

# **NASIRU DEEN TEJAN COLE MOOT COURT COMPETITION 2020**

## **HYPOTHETICAL CASE**

**before the African Court on Human and Peoples' Rights**

**in the case between**

**NGO Liberty and Others**

**and**

**the State of Donamistan**

1. Donamistan is a West African state with an estimated population of 16 million. Its capital city, Boustanabad, is located in the west of the country. It became an independent state on 30 June 1960, after more than a century of French colonisation. This day has since then been celebrated as "Independence Day". The country has been relatively stable since independence, and has not experienced any coup d'état. From an economic point of view, it is one of the most stable countries in the sub-region and as such it attracts many migrants and refugees from neighbouring countries. The immediate neighbours of Donamistan have been experiencing a crisis in recent years, linked either to the rise of terrorist groups or to electoral and inter-ethnic crises. The majority of the population is Christian, and belong to the Bomba ethnic group.
2. Donamistan's judicial system consists of first instance courts at the district and regional levels in each district and region. The district courts have jurisdiction over misdemeanours and small civil claims, while regional courts handle felonies, capital crimes and other civil claims beyond the prescribed limit for small claims. Appeals from these courts may be submitted to the Courts of Appeal in each region, and from there to the Civil or Criminal Division of the Supreme Court. The Constitutional Court is the only competent body for matters relating to the conformity of the law with the Constitution. Such a matter may be referred to the Constitutional Court before the entry into force of a law (a priori control), by the President of the Republic, or by one-tenth of the Members of the National Assembly, or after the entry into force of the law (a posteriori control), by virtue of a certified "question of constitutionality",

submitted by any individual appearing in a case before the Court of Appeal or before the Supreme Court. Regional Courts of Appeal and the Supreme Court may refer a request by any individual that a matter be certified as a “question of constitutionality” to the Constitutional Court for determination if they “consider that the matter potentially reveals a question of constitutionality that requires resolution”. A recent academic article by a leading academic of the University of Donamistan found that the Constitutional Court had in only 5 per cent of matters involving posteriori control held the relevant law unconstitutional. Under Donam law, private prosecutions may be instituted when the state refused to prosecute. However, private prosecutions may only be instituted in respect of offenses that are punishable only by fine; or with no more than 5 years’ imprisonment.

3. Donamistan ratified the African Charter on Human and Peoples’ Rights (African Charter) on 19 January 1983; the two International Covenants on Civil and Political Rights, and on Economic, Social and Cultural Rights on 12 February 1978; the UN Convention on the Rights of the Child on 21 February 1990; the Protocol to the African Charter on the Rights of Women (Maputo Protocol) on 12 April 2004; and the African Charter on the Rights and Welfare of the Child on 15 June 2005. It also ratified the Protocol to the African Charter establishing the African Court on Human and Peoples’ Rights (Ouagadougou Protocol) on 4 March 1999, and made a declaration under article 34(6) of this Protocol on 12 April 2018. Donamistan further ratified the African Union Convention on Cyber Security and Personal Data Protection on 13 June 2015, and the Budapest Convention on Cybercrime on 5 February 2019. The country also became a member of the International Telecommunications Union (ITU) on 2 January 2004. Donamistan on 1 December 2018 acceded to both the African Charter on Democracy, Elections and Governance and the African Union Convention on Preventing and Combating Corruption (AU Anti-Corruption Convention). Donamistan is a monist state, and in terms of the Constitution, “all treaties become part of national law upon ratification or accession”. Sometimes, the state also adopts legislation to give effect to treaties, as it did with the AU Anti-Corruption Convention. To give effect to this treaty, the Donamistan National Assembly adopted Law 2019-21 of 30 June 2019, which created offences mirroring the wording of article 4(1) of the AU Anti-Corruption Convention. Each of

these offences is punishable by a maximum sentence of 3 years imprisonment, and/ or a fine equivalent to USD 100 000.

4. Since 2008, Donamistan decided to adopt three legislative measures to deal with the emerging challenges stemming from the rise of digital technology:
  - Law 2008-01 of 25 January 2008, amending the Criminal Code in respect of the fight against cybercrime.
  - Law 2016-29 and 2016-30 of 8 November 2016, amending the Criminal Code and the Criminal Procedure Code, respectively, establishing procedures for computer search and seizure, computer interception and electronic evidence.
  - Law 2017-28 of 12 December 2017, the Electronic Communications Code. Article 7 of the Code provides: “In the interest of national security, public order and for the detection or prevention of serious crimes or for the purpose of safeguarding the economic interests of Donamistan, the Minister of Communications is authorised to apply to a regional court judge for a warrant allowing the interception of internal communications. The initial warrant may be issued for a period of up to one month; and is renewable for a subsequent period of one month, or for a period that may be prescribed by the regional court given the circumstances.” Article 8 of this Code provides: “In the interest of national security, for the detection or prevention of serious crimes or for the purpose of safeguarding the economic interests of Donamistan, the Minister of Communications is authorised to issue a warrant allowing the interception of external communications. The initial warrant may be issued for a period of up to three months; and is renewable for a subsequent period of three months, or for as long as the threat continues.” Article 9 states as follows: “The Minister must inform the President of the National Assembly and the Chair of the Commission for the Protection of Personal Data of any warrants issued under article 8”. Article 1 of the Code defines external communication as “a communication sent or received from outside Donam territory.” Article 33 of the Code establishes the National Commission for the Protection of Personal Data, to oversee the application of the Code. The Commission is chaired by an independent expert, appointed by the National Assembly. The Code also establishes the Special

Unit to Fight Cybercrime, headed by the Director of the Unit. The Director of the Unit is appointed by the President of the country, in consultation with his Cabinet.

- Article 32 of the Electronic Communications Code provides: “Authorisation to acquire communication data (metadata) from a communication service provider is granted by a designated person who must hold a function, rank or position within the competent public authorities, provided for by an order of the Minister of Communications”.

5. Since the independence of Donamistan, the Dioula ethnic group has sporadically been fighting for independence in the southern part of the country. The Dioula, who mainly adhere to the Muslim religion, live in both the south of Donamistan and the west of the neighbouring country, Malingo. **Malingo is a member state of the African Union.** The group Al Abab advocates for the unification of all Dioula in a separate independent state. For the past 7 years, there has been relative calm in Donamistan. Malingo, where Al Abab has been much more active, has been facing terrorist attacks for the past 3 years, plunging the country into unprecedented instability. A United Nations (UN) stabilization mission has been deployed by a resolution of the UN Security Council. Donamistan has sent a contingent of 300 military personnel and 150 police officials as part of this UN mission to stabilize Malingo.
6. On 3 April 2018, during a State visit to Malingo, the President of the Republic of Donamistan, Mr. Abdoulaye, made a public statement on television alongside the President of Malingo affirming his determination to fight against the terrorist groups that are also knocking on Donamistan's door. This statement has been posted on the official Twitter account of the Head of State of Donamistan, as well as on his Facebook page and LinkedIn. In response, a video was posted on the Internet, in the name of the Al Abab group. In the video, an unidentified male said the following: “We will soon strike Donamistan, especially Bustanabad, which is a refuge for terrorists who are against the spread of Islam.” Following this statement, the President of Donamistan decided to strengthen border security and surveillance throughout the country. The two countries subsequently entered into mutual counter-terrorism collaboration through which a judge in one country may issue a warrant enforceable

in the other; and in terms of which the intelligence services in the two countries collaborate in the execution of warrants. In a speech to the nation on the eve of 2018 Donamistan's Independence Day celebrations, the President said: “Our country has the necessary legal, human and material resources to deal with the terrorist threat.”

7. The President of Donamistan asked the Special Unit to Fight Cybercrime to investigate the origin and authenticity of the video. The Unit identified Ibrahima X, a 33-year old national of Donamistan, living in Malingo, as the person speaking in the video. The Unit’s investigation also concluded that Ibrahima X is the leader of Al Abab. Echoed by the local and international press, this discovery tarnished the climate of trust that prevailed in the country and revived the tensions between the Dioulas and the other ethnic groups. Following this information, on 4 May 2018, the Minister of Communications issued a warrant for the mass interception of external communications in accordance with article 8 of the Electronic Communications Code. This warrant was systematically renewed for 3-month periods, until 12 November 2019.
  
8. The warrant issued by the Minister enabled the Special Unit to Fight Cybercrime to acquire a large volume of communications data. The Unit uses a filter to automatically exclude communications that are unlikely to be of intelligence interest. Authorised personnel of the Unit then apply search criteria to select communications of potential interest in accordance with the warrant issued by the Minister. This process allowed the Unit to intercept a text exchange between Imam Ali and his cousin Mokhtar. Ali is an Imam living in the south of the country; and is known to lead Friday prayers at a mosque attended by the Dioula community in the village of Chofor. Mokhtar is a 16-year old student Donam national studying in Malingo; he is also from the Dioula ethnic group. Mokhtar has been awarded a bursary to study at a school in Malingo specialising in computer science. In the year that he spent on Malingo, he has become involved in student politics, and emerged as a student leader. The application they used to communicate is hosted on a server located in the United States. This is an excerpt of the exchange:

“Ali: You saw the news. Ibrahima has been exposed.

Mokhtar: I saw the video but I doubt its authenticity. It's not his style to embark on situations that so foolishly put his loved ones at risk.

Ali: But it is him.

Mokhtar: Let's be careful. It may be a deep fake. We will continue the discussion as soon as I return to the village, this channel is not very safe.”

Based on this chat exchange, the Unit obtained a search warrant from a Supreme Court judge against Mokhtar and Ali. Unit officers consequently seized Mokhtar's computer data and caused his arrest, through the help of intelligence forces in Malingo, on suspicion of association with a terrorist group. At Ali's house, the agents seized an audio file of one of his sermons, in which he said: “We are with God. They are the terrorists, not us. May every son of Dioula defend the religion, his ethnic group....” A few days later, Ali was arrested for terrorism and association with a terrorist organisation. During the trial, counsel for Ali and Mokhtar challenged the constitutionality of the article 8 of Electronic Communication Code. A few weeks later, the Boustanabad regional court dismissed the charges against Ali and Mokhtar, and ordered the return of Mokhtar’s computer. However, the regional court declined to make pronouncements on the propriety of article 8 of the Electronic Communications Code. Ali and Mokhtar felt aggrieved about the continued validity of article 8 of the Electronic Communications Code.

9. Following these arrests, about a thousand young people in Chofor protested, carrying placards denouncing the stigmatisation of their ethnicity and religion. A Dioula activist, Thiemaka, tweeted a denouncement of “the public authorities’ relentlessness” towards her “Dioula sisters and brothers” and called on them to “resist this provocation”. She further tweeted a video in which she said: “The President of Donamistan attacks our sisters and brothers while the terrorist is the one who spreads terror among his people, who maintains a system of corruption and political clientelism (...) He is Hitler's incarnation (...) He is a thief and a racist who deserves to be dismissed (...).” Thiemaka is an orphan whose only asset is the small house where she lives, valued at the equivalent of USD 12,000, which she inherited from her grandmother. Thiemaka’s family has been living in and around Chofor for the last hundred years or so. Following the tweeted video, Thiemaka was arrested, released on bail, tried and convicted by the Boustanabad Regional Court of defaming the Head of

State, in accordance with article 181 of the Criminal Code of Donamistan which states that “any person who, with intent to bring the President into ridicule or contempt, publishes any defamatory or insulting matter, whether by writing, print, word of mouth or in any other manner, is guilty of an offence and is liable on conviction to imprisonment for a period not exceeding three years.” At the time of her conviction, Thiemaka was not married, and had a two-year old daughter. Thiemaka was sentenced to 12 months’ imprisonment with the option of paying a fine of the equivalent of USD 10,000. This sentence was confirmed by the Boustanabad Court of Appeal, and on 12 October 2018, by the Criminal Division of the Supreme Court. Thiemaka's lawyer raised the issue of the constitutionality of article 181 at the Court of Appeal, which decided not to refer the issue to the Constitutional Court. The Supreme Court did not comment on this issue in its judgment. Unable to pay the fine, Thiemaka on 13 October started serving the sentence, and was released one year later. In response, the young people of the village of Dioula created a WhatsApp group called “For the liberation of the Dioula People” to express their dissatisfaction.

10. The Director of the Special Unit to Fight Cybercrime, with the authorization of the Minister of Communications, sent a notice to the two cell phone companies in Donamistan after obtaining a warrant from a regional court judge in accordance with the provisions of article 7 of the Electronic Communication Code to hand over the data in their possession concerning the Dioula community.
11. Meanwhile, just before the confirmation of Thiemaka’s conviction and sentence on appeal, Boustanabad-Actu, a Limited Liability Company established under Donam law, published an article about Thiemaka’s case on its well-known website [www.boustanabad-actu!.com](http://www.boustanabad-actu!.com). The article included a link to Thiemaka's video on YouTube. Boustanabad-Actu also owns a pornographic site and an adult dating platform ([www.boustanabad-actu-action!.com](http://www.boustanabad-actu-action!.com)) hosted by a similar website in Canada. It publishes fresh sex scandals that take place in the country, and sex workers also use it to make their offers to, and link up with potential clients in Donamistan. There have been a number of complaints that some of the images and videos posted on the website were not taken with the consent of one of the parties, in what has been termed as revenge porn. The State charged Boustanabad-Actu with putting out defamatory statements and advocating terrorism. The Boustanabad Regional Court delivered a

finding of guilty, and ordered the company to prominently publish on its website excerpts from the judgment that describe Thiemaka's comments as defamation and to remove the hyperlink to the video on YouTube from the article. The company was also charged with and found guilty of disseminating images and videos “contrary to morality” (on the basis of article 112 of the Criminal Code), and was ordered to immediately close the site [www.boustanabad-actu-action!.com](http://www.boustanabad-actu-action!.com). The Boustanabad Court of Appeal on 12 March 2019 upheld the judgment on appeal. During the appeal, the applicant raised an exception of unconstitutionality, arguing that such a restriction infringed the right to freedom of expression guaranteed by the Constitution. The Court of Appeal adjourned the proceedings and referred the matter to the Constitutional Court, which on 12 April 2019 ruled that as a company, Boustanabad-Actu was not entitled to invoke a violation of the right to freedom of expression.

12. During the investigation of the [www.boustanabad-actu-action!.com](http://www.boustanabad-actu-action!.com) web site, it came to the attention of the Special Unit that some restricted information, to which only sophisticated decryption could allow access, revealed that “high government officials” were implicated in immoral behaviour. When he was informed of this, the Director of the Special Unit to Fight Cybercrime took full control of this part of the investigation, and restricted the rest of the investigation team from accessing the relevant information. It became clear to him that the Minister of Education was deeply involved, and that the revelations would cause him – and the sitting government – great embarrassment. The Director approached the Minister of Education, and set up a secret meeting. During this meeting, which took place on 1 April 2019, the Director informed the Minister of the information implicating him in immoral activity, and indicated that in the interest of full disclosure he would have to include the information in his report to the President. On the spur of the moment, the Minister of Education offered the Director an amount of USD 100 000 to “make this go away.” After some consideration, the Director accepted the Minister of Education’s offer, but set a deadline of one week (with as end-date the day on which the report to the President was due) after the meeting for the payment of the money. To raise this amount, the Minister of Education decided to sell a house he owned in one of the villages. After some frenetic efforts, he got a buyer who agreed to buy the house for USD 70 000. The Minister then informed the Director that he is able to pay the agreed amount, but would be able to do so only in another week, once the sale of his house



had been finalised. However, the Director insisted that the amount has to be paid before the report is submitted to the President, and that no delay would be possible. In response, the Minister of Education mandated the transfer of an amount of USD 70 000 from his Ministry's budgetary allocation, to a construction company he owns, invoicing the company for work to be done to a school for children with learning disabilities. Having obtained that money, he met the Director and handed him the cash. The Director subsequently submitted his report to the President without any mention of the Minister of Education. A few weeks later, the buyer paid the agreed amount of USD 70 000 to the Minister of Education. The Minister's construction company subsequently refunded the sum of USD 70 000 to the Ministry of Education, citing technical difficulties in the execution of the work required to be done as its ground for refunding the money.

13. Sometime later, one of the officials in the Ministry of Education noted that payment under the invoice was irregular, as there has not been any tender for the project. She shared her suspicions with a journalist of the Donamistan Sun, who conducted further investigations, and published an article on 5 June 2019, titled "Corruption in high places." In response to the journalist's questions, the Minister of Education was quoted as saying: "The facts are inaccurate. I merely took a temporary loan due to personal emergency, and repaid the amount when I sold my house in the countryside. Here I have the contract of sale and the refund to the exact amount concerned." Despite significant pressure from various quarters, including from within his own government, the President indicated that he accepted the Minister's version, and made it clear that the Minister's conduct did in his view not constitute any offence. The National Prosecuting Authority (NPA) has been seized with the matter, as indicated in a press release to this effect issued by the head of the NPA on the day after the President's statement (12 June 2019), but it has up to the present not instituted any proceedings.

14. Liberty 2.0 is a Donam NGO advocating for active citizenship, curbing corruption and protecting the rights of the marginalised. It enjoys observer status before the African Commission on Human and Peoples' Rights. The NGO made several statements, expressing particular concerns about human rights violations over the implementation of government measures since the publication of the threats made by the Al Abab

group against Donamistan. Early in 2020, Thiemaka, Imam Ali, and Mokhtar approached Liberty 2.0. to assist them to explore possibilities of further recourse. When they learnt about the possibility of submitting their cases to the African Court, they asked Liberty 2.0 to assist them to do so. Liberty 2.0 then reached out to Boustanabad-Actu. Together, Liberty 2.0 and Boustanabad-Actu prepared a joint submission.

15. On 12 March 2020, Liberty 2.0 and the company Boustanabad-Actu jointly submitted an application to the African Court on Human and Peoples' Rights, asking the Court to rule as follows:

- (a)The provisions and application of article 8 of the Electronic Communications Code violate the African Charter and/or other international human rights law.
- (b)The conviction of Boustanabad-Actu; and the closure of [www.boustanabadactu-action!.com](http://www.boustanabadactu-action!.com) violate the African Charter and/or other international human rights law.
- (c)The arrest, conviction and sentence of Thiemaka; and section 181 of the Criminal Code of Donamistan violate the African Charter and / or other international human rights law.
- (d)The failure of the State to prosecute the Minister of Education for corruption constitutes a violation of the AU Anti-Corruption Convention and / or other international human rights law.

The African Court is scheduled to hear the case at its 2020 session, to take place at Fourah Bay College, Freetown, Sierra Leone. Prepare one written submission on behalf of the applicants (Liberty 2.0 and Boustanabad-Actu), one on behalf of the respondent (the State of Donamistan) by addressing the issue of jurisdiction, admissibility, merits and reparations in relation to claims (a) to (d).