

Memo

To: Dr. John Bruce, Counselor Boakai Kanneh, Dr. Jeanette Carter

From: Caleb Stevens, Esq.

CC:

Date: 3/23/11

Re: Racial Qualification for Land Ownership

I. Questions

- A. If Liberian law prohibited non-blacks from owning land would it violate Liberia's obligations under the Convention on the Elimination of All Forms of Racial Discrimination ("CERD"), even if non-blacks were permitted to become citizens?
- B. Would a Liberian law prohibiting non-blacks from owning land violate the Liberian Constitution, specifically Article 11, even if non-blacks were permitted to become citizens?

II. Short Answers

- A. Yes. The "ordinary meaning" of CERD, "in light of [its] object and purpose," and Committee Against Racial Discrimination (the "Committee") documents show that a statute or constitutional provision imposing a racial qualification for land ownership, but not citizenship, would still violate Liberia's international legal obligations under CERD.
- B. Likely yes. If the Liberian Constitution's equal protection clause in Article 11(c) is interpreted in accordance with the US Constitution's Equal Protection Clause jurisprudence, then a statute or constitutional provision prohibiting non-black citizens from owning land would likely violate it. In addition, if private land ownership is found to be a fundamental right within Constitution Article 20(a) then it is likely that a statute or constitutional provision prohibiting non-black Liberian citizens from owning land would be struck down.

III. Analysis

A. CERD and Racial Qualification for Land Ownership

Article 5(v) of CERD provides:

State Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights . . . the right to own property alone as well as in association with others.¹

Although I have not been able to find any Committee documents directly on point, there is material indirectly supporting the proposition that a statute or constitutional provision prohibiting non-black citizens from owning land would violate Article 5(v) of CERD. The Committee has interpreted Article 5(v) as prohibiting restrictions on the alienation and ownership of land by indigenous peoples.² Consequently, Fiji and Tonga submitted reservations on their respective laws that “prohibit[] or restrict[] the alienation of land by the indigenous inhabitants.”³ Additionally, Lebanon, during its reporting presentation to the Committee in 1998, expressly noted that its quota system for foreign ownership of property applied “to all foreigners and did not constitute a refusal to sell goods or services on racist grounds.”⁴ A law prohibiting non-black citizens from owning land would almost certainly be considered a refusal to sell a good on racist grounds.

Perhaps I have been unable to find Committee documents directly on point because the “ordinary meaning” of Article 5, “in light of the object and purpose” of CERD,⁵ seems to clearly prohibit the denial of land ownership based on race. Therefore, the Committee may have never felt the need to elaborate on this issue.

B. Liberian Constitution and Racial Qualification for Land Ownership

Liberian Constitution Article 11 has three parts. Part (a) proclaims the “inalienable rights” of “all persons,” “among which are . . . possessing and protecting property . . .”⁶ Importantly, this right is “subject to such qualifications as provided for in this Constitution.”⁷ Part (b) provides, “All persons, irrespective of . . . race . . . are entitled to the fundamental rights and freedoms of the individual . . .”⁸ Again, these rights and freedoms are “subject to such qualifications as provided for in this Constitution.”⁹ Part (c) is the equal protection clause. It states, “All persons are equal before the law and are therefore entitled to the equal protection of the law.”¹⁰ Interestingly, there is no caveat in Part (c) as is found in Parts (a) and (b).¹¹

¹ Convention on the Elimination of All Forms of Racial Discrimination, Article 5(v) (1969).

² Committee on the Elimination of Racial Discrimination, General Comment No. 23 (Aug. 18, 1997).

³ Reservations of Fiji and Tonga to CERD, available at:

http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en.

⁴ Committee on the Elimination of Racial Discrimination, 52d Sess., Summary Record of the First Part (Public) of the 1259th Meeting, CERD/C/SR. 1259, para. 21 (Apr. 1, 1998).

⁵ Vienna Convention on the Law of Treaties, art. 31 (1969).

⁶ Constitution of the Republic of Liberia, art. 11(a) (1986).

⁷ *Id.*

⁸ *Id.* at art. 11(b).

⁹ *Id.*

¹⁰ *Id.* at art. 11(c).

¹¹ *Id.*

i. Racial Qualification for Land Ownership as a Constitutional Provision

Even if a constitutional provision were added prohibiting non-blacks from owning land the Liberian Supreme Court would likely strike it down as inconsistent with the protections afforded Liberian citizens in at least Article 11(c). Because Parts (a) and (b) are subject to the limitations imposed by other constitutional provisions, it is less likely that a Liberian court would find another constitutional provision inconsistent with them. In *Tolbert v. Gibson-Sonpon*, the Liberian Supreme Court addressed the issue of whether Constitution Article 97(a) is inconsistent with the due process protections in Constitution Article 20(a).¹² Article 97(a) prohibits “any court or other tribunal” from making “any order” or granting “any remedy or relief” with respect to any act by the People’s Redemption Council.¹³ The Court noted, “If there is an apparent discrepancy between different provisions [of the Constitution], the court should harmonize them *if possible*.”¹⁴ However, the Court held that Article 97(a) is inconsistent with and inapplicable to the adjudication of private property rights, which must be done by a competent court in accordance with due process of law.

[I]t is the unanimous opinion of this Court that Article 97(a) of the Constitution of Liberia cannot deprive any of the citizens and residents of this Republic from exercising any fundamental rights guarantee [sic] to them under the Constitution of Liberia.¹⁵

There are two ways to construe this opinion: narrowly and broadly. According to the narrow construction, the case is peculiar to the fundamental rights in Article 20(a) and the language of Article 20(a) which refers to protections “consistent with” the Constitution. It is the fact that Article 20(a) reflects fundamental rights and implicitly permits inconsistent constitutional provisions to be struck down when upholding those rights that caused the Court to rule as it did. As will be discussed below, private land ownership may fall within the fundamental rights laid down in Article 20(a). If private land ownership is found to be a fundamental right under Article 20(a), even under the narrow construction of *Tolbert* a constitutional provision prohibiting non-blacks from owning land would likely be struck down. The broad construction is that *Tolbert* stands for the proposition that the Liberian Supreme Court can strike down constitutional provisions that are inconsistent with other more fundamental provisions—like equal protection. If a Liberian court took this approach it could strike down a constitutional provision prohibiting non-black Liberian citizens from owning land as inconsistent with at least Article 11(c). In which case, the below arguments concerning the equal protection clause in Article 11(c) would apply.

ii. Racial Qualification for Land Ownership as a Statute

A statute prohibiting non-black Liberian citizens from owning land would also likely run afoul of at least Article 11(c). The language of Part (a) does not appear to bar prohibitions on land ownership. “[P]ossessing and protecting property” is not the same as land ownership. A 99-year leasehold protected by the government constitutes possession of the land and

¹² *Tolbert v. Gibson-Sonpon*, 37 Liberian Law Reports, 113, 122-23 (1993).

¹³ Constitution of the Republic of Liberia, art. 97(a) (1986).

¹⁴ *Tolbert*, 37 LLR at 123 (emphasis added).

¹⁵ *Id.* at 123-24.

protection of that right to possession. So it is far from clear that that provision would nullify a racial qualification for land ownership.

Similarly, it is far from clear that private land ownership is a “fundamental right” within the meaning of Part (b). The Court has referred to the rights laid down in Constitution Article 20(a) as “the core of the fundamental rights” of the Constitution.¹⁶ Those rights include the right not to be deprived of property “except . . . in accordance with due process of law.”¹⁷ In the US private property rights, including land ownership, are in general regarded as a fundamental right.¹⁸

If private land ownership is included within the fundamental rights in Article 20(a) then, under US law at least, a law prohibiting non-black citizens from owning land would be subject to strict scrutiny.¹⁹ Strict scrutiny means a law infringing upon a fundamental right is unconstitutional unless the governmental interests in passing the law is “compelling” and the law is a “narrowly tailored” means of furthering those interests.²⁰ Even assuming that the Liberian governmental interest is “compelling,” it is hard to see how a ban on all non-blacks owning land is a “narrowly tailored” means of achieving that interest. For example, it does not distinguish between non-blacks who were born in Liberia and new arrivals. Moreover, a quota system based on the number of non-black owners and parcel sizes could be established rather than a categorical prohibition.

Regardless, a law prohibiting non-black citizens from owning land would likely violate the equal protection clause in Part (c). The Equal Protection Clause of the Fourteenth Amendment to the US Constitution uses similar phrasing as that found in Article 11(c).²¹ It provides, “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”²² Although the Equal Protection Clause uses the plural ‘laws’ and Article 11(c) uses the singular, the equal protection part of the clause is otherwise identical.²³ There is no doubt that prohibiting all non-black citizens from owning land would violate the Equal

¹⁶ *Buchanan v. Bridgeway Corp.*, 36 Liberian Law Reports 470, 473 (1989).

¹⁷ Constitution of the Republic of Liberia, art. 20(a) (1986).

¹⁸ See *Chicago B & QR Co. v. Chicago*, 166 U.S. 226, 236 (1897) (“The requirement that the property shall not be taken for public use without just compensation is but ‘an affirmance of a great doctrine established by the common law for the protection of private property. It is founded in natural equity, and is laid down by jurists as a principle of universal law. Indeed, in a free government almost all other rights would become worthless if the government possessed an uncontrollable power over the private fortune of every citizen.’”); *Shelley v. Kraemer*, 334 U.S. 1, 11 (1948).

¹⁹ Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 Vanderbilt Law Review 793, 799 (2006).

²⁰ *Id.* at 800.

²¹ *Liberia v. Leadership of Liberian National Bar Association*, 40 Liberian Law Reports 635, 656 (2001) (observing that the US Constitution “has a similar provision to that of Liberia” regarding equal protection).

²² US Constitution, 14th Amendment (1788).

²³ The US Supreme Court’s approach to equal protection claims under the Fourteenth Amendment (applying to the States) and those under the Fifth Amendment (applying to the Federal Government) “has always been precisely the same.” *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 218 (1995) (quoting *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638, n.2 (1975)).

Protection Clause.²⁴ If a Liberian court relies on Equal Protection Clause jurisprudence then they would likely draw the same conclusion from Article 11(c).

There is evidence that in interpreting Article 11(c) a Liberian court would rely on US Equal Protection Clause jurisprudence. In *Liberia v. Leadership of Liberian National Bar Association*, the Liberian Supreme Court relied on “various decisions of the Supreme Court of the United States” to give meaning to the equal protection clause in Article 11(c):

‘[E]qual protection’ of the laws means that no person or class of persons within the jurisdiction of the United States shall be denied the same protection of the laws which is enjoyed by other persons or other class in like circumstances in their lives, liberty, property, and in their pursuit of happiness.²⁵

The Court went on to suggest that a successful equal protection claim could be raised by reliance on either US or Liberian jurisprudence.²⁶

Additionally, in *Scott v. Johnson* the Liberian Supreme Court addressed the issue whether dependents under a workmen’s compensation statute included illegitimate children.²⁷ The Court held that it could because “the issue of legitimacy of heirship or heirs . . . is completely irrelevant and immaterial to the case at bar.”²⁸ In support of this holding the Court looked to the “compelling legal authorities” *American Jurisprudence* and *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 165 (1972).²⁹ In *Weber* the US Supreme Court held that Louisiana’s statute denying workmen’s compensation benefits to unacknowledged illegitimate children violated the Equal Protection Clause of the Fourteenth Amendment.³⁰

Thus, there is evidence in Liberian Supreme Court case law that US Equal Protection Clause jurisprudence would be used to determine whether a law prohibiting non-black citizens from owning land would violate Article 11(c). In which case, the Court would likely find that such a law violates the equal protection of the laws guaranteed by Article 11(c).

IV. Conclusion

A statute or constitutional provision prohibiting non-black citizens from owning land in Liberia would violate Liberia’s international legal obligations under CERD. A statute or

²⁴ See, e.g., *Shelley*, 334 U.S. at 21 (holding that state court enforcement of restrictive covenants designed to bar blacks from owning land violates the Equal Protection Clause). Laws based on racial classifications, like laws infringing on fundamental rights, are subject to strict scrutiny analyses because minority races have historically been subject to discrimination in the US (i.e. is a “suspect class”). See *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964). However, the history of Liberia, which has not been one of discrimination based more on indigenous or settler origins rather than race, may be a reason to treat race differently than in the US as a matter of equal protection. That said, from the standpoint of racial minorities in Liberia race should be treated as a suspect class.

²⁵ *Liberia*, 40 LLR at 656-57.

²⁶ *Id.* at 657 (“There is no doubt in our minds that the facts and circumstances of these mandamus proceedings do not invoke the equal protection clause of the 1986 Constitution, either by way of our own jurisprudence or the jurisprudence of the United States.”).

²⁷ *Scott v. Johnson*, 30 Liberian Law Reports 30, 34-35 (1982).

²⁸ *Id.* at 35.

²⁹ *Id.* at 34.

³⁰ *Weber v. Aetna Casualty & Surety Col.*, 406 U.S. 165, 165 (1972).

constitutional provision would also likely violate the equal protection clause of the Liberian Constitution in Article 11(c) if a Liberian court relies upon US Equal Protection Clause jurisprudence. In addition, if private land ownership is found to be a fundamental right within Constitution Article 20(a) then it is likely that a statute or constitutional provision prohibiting non-black Liberian citizens from owning land would be struck down.