

**THE SUPREME COURT OF THE REPUBLIC OF RWANDA**

**APPLICATION NO:.....OF JULY 2015**

**CENTRE FOR HUMAN RIGHTS - RWANDA**

**(CHR-R) .....**

***AMICUS CURIAE***

**IN**

**DEMOCRATIC GREEN PARTY OF RWANDA**

**.....**

**APPLICANT**

**VERSUS**

**ATTORNEY GENERAL .....**

**RESPONDENT**

**ARISING FROM**

**REFERENCE NO ..... OF 2015**

**BRIEF OF AMICUS CURIAE**

**CENTRE FOR HUMAN RIGHTS LAW FIRM LTD**

Rwanda Development Board's Registration  
Number: 103463667  
Gasabo  
Kigali

Kwetu Residence Inn  
2020 Gacuriro Estate  
Gacuriro  
Kinyinya

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### STATEMENT REGARDING *AMICUS CURIAE*

Maitre Gatete Thierry Kevin, residing at Kigali in the Republic of Rwanda, with the physical Address: Nbr 44, Nyarutarama Road, Nyarutarama, Gasabo - Kigali

I am an adult male of sound mind and the Senior Advocacy Expert of the Centre for Human Rights – Rwanda, with due authority to submit this application in support of this motion on behalf of Centre for Human Rights – Rwanda to intervene by way of *Amicus Curiae*.

- I am a Rwandan citizen, Human Rights Lawyer,
- Member of the Rwandan Bar Association (Non-Practicing);
- Co-Founder of the Legal Aid Forum – Rwanda;
- Former member of the Justice, Reconciliation, Law and Order (JRLO) Sector Working Group;

The Centre for Human Rights – Rwanda is a legally registered law firm, which specializes in Advocacy and Public Interest Litigation.

The Centre for Human Rights - Rwanda has a vested interest and cause in the above-mentioned case as an organization Registered in Rwanda and serving interests of Rwandans.

The Centre for Human Rights – Rwanda is willing to offer *pro-bono* support to the Democratic Green Party of Rwanda in their endeavor to request the Supreme Court of the Republic of Rwanda to give a legal opinion on the ongoing discussion, petitioning and Parliamentary consultations, building up to a potential Referendum for the modification of Section 101 of the Constitution of the Republic of Rwanda.

#### STATEMENT OF THE *AMICUS CURIAE*

1. This *Amicus Curiae* is submitted in support of the petition by the 'Democratic Green Party of Rwanda's to the Supreme Court of the Republic of Rwanda, requesting a ruling on the possible change of the Constitution of the Republic of Rwanda, especially in its Section 101, on Presidential term limits.
2. The Centre for Human Rights - Rwanda is not affiliated to the Democratic Green Party of Rwanda;
3. The Centre for Human Rights - Rwanda submits this *Amicus Curiae* brief as part of its mission to conduct *Public Interest Litigation* in Rwanda;
4. The Centre for Human Rights - Rwanda believes that this initiative and the subsequent ruling by the Supreme Court of the Republic of Rwanda will contribute to the Jurisprudence in our country and beyond;
5. The Centre for Human Rights envisions a Rwandan Supreme Court that is more active and pedagogic in advising the executive on how to govern in accordance with the Laws of Rwanda, and the Legislature on the implications of their resolutions in the face of international law, especially the conventions to which Rwanda is a party;
6. The Centre for Human Rights - Rwanda believes that this legal initiative by the Democratic Green Party is healthy for the growth of our insipient democracy and rule of law;

7. The Centre for Human Rights does not accept any implications for intervening as *Amicus Curiae* in a third party case, with the sole aim of promoting the rule of law in Rwanda

## MERITES AND ARGUMENTS

### Merits

1. The Supreme Court of Rwanda, being the highest court of the land, serves, as the Constitutional Court in Rwanda, and is competent to hear all matters pertaining to the interpretation of the Constitution of the Republic of Rwanda as per its Section 145.
2. Art. 6(3) of the LAW N°21/2012 OF 14/06/2012 RELATING TO THE CIVIL, COMMERCIAL, LABOUR ADMINISTRATIVE PROCEDURE, prescribes that: *'Judges cannot refuse to decide a case on any pretext, even if the law is silent on the matter, obscure or insufficient.'*  
The august Court may therefore not deny justice to the Appellant, without orienting him on the more competent jurisdiction.  
Further International jurisprudence is provided herein to buttress this submission.
3. The State may be sued for the petitioning process requesting a referendum for the change of Section 101 of the Constitution of the Republic of Rwanda as several government officials have used their position and capacity to campaign with the public for petitions in that respect.
4. Ministers, Legislators and Mayors are on record campaigning in favor of extending presidential terms. In the eyes of the Rwandan public, and indeed in our own eyes, there is no difference between a government official speaking on behalf of the government or in his individual capacity as a regular citizen.
5. Political parties in the government coalition have issued statements in favor of extending presidential terms.
6. It is the Friend of the Court's submission that the government, through a number of its representatives has erred in campaigning with the public to

petition for something that is explicitly prohibited by the Constitution, and may be sued.

7. The number of Presidential Terms may not be changed as per Sections 101 and 193 of the Rwandan Constitution. The reading of its Section 193 indicates that the only modification possible, *inter alia*, through referendum is of the 'term' – as opposed to the 'terms' of the President of the Republic. In other words, a referendum may be organized to shorten or extend the years of a **term**, as opposed to increasing or decreasing the number of **terms** that a President of the Republic is allowed to stand.

### Arguments

8. '*We the People of Rwanda*' in the preamble of the Constitution does not refer solely to the current public opinion, but to the Rwandan people; past, present and future, whom all have a stake in our Constitution, and it is our submission that it is the role of the Supreme Court of the Republic of Rwanda to safeguard their interests.
9. A strong Constitution is immutable in principle. *Opinio juris* define constitutions as aspirational, foresighted monuments that serve to enlighten citizens, and, at times trump public opinion in the interest of highest common values.
10. '*Historically, constitutionalism was a product of the age of enlightenment. It was associated with the overthrow of arbitrary power and the attempt to ensure that government functioned according to established principles and in the light of enduring values [...] that no one had God-given rights to rule over others*' - Albie Sachs J in *Makwenyane* [389]
11. '*The Constitution is both a monument which celebrates and a memorial which commemorates [...]*' -Du Plessis ('The South African Constitution as memory and promise' (2000) *Stellenbosch Law Review* 385-394)
12. '*We the people of Rwanda*', does not merely mean the current electorate or public opinion. The term '*We the people*', encompasses who we are;

our history, our condition, our forefathers and descendants. By making that pledge, we put all our minds and energy together. **The idea of a strong Rwandan will is realized.**

13. Those who petitioned may be referred to as public opinion. The people of Rwanda include our forefathers, children, whom while have not petitioned, shall be affected by any decisions to change one of the leading principles upon which our constitution is founded.

14. **The constitution versus the will of the people:** The constitution also has the duty to thwart the will of the people in some instances where, driven by subjective political consideration, the people may err.

15. **The question for the petition has been misleading:** The question was posed as follows: *'Would you like president Paul Kagame to continue leading Rwandans?'* Given his undeniable achievements, president Paul Kagame is understandably popular and there are no social, political or economic grounds upon which the majority of the people may feel ready to rid themselves of him.

16. The manner in which the question is posed, suggests that under the current legal dispensation the terms of the president may be extended, even waived; Our humble submission is that such action is prohibited by Section 193 of the Constitution of the Republic of Rwanda.

17. **However, had the question been posed correctly as follows:** *Do we, Rwandans want the respect of our paramount constitution? Where it may not change to fit timely interests, including of incumbents? How would the answer have been then? It is our belief that the answer would have been Yes, because indeed, everyone aspires to a strong, predictable and trustworthy constitution.*

18. Those who petitioned used their democratic right, and posed the question in a manner they saw fit. However, this opinion aims to bring to the fore,

the other side of the story. It seeks to initiate a principled judicial dialogue, where beyond passions and public pressure, we examine the essence of the limitation of presidential terms in a retrospective, but also foresighted fashion.

19. **Brought in the court of law, both parties have equality of arms.** While those who petitioned to change the constitution were many in numbers, it is also the duty of the Constitution, and indeed the Supreme Court of the Republic of Rwanda, to protect minority rights and views – sometimes against majority will.

20. **An opinion reached in our favor, namely, advising against the change of Section 101 of the Constitution of the Republic of Rwanda, shall not be undemocratic,** in the sense that the Rwandan people have, in their majority, through the constitutional Referendum of the 26<sup>th</sup> May 2003, legitimized the judiciary to act, not in respect of public opinion, but on the letter of the law and their conscience.

21. In *State v Makwenyane, 1995*, the South African Constitutional Court took a decision, which was contrary to public opinion and ruled against the death penalty<sup>1</sup>.

22. Secondly, in *National Coalition for Gay and Lesbian Equality and others v The Minister of Justice and others*<sup>2</sup>, confirming a judgement by Ackermann J, decriminalising homosexuality; by repealing, *inter alia*, section 20A of the Sexual offences Act; included “sodomy” as an item in Schedule 1 of the same act<sup>3</sup>

In this last judgement the court repealed existing statute, enacted by parliament and made legislation directly from the bench.

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<sup>1</sup>in the Constitutional Court of South Africa *The State v. T Makwanyane and M Mchunu*, 1995, Case CCT/3/94

<sup>2</sup>in the Constitutional Court of South Africa: *The National Coalition for Gay and Lesbian Equality and The South African Human Rights Commission v The Minister of Justice and others*, Case CCT 11/98

<sup>3</sup> Republic of South Africa: Criminal Procedure Act, 1977

23. In both cases, the Attorney General, representing the South African Government argued the position of the public opinion, but failed to sway Judges of the Constitutional Court. The final rulings were indeed against public opinion.

Many legal scholars argue that that is when ***‘the Court becomes supreme’!***

24. In these submissions, South African Jurisprudence will be extensively cited. The reason for privileging South African Jurisprudence is that Rwandan and South African constitutions stem from a similar historical standpoint. They are both reactions to oppression, crafted to ensure that what happened in the past never happens again. Accordingly, they are both aspirations to an *open and democratic society based on principles of Justice, equality and freedom.*

25. Also, like its South African Counterpart, the Rwandan government has, at times, taken decisions that were contrary to public opinion. Indeed in the aftermath of the Genocide, the Rwandan government decided to abolish the death penalty.

26. Not least, Rwanda transcended regional prejudice and prevailing social stigma locally, to refrain from criminalizing homosexuality.

27. The decisions and their timing were most unpopular. Yet, the government of the Republic of Rwanda used foresight to trump public opinion and uphold human rights values.

28. This opinion is submitted to the august Court in the same vein, with the same expectations.

29. Historical facts, especially in our country, inform us that public opinion is fickle, subjective, swayable and, at times, shortsighted. The constitution, as a foundation of our Republic; a pillar of our Democratic system, serves to mitigate such timely agitations aiming at diverting society from the course, as intended by the founders of our way of life, towards a

government based on the rule of law and respect of institutions.

30. **While our constitution is not holy writ, it is a monument, immutable in principle.** A historical interpretation must occur, in the sense that ‘We’, the Rwandan people are aware of the past dents that were made to our constitution in the interest of incumbents.

31. In 1972, public opinion requested former president Grégoire Kayibanda to stand for a third term in office.

32. That such historical fact has not surfaced in the current debate, in spite of its relevance regarding the extension of presidential terms, underpins the rational of this submission.

33. People’s request then was submitted to parliament in a fashion that is arguably similar to the one currently ongoing. Such past request may make no sense to the modern-day Rwandan, yet was massively popular at the time.

34. I see a pattern, in which Rwandan leaders manage to make themselves so popular, that the electorate fails to see beyond them.

35. Therefore, the Rwandan public opinion shouldn’t be trusted to make dispassionate decisions. They should be guided by an unshakable pillar of wisdom; which is their Constitution.

36. As regards the prevailing argument in the public opinion, that the makers of our constitution could not have given more weight to limiting ‘terms of the President of the Republic’, and less weight to ‘the system of democratic government based on political pluralism, or the constitutional regime established by this Constitution especially the republican form of the government or national sovereignty’

37. It is our submission that as a constitution whose main intent was to

ensure that never again should the tragedies such as the Genocide Against the Tutsi occur in our country, by putting in place measures that prevent political actions that led to its occurrence, the legislator feared prolonged rules more than the advent of a monarchy, or even possible alienation of Rwandan territory; the last two being more unlikely.

38. *In fine*, we would like to close our brief with a quote from former South African Chief Justice Mahomed J, who explained constitutional supremacy in the following ringing tones: *in S v Acheson 1991 2 SA 805 (Nm) 813A-C*:

*'(T)he Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relations between the government and the governed. It is a "mirror reflecting the national soul", the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people';*

He pursues in *S v Makwanyane 1995 3 SA 391 (CC) para 262*:

*'All constitutions seek to articulate, with differing degrees of intensity and detail, the shared aspirations of a nation; the values which bind its people, [...] the constitutional limits and the conditions upon which that power is to be exercised; the national ethos which defines and regulates that ethos; and the moral and ethical direction which that nation has identified for its future. In some countries, the Constitution only formalises, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future [The constitution] is a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos, expressly articulated in the Constitution.'*

## V. CONCLUSION:

The Centre for Human Rights - Rwanda prays to the Supreme Court of the Republic of Rwanda to uphold the submissions of the Democratic Green Party of Rwanda;

To advise Rwandans in general, Political Parties and the Rwanda Parliament in particular on the illegality of their petitions and resolutions regarding the change of the Constitution of the Republic of Rwanda.

Alternatively, to offer an opinion on the legality or none thereof of the modification of Section 101 of the Constitution of the Republic of Rwanda and possible extension of Terms of the President of the Republic.

So may please the Court.

RESPECTFULLY SUBMITTED

By: Me. Gatete Thierry Kevin LLB Law,  
LLM Human Rights and Democratisation for Africa

On Behalf of:

Centre for Human Rights – Rwanda (CHR-R)

*Amicus Curiae*

CERTIFICATE OF COMPLIANCE AND SERVICE

Pursuant to Art 16 and 17 of the LAW N°21/2012 OF 14/06/2012 RELATING TO THE CIVIL, COMMERCIAL, LABOUR ADMINISTRATIVE PROCEDURE, the undersigned hereby certifies that this *Amicus Curiae* brief has been served to all parties, namely: The State and the Democratic Green Party of Rwanda in print version and *via* Electronic mail, to the physical and electronic addresses of the State, represented by the Attorney General; and the Democratic Green Party, represented by its President and its Counsel.

The Registrar in Chief of the Supreme Court has been copied in the above-mentioned mails