaratory judgement). In Poiret & Anor v Seychelles Pension Fund & Anor [2022] SCCA 38 para 38, the Court of Appeal held that the Supreme Court's reasons to decline referring a case to the Constitutional Court can be inferred from the decision of the court.

100 For example, R v Krishnamart & Co (Pty) & Anor [2011] SCSC 105 (dealing with the right to a speedy trial. However, it can be inferred that the court dismissed the application on the basis that it was frivolous or vexatious).

101 Registrar of the Supreme Court v Public Service Appeals Board and Ors [2021] SCCA 11 para 23.

102 Registrar of the Supreme Court v Public Service Appeals Board and Ors, note 101, para 23.

103 Parcou v Laporte, note 44, para 8.

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However, the Supreme Court can make a reference *mero motu* and without submissions from any of the parties if both parties do not object to the reference.[104] The Supreme Court referred to Article 46(7) and held that '[i]n determining whether the question is not frivolous or vexatious, this Court has to also consider whether the question is fundamental and essential in order to determine the current' issue before it.[105] It added that reference can only be made to the Constitutional Court if the Constitutional Court's decision would help in the determination of the issue before the Supreme Court.[106] Should a court dismiss an application by one of the parties to invoke Article 46(7) and refer the matter to the Constitutional Court, the aggrieved party has a right to either appeal against that decision to the Court of Appeal (if the application is dismissed by the Supreme Court)[107] or make 'a fresh request for referral if the refusal was based on form, and not substance.'[108] He cannot invoke Article 46(1) and approach the Constitutional Court directly.[109]

However, should such a question arise before the Court of Appeal, it isn't required to refer it to the Constitutional Court.[110] For example, in Franky Simeon v Republic[111] the Court of Appeal held that:

> *'We wish to point out for future guidance that if the Seychelles Court of Appeal is alleged by any litigant to have denied him his right to a fair hearing, as in the present case, the proper procedure to follow is to make an application by way of notice of motion to this Court and invoke the latter's inherent jurisdiction in the matter, instead of going to the Constitutional Court… Moreover, it is open to the Constitutional Court to transfer any such application made before it to the Seychelles Court of Appeal, pursuant to Article 46(4) of the Constitution of Seychelles.'*[112]

This means that in such a case, the Court of Appeal has jurisdiction to grant redress for a contravention of the Charter. It also means that the Court of Appeal can grant any of the remedies under Article 46(5). This is so because it would have 'assumed' the role of the

104 R v Georges [1998] SCSC 13 (dealing with the right to a speedy trial); Serret v Attorney General [2013] SCSC 54 (compensation for wrongful conviction).

105 Seychelles Postal Services v Nourrice and Nourrice v Seychelles Postal Services [2021] SCSC 902 para 16.

106 Seychelles Postal Services v Nourrice and Nourrice v Seychelles Postal Services, note 105, para 17.

107 Parcou v Laporte, note 44, paras 25–27.

108 Parcou v Laporte, note 44, para 28.

109 Parcou v Laporte, note 44, para 26.

110 In Desaubin & Others v Sedwick [2014] SCCA 20 para 3, the Court of Appeal held that 'article 46(7) refers to constitutional questions arising in courts other than the Court of Appeal.' See also Subaris Company Ltd and Others v Seychelles Court of Appeal and Another [2011] SCCC 1 para 26; Eastern European Engineering Limited v Vijay Construction (Proprietary) Limited [2022] SCCA 56 paras 49 – 50.

111 Franky Simeon v Republic [2003] SCCA 20 .

112 Franky Simeon v Republic, note 111, p. 6.

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Constitutional Court. This is one of the very few exceptions in which the Court of Appeal hears a matter at first instance and only when the issue of the alleged violation of the Charter arises 'in the course of the proceedings in the Court of Appeal.'[113]

The Supreme Court's decision R v Kilindo[114] raises an important issue of whether appeal proceedings are 'proceedings' within the meaning of Article 46(7) of the Constitution. In this case, the Family Tribunal convicted the appeal for contempt of court and sentenced him to six months' imprisonment. One of his grounds of appeal was that the Tribunal violated his right to a fair hearing (the right to test the evidence against him). In dismissing this ground, the Supreme Court held that:

> *'The Constitution is the supreme law and the violation of any of its provisions is indeed a very serious issue. Article 46 of the Constitution sets out the specific procedures by which breach of the provisions of the Constitution should be addressed. Article 46(1) states… A person who pleads that his constitutional right has been violated cannot do so by way of appeal to a higher or supervisory court. The Appellant therefore cannot plead violation of his constitutional right as a ground of appeal against the conviction and sentence imposed by the Family Tribunal.'*[115]

Had the Court referred to Article 46(7), it would probably have come to a different conclusion. This is so because there is nothing in Article 46(7) to create room for the argument that 'proceedings' therein exclude appeal proceedings. The Court should have decided whether this was an appropriate case to refer the matter to the Constitutional Court under Article 46(7). This is so because not every alleged contravention of the Charter has to be dealt with under Article 46(1). This is an approach the same court followed in a subsequent case when dealing with an appeal from the Employment Tribunal. It refused to make a referral to the Constitutional Court after discussing the grounds in Article 46(7) in detail.[116] As mentioned above, Article 46(1) is only applicable where there are no proceedings pending before court. Article 46(7) is applicable where there are proceedings before Court.

F. The burden of proof

Article 46(7) should be read with Article 46(8) which provides that:

> *'Where in an application under clause (1) or where a matter is referred to the Constitutional Court under clause (7), the person alleging the contravention or risk of contravention establishes a prima facie case, the burden of proving that there*

113 Vijay Construction (Pty) Ltd v Eastern European Engineering Limited & Anor, note 89, para 19.

114 R v Kilindo [2010] SCSC 21.

115 R v Kilindo, note 114, p. 5.

116 Seychelles Postal Services v Nourrice and Nourrice v Seychelles Postal Services, note 105.

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> *has not been a contravention or risk of contravention shall, where the allegation is against the State, be on the State.'*

A combined reading of Articles 46(1), (7) and (8) shows that there are two ways in which the Constitutional Court's jurisdiction to protect human rights in the Charter can be triggered - by a person (under Article 46(1) and by a court (under Article 46(7)). However, in both cases, the objective is the same - to put an end to a contravention of the Charter or to prevent a likely contravention of the Charter. Article 46(8) imposes different evidential burdens on the applicant and the respondent state. The applicant has a burden, through his/her allegation, to establish a *prima facie* case that the Charter has been contravened or likely to be contravened (the evidential burden). This means that the 'factual basis' must be 'laid to substantiate the claim.'[117] The details of what should be included in the affidavit are provided for under Rule 10 of the Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitution) Rules, 1994. The Court of Appeal referred to Article 46(8) and held that:

> *'The words prima facie in this context refers [sic] to the standard of proof under which a party need only present enough evidence to create a rebuttable presumption that the matter averred is true…[T]hese provisions establish that an aggrieved party has merely to allege a contravention of the Constitution to establish a prima facie case.'*[118]

Once the applicant has discharged that task, the burden shifts to the state to disprove the allegations (both evidential and legal burden).[119] The Court of Appeal held that under Article 46(8), '[t]he State bears the burden of proving that there has not been a contravention of the Constitution.'[120] The burden of proof is always on the state and does not shift to the applicant.[121] Article 46(8) is silent on the burden of proof in cases where it is alleged that a private individual contravened or is likely to contravene any human right in the Charter. Unlike the constitutions of some African countries such as South Africa,[122] Kenya[123] and Zimbabwe,[124] the constitution of Seychelles does not expressly provide that that the Charter (or Bill of Rights) binds private individuals. In other words, it does not expressly impose an obligation on private individuals to respect the rights of others and also not to violate those rights. However, the Court of Appeal held that that obligation is implied in the Constitution

117 Government of Seychelles v Bordino, note 77, para 9.

118 Mellie v Government of Seychelles & Anor [2019] SCCA 40 para 21.

119 Geers v Attorney-General, note 73, para 25.

120 Morin v Minister of Land Use and Habitat and Another [2005] SCCA 18 para 12.

121 Sagwe v R [2016] SCCA 15 para 33.

122 Section 8(2) of the Constitution of South Africa (1996).

123 Article 20(1) of the Constitution of Kenya (2010).

124 Article 45(2) of the Constitution of Zimbabwe (2013).

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and it referred to this as the 'horizontal application' of the Constitution.[125] In Ugo Sala & Anor v Sir Georges Estate (Proprietary) Ltd & Anor[126] the Court of Appeal held that '[n]ot only Constitutional Authorities, institutions, officials in their relationship with the citizen but also citizens in their relationship with citizens are bound by the constitutional provisions.'[127] In other words, the Constitution imposes an obligation on private individuals not to violate the rights of others.[128]

Although the Seychelles Constitution has horizontal application, Article 46(8) is silent on the burden of proof in cases where proceedings have been instituted against a private individual for the contravention or likely contravention of the Charter. In cases of where it is alleged that a private individual contravened or is likely to contravene the Charter, the applicant has to prove those allegations. In other words, he/she has both the evidential and legal 'burdens' to prove the violation. Once he/she has established a *prima facie* case against the respondent, the evidential burden shifts to the respondent to challenge the applicant's allegations. The legal burden, to prove the violation or likely violation, is always on the applicant.[129] Unlike the evidential burden, the legal burden never shifts.[130] This is so because the general rule in Seychelles law of evidence is that he/she who alleges a fact must prove it.[131] In some cases where the court has dealt with cases in which private individuals are alleged to have contravened the Charter, it has referred to Article 46(8) but does not explain the allocation of the burden of proof. It just reproduces Article 46(8) without any explanation.[132] Since the Constitution has horizontal application, the Court of Appeal's reasoning that Article 46 is applicable when, inter alia, 'a public body has done something or omitted to do something'[133] should not be understood as implying that private persons cannot contravene the Charter.

125 Laporte v Fanchette [2013] SCCA 32 para 12.

126 Ugo Sala & Anor v Sir Georges Estate (proprietary) Ltd & Anor [2014] SCCA 9.

127 Ugo Sala & Anor v Sir Georges Estate, note 126 para 32.

128 Ugo Sala & Anor v Sir Georges Estate, note 126, pp 15–17. In the light of this decision, the Supreme Court's decision in Rene v Regar Publication & Others [2002] SCSC 16 that the Charter of Human Rights does not impose obligations on private individuals is no longer good law.

129 In Aithal v Seychelles Breweries Ltd [2006] SCSC 26 p. 6, the Court held that '[t]he onus of proof may shift from time to time as a matter of evidence only. But the legal burden on the plaintiff, however onerous remains with him.'

130 In John Marengo & Others v Fred Anderson [2019] SCCA 6 para 11, the court held that in civil matters, the evidential burden of proof shifts.

131 Platte Island Villa Resort Ltd v Eme Management Services Ltd [2015] SCCA 20 para 15; Ramkalawan v Electoral Commission & Others [2016] SCCA 28 para 92; Roselie & Others v Roselie [2021] SCCA 9 para 2.

132 See for example, Durup & Others v Brassel & Anor [2013] SCCC 6 para 14–15.

133 Chow v Attorney General, note 10, para 11(2).

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Article 46(9) provides that:

> *'The Court in which the question referred to in clause (7) arose shall dispose of the case in accordance with the decision of the Constitutional Court, or if that decision is the subject of an appeal to the Court of Appeal, in accordance with the decision of the Court of Appeal.'*

The effect of Article 46(9) is that the referring court is bound by the decision of the Court of Appeal or the Constitutional Court. This means that such a decision is final and is not subject to appeal or review. It is against that background that the Constitutional Court has resolved some issues and referred the cases back to the Supreme Court to continue with the proceedings.[134] For Article 46(9) to be applicable, the proceedings must have been instituted in an appropriate court following the correct procedure.[135]

G. Procedural access to the Court

Article 46(10) of the Constitution provides that:

> *'The Chief Justice may make rules for the purpose of this article with respect to the practice and procedure of the Constitutional Court in relation to the jurisdiction and power conferred upon it by or under this article, including rules with respect to the time within which an application or a reference may be made or brought.'*

In 1994, the Chief Justice issued the Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitution) Rules[136] which give effect to Article 46(10). Rule 4 provides that:

> *'(1) Where the petition under rule 3 alleges a contravention or a likely contravention of a provision of the Constitution, the petition shall be filed in the Registry of the Supreme Court - (a) in a case of an alleged contravention, within 3 months of the contravention; (b) in a case where the likely contravention is the result of an act or omission, within 3 months of the act or omission; (c) in a case where the likely contravention arises in consequence of any law, within 3 months of the enactment of such law.*
> *(2) Where a petition under rule 3 relates to the application enforcement or interpretation of any provisions of the Constitution, the petition shall be filed in the Registry of the Supreme Court within 3 months of the occurrence of the event that requires such application, enforcement or interpretation.*

134 Republic v Marie [2008] SCCC 1 (the accused's right to cross-examine a witness had not been violated); Chow v Bossy, note 84 (examining the judgement debtor).

135 Chetty v Principal Secretary, Ministry of Administration & Manpower [1996] SCCA 14.

136 Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitution) Rules, 1994 (S.I. No. 33 of 1994).

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(3) Notwithstanding sub-rules (1) and (2), a petition under rule 3 may, with the leave of the Constitutional Court, be filed out of time.
(4) The Constitutional Court may, for sufficient reason, extend the time for filing a petition under rule 3.'

The Constitutional Review Commission criticised the 3-month deadline and recommended that the period should be extended to five years.[137] However, the above recommendation was not implemented and these Rules were subsequently amended in 2004[138] and 2021.[139] However, the three months' duration was still retained. The Court of Appeal held that a person who alleges a contravention or likely contravention of his/her right under the Charter 'is as of right entitled to file' his/her petition within the period stipulated in Rule 4(1)(a).[140] However, such a person is 'permitted to do so outside the prescribed period only if he obtains leave of the Constitutional Court' based on 'sufficient reasons' in his/her application.[141]

The Court of Appeal has questioned the legality of Rule 4 in that it contradicts with some pieces of legislation.[142] It has also been held that the Rules should not be interpreted strictly if they have the effect of preventing people from exercising their constitutional rights.[143] In Lesperance v Bastienne & Anor[144] the Constitutional Court referred to earlier case law and held that '[t]he factors to be taken into account when exercising the discretion are length of delay, reasons for delay, degree of prejudice to the defendant, and whether there is an arguable case on appeal.'[145] This suggests that this list is exhaustive. The Court will dismiss an application which is filed out of time without a sufficient reason.[146] There are instances in which the Constitutional Court has allowed applications filed out of time based on 'sufficient' reasons.[147] The three-month period within which an applicant can petition the Constitutional Court is very strict compared to the approach followed in other

137 Constitutional Review Commission, p. 25.

138 SI. 2 of 2004.

139 Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitution) (Amendment) Rules, 2021, S.I. 37 of 2021 (10 May 2021).

140 Green v Seychelles Licencing Authority [1998] SCCA 12, p. 2.

141 Ibid., pp. 2–3.

142 Morin v Minister of Land Use and Habitat and Another [2005] SCCA 18 paras 14–17.

143 Chow v Attorney General, note 10, para 27.

144 Lesperance v Bastienne & Anor [2022] SCCC 4.

145 Ibid., para 13.

146 Valentin v Planning Authority & Others, note 45, para 2.

147 See for example, Nora v Minister of Land Use and Habitat and Another [2002] SCCC 1 (the letter notifying the petitioner that the government was intending to acquire his land was sent to him late).

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countries such as the United Kingdom (one year),[148] Uganda (10 years)[149] and Canada (one year).[150] Unlike the approach followed in Canada, the Rules also impose the same period whether or not a human rights violation is continuous.[151] Although the Constitution of Seychelles provides for derogable and non-derogable rights,[152] the Rules impose the same time limit within which a contravention of any right, whether derogable or non-derogable, has to be filed. This approach is different from the one followed, for example, in Uganda. In Uganda, actions for enforcement of non-derogable rights can be filed any time. The ten-year period is only applicable to actions relating to derogable rights.[153] The Rules may have to be amended to address the following issues. First, there should be a distinction between the time within which an application alleging violation of a human right (which violation has already occurred) should be filed and the one alleging a threatened violation of a human right (before it has taken place) should be brought. In the former situation, the time may have to be increased from three months to at least two years and at most five years (as suggested by the Constitution Review Commission). This will, amongst other things, enable the applicant to prepare for his/her case by gathering the necessary evidence and resources he/she need to pay for legal representation. This may be the case, for example, in instances where the applicant may need expert evidence/reports to substantiate his/her claim. Of course, the applicant stands a risk of losing the case in case he/she cannot trace the important witnesses or documents after a long period of time since the violation took place. In the case of a threatened violation of a right, there should not be a time-limit. The most important consideration should be that the threat still exists. Second, the law may have to provide for different time-limits depending on the nature of the right which was allegedly violated as is the case in Uganda. The two or five years suggested above should only be limited to derogable rights. In case of non-derogable rights and continuing violations, there should not be a time limit. Otherwise, the Court may have to interpret the Rules broadly to accommodate these and other exceptional situations.[154]

H. Conclusion

In this article, I have discussed the human rights jurisdiction of the Court. I argue, inter alia, that although there is no express requirement that the redress obtained from another court has to be adequate for a person to be barred from approaching the Constitutional Court, a person who had obtained redress from another court for the violation of his/her right should

148 Section 7(5) of the Human Rights Act 1998.

149 Section 19(1) of the Human Rights (Enforcement) Act (2019).

150 Section 22(1) of the Human Rights Code [RSBC 1996] (Chapter 210).

151 Section 22(2) of the Human Rights Code [RSBC 1996] (Chapter 210).

152 See Article 44(1) of the Constitution.

153 Section 19 of the Human Rights (Enforcement) Act.

154 In Assemblies of God v Attorney General, note 44, paras 23 – 24, the Court recognised the fact that in some instances a human rights violation is of a continuous nature.

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only approach the Constitutional Court where that redress was inadequate. I also submit that there is nothing in Article 46(7) to create room for the argument that 'proceedings' therein exclude appeal proceedings. It is submitted that since the Constitution is silent on the burden of proof in cases of human rights violations by private individuals, in such cases the applicant has to prove those allegations. It is recommended that the Rules may have to be amended to extend the period in which those alleging the violation of non-derogable rights may file their petitions before the Court.

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