

**THE ERADICATION OF DOMESTIC EXPEDIENCY
BY THE AFRICAN COURT ON HUMAN AND
PEOPLES' RIGHTS : LESSONS FROM EUROPE**

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Declaration of Originality

I hereby confirm that everything that I have written is my own work and that I have acknowledged all my sources in this article.

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Abstract

The proposed African Court on Human and Peoples' Rights is an important development in the history of Africa. For the first time, there will be a regional judicial mechanism for the adjudication of human rights issues. The difficulty may lie in the manner in which the Court applies its discretion in relation to the doctrine of margin of appreciation and derogations. As a subsidiary body that has a power of review, the Court must tread warily when applying these principles. Lessons may be learnt from the well established European Court of Human Rights which has applied and developed the doctrine of margin of appreciation and has had occasion to examine the manner and extent of derogations from the European Convention. Applying this knowledge in an African context is important, but there must be discretion in that application that takes the particular circumstances of Africa into account.

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PART I

I. INTRODUCTION

The adoption of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights¹ is a significant development towards the promotion of African regional human rights. It signals the intention to deal with human rights violations through a judicial process. This development acknowledges the failure of the African Commission on Human and Peoples' Rights² to impact meaningfully on the development and maintenance of human rights in Africa which has been marred by, *inter alia*, political horse trading³ and its resultant disregard of human rights. In the words of Jean-Paul Masseron, "(t)he leading statesmen of Africa have a tendency to sacrifice individual liberties in order to safeguard national independence".⁴

The function of the proposed African Court on Human and Peoples' Rights (hereinafter the African Court) in the maintenance and development of human rights is to be achieved by "complement(ing) and reinforc(ing) the functions"⁵ and "complement(ing) the protective mandate of"⁶ the African

¹ Hereinafter "the Protocol".

² Hereinafter "the African Commission".

³ See Andre Stemmet, "A future African Court for Human and Peoples' Rights and domestic human rights norms" (1998) 23 *SAYIL* 233 at 235.

⁴ Keba M'Baye and Birame Ndiaye, "The Organisation of African Unity" in K. Vasak (ed), *The International Dimensions of Human Rights*, revised and edited for the English edition by Philip Alston, volume 2, at 594.

⁵ See the Preamble of the Protocol.

⁶ Article 2 of the Protocol.

Commission. This development heralds the formation of the African Union⁷, a supranational structure similar to the European Union, necessitated by increasing globalisation and the disenchantment expressed by African people with the political, economic and social choices exercised by their respective governments.

There is, however, the danger that the political horse trading previously alluded to may manifest itself in the proposed African Court's judgments, for example, where it appears to merely legitimize certain institutional practices of member states. In such cases, where there is an apparent bias in favour of a respondent government, the perception that justice is not seen to be done will prevail, thereby relegating both the Court's stature and its effectiveness.

Moreover, leniency by the African Court towards governments may mean that the mandate of the African Court is in danger of remaining largely unfulfilled especially in the light of:

- the violations by African states of human rights norms contained in the African Charter⁸ and other international human rights instruments;
- ethnic intolerance which has its roots mainly in the drawing of artificial boundaries by previous colonizing powers; and
- certain principles of international law, such as derogations and the

⁷ On the African Union, see generally Evarist Baimu "The African Union: Hope for better protection of human rights in Africa?" *African HRLJ* Vol. 1, No. 2, 2000, 299.

⁸ During the first ten years of existence of the African Charter, the African Commission gave final decisions on the merits in twelve cases of individual complaints. In all these cases, the governments concerned were found to have violated the African Charter (See Frans Viljoen "Review of the African Commission on Human and Peoples' Rights 21 October 1986 to 1 January 1997" in Christof Heyns (ed) *Human rights law in Africa 1997* (1999) at 74.

doctrine of the margin of appreciation, that seem to allow states to deviate from the proper application of generally accepted human rights norms.

This article will seek to identify potential obstacles to the effectiveness of the envisaged Court. It will be submitted that an assessment of how the principles of international law should apply in an African context is vital to secure, firstly, the eradication (or, at least, reduction) of the latitude that African states presently enjoy in subverting human rights standards and, secondly, the promotion of respect for and protection of human rights on the continent as a whole.

It will further be submitted that such an assessment will ultimately facilitate the development of:

- i) a minimum but enforceable human rights standard that has not previously been known on this continent; and
- ii) a distinctly African jurisprudence that accommodates the differences in culture, ethnicity and politics that have often created deep divisions, mistrust and even hatred among the people of Africa.

Reference will be made to the European human rights system, that is the European Commission on Human Rights⁹, the European Court on Human Rights¹⁰ and the European Convention on Human Rights¹¹. Since it is an established regional human rights system, much wisdom may be drawn from the European experience. More importantly, “the influence of the (European)

⁹Hereinafter “the European Commission”.

¹⁰Hereinafter “the European Court”.

Convention has also been felt in Africa” as it has “served to some extent as a model for the African Charter...” and “some African courts... refer to the (European) Convention when dealing with human rights related issues”.¹² It is suggested that it is precisely because a number of African states and the drafters of the African Charter have relied on the European Convention, that it is appropriate to make reference to that system of human rights protection for a more complete understanding of how a regional human rights court should apply the principles of international law previously alluded to. A further reason for adopting this approach is provided by Osterdahl¹³, who states that the Protocol “bears some resemblance to the (Statute) of ... the European Court”. If the ultimate goal is to achieve a universal standard of human rights, it is necessary to develop an informed African jurisprudence that is the result of a critical analysis of the failures and achievements of other human rights regional systems such as the European system. O’ Shea points out that “it is desirable that international judges strive to reach global consensus on the meaning of human rights and differing cultural values should inform this consensus rather than prevent it through different interpretations of fundamental rights”.¹⁴

Accordingly, in Part II this article will examine the principle of subsidiarity, the doctrine of the margin of appreciation and derogations. A specific focus will be placed on what they mean, how they are applied in existing regional human rights fora, difficulties associated therewith and how they should be applied by the African Court especially in the context of

¹¹ Hereinafter “the European Convention”.

¹² Christof Heyns "African Human Rights Law and the European Convention" (1995) 11 *SAJHR* 252 @ 253.

¹³ Inger Osterdahl, “ The Jurisdiction *Ratione Materiae* of the African Court of Human and Peoples’ Rights: A Comparative Critique” *Review of the African Commission on Human and Peoples’ Rights* vol. 7(1998) 132 at 133.

minorities and the widespread use of claw back clauses in the African Charter. Part III looks at the question of the independence of the judges that are to sit on the bench of the African Court and how Article 17 read with Article 22 of the Protocol are important for building the confidence of member states in the African Court. Part IV concludes with a suggestion that the downfalls and positive outcomes of other regional human rights courts must serve as lessons for the African Court if the latter is to be recognised as a truly judicial body devoid of too much leniency and bias.

The following analysis is confined to the application of civil and political rights in the African Charter. The treatment of third generation rights or even the interpretation of international human rights treaties (other than the African Charter) in respect of which the African Court may have jurisdiction under Article 3 of the Protocol raise more unique issues that fall outside the scope of this article.

¹⁴ A O'Shea "A Human Rights Court in an African Context" *Commonwealth Law Bulletin* (26) No.2, 2000,1313 at at 1320.

PART II

SELECTED PRINCIPLES OF INTERNATIONAL LAW

a) The Principle of Subsidiarity

The principle of subsidiarity is a means of interpretation of the European Convention that was developed by the European Court and European Commission “to allow the domestic legal systems” of the member states of the European Union “to coexist without undue tension”.¹⁵ The principle ensures that the European Union’s “member states’ own political and cultural traditions are respected...”¹⁶ by the Strasbourg organs.

The purpose of the principle is to distribute powers between the member states and the European Convention.¹⁷ Therefore, while it is the prerogative of the member state to implement mechanisms that are designed to achieve the realisation of the rights enshrined in the European Convention, as it deems fit, it is the European Court that retains a power of review over that member state’s conduct which must be measured “against the standard set by the provisions of the European Convention”.¹⁸

In *Handyside v United Kingdom*,¹⁹ the European Court defined its role in this scheme as being a “supervisory”²⁰ one. The majority judgment makes it

¹⁵ Stemmet op cit at 241.

¹⁶ Wadham and Mountfield *Blackstone’s Guide to the Human Rights Act, 1998* 1999 at 16.

¹⁷ Stemmet op cit at 241.

¹⁸ *Ibid.*

¹⁹ *Handyside v United Kingdom*, judgment of 7 December 1976 (Hereinafter “the *Handyside* case”).

²⁰ *Handyside* at paragraph 49.

clear²¹ that it is “not the Court’s function to compare different decisions taken, even in apparently similar circumstances by prosecuting authorities and courts” of a member state. In other words, it is not the European Court’s task to replace or substitute a competent national court, “but rather to review... the decisions they delivered in the exercise of their power of appreciation”.²²

According to Kalb,²³ “(t)he need for subsidiarity ... must be clearly recognised” in order to “formulate a way that adequately respects both universal rights and other concerns”, failing which the world is likely to be faced with “universal tyranny”. It is submitted that these concerns express the tension between the positivist and relativist approaches to human rights. Perhaps more than any other continent, Africa is faced with this difficulty especially with her history of colonialism that has understandably created suspicion of western ideals of human rights. Hence the more reason why there is a need to formulate a consistent African human rights regime that accommodates African values. The starting point is, of course, the African Charter.

The application of the principle of subsidiarity must be understood in the light of the “increasing interdependence and interconnectedness of nations, both as a result of voluntarily undertaken international obligations and the establishment of international institutions”²⁴. A consequence of the power of review that is itself an essential element of the application of the principle of subsidiarity is the creation of a human rights system that applies uniformly, or, at least, to some extent, within a given region, thereby ensuring a certain degree

²¹ *Handyside* at paragraph 56.

²² *Handyside* at paragraph 50.

²³ J. Kalb "The New Human Rights – A Draft Proposal" website of www.Rightsreform.net/index.html.

²⁴ G. de Burca "Reappraising Subsidiarity’s Significance after Amsterdam" (2000) Harvard Law School

of harmony between a regional human rights instrument and the domestic human rights instruments and practices of member states. The obvious outcome of this process is the creation of a more or less defined standard that member states of a region are expected to maintain.

Stemmet²⁵ correctly asserts that a regional human rights court and commission do not serve as “substitutes for domestic institutions in the interpretation and application of domestic law” because to do so would be to negate “the subsidiary nature of the international machinery of collective enforcement”²⁶ established by a regional human rights treaty. In the *Handyside* case²⁷, the European Court pointed out that the “machinery of protection” that the European Convention provides for is “subsidiary to the national systems safeguarding human rights”.

Article 28 of the Protocol provides that the African Court’s judgment shall be final and not subject to appeal. When exercising its adjudicatory jurisdiction under Article 3 of the Protocol, the African Court will effectively be performing a review function, thus implementing the principle of subsidiarity. In this regard, the African Court should bear in mind the foregoing discussion in order to properly fulfill its role as a “protective” guardian of human rights in Africa. Merely rubberstamping abusive state action will result in the Court abdicating its responsibility as an organ of review and failing to fulfil its subsidiary role in Africa. The importance of review must be understood in terms of the likelihood that states are less likely to complain that their domestic

Jean Monnet Chair Seminar and Workshop on Advanced Issues in Law and Policy of the European Union, NAFTA and the WTO Jean Monnet Working Paper 7/99

²⁵ Stemmet op cit at 242.

²⁶ *Case relating to certain aspects of the laws on the use of languages in education in Belgium*, 23 July 1968 (Cited in Stemmet ibid at f.n. 46).

²⁷ *Handyside* at paragraph 48.

authority is being challenged. Review would therefore be preferable from the state's point of view. Regarding the Court as supreme would have the disadvantage of states being reluctant to ratify the Protocol for fear that their individual domestic legal systems and, consequently, state authority, will be subjected to an upheaval in order to ensure compliance of those laws with the African Charter and the findings of the Court in any given case.

b) The Doctrine of the Margin of Appreciation

i) General

The doctrine of the margin of appreciation holds that at a domestic level states are allowed a certain degree of discretion in the implementation and application of guaranteed rights in certain circumstances. It is precisely when a state does employ the discretion that its conduct is challenged on the basis that it has violated a guaranteed right(s) enshrined in a domestic and/or a regional human rights treaty.

The jurisprudence of the European Court is rich with cases in which the doctrine has been applied, the first of which was the *Handyside* case where it was recognised²⁸ that "...it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals" resulting in their respective laws having differing views of "the requirements of morals". Since each Contracting State has "direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than

the international judge to give an opinion on the exact content of these requirements as well as on the ‘necessity’ of a ‘restriction’ or ‘penalty’ intended to meet them”.²⁹ For these reasons the European Court stated that “(t)he domestic margin of appreciation...goes hand in hand with a European supervision”³⁰, thereby recognising the interplay between the principle of subsidiarity and the doctrine of margin of appreciation.

A regional human rights court is therefore tasked with, *inter alia*, “ensuring the observance of (Member) States’ engagements”³¹. The doctrine requires that when doing so, the regional court “has to take into account the legal and factual situations in the State, with the result that the standards of protection may vary in time and place”.³²

Over a period of time, a rule of thumb that has developed in the European Court is that “ where there is substantial consensus in the domestic practice and laws of states in relation to a particular right, then states have a small margin of appreciation, but...where there is no such consensus the margin of appreciation is larger”.³³ Since the *Handyside* case, the idea that governments should be accorded a margin of appreciation has become firmly established in the jurisprudence of the European Convention with regard to restrictions on the freedom of expression, limits on the right to privacy, controls of property use³⁴,

²⁸ *Handyside* at paragraph 48.

²⁹ *Ibid.*

³⁰ *Handyside* at paragraph 49.

³¹ *Ibid.*

³² Stemmet *op cit* at 242.

³³ A O’Shea *op cit* at 1321.

³⁴ S. Marks "Civil Liberties at the Margin: the UK Derogation and the European Court of Human Rights" 15 *Oxford Journal of Legal Studies* (1995) 69 at 74.

and, more recently, in relation to restrictions on the freedom of religion in the case of *Cha'are Shalom ve Tsedek v France*³⁵.

The European Court is likely to allow an interference with or restriction of European Convention rights where a respondent government can show that the interference was "...justified by a legitimate aim and proportional to the need at hand, that is 'necessary in a democratic society'"³⁶. The doctrine is, however, not without difficulties. In its recognition of moral relativism, the doctrine is incompatible with the notion of the universality of human rights.³⁷ This, in turn, leads "national institutions to resist external review altogether, claiming that they are the better judges of their particular domestic constraints and hence the final arbiters of their appropriate margins"³⁸. Clearly, a regional court that grants states too much latitude in the application of regional human rights provisions encourages such an attitude.

Marks has criticized the doctrine on the basis that the European Convention organs have been more partial to a government's argument that a restriction on free speech is justified when it is based on grounds of national security than "when the judiciary's authority is at stake"³⁹. Marks' argument seems to suggest that the European system will more readily grant a respondent government a wider margin of appreciation in the exercise of its subsidiary power of review in certain defined areas rather than use the factual circumstances and the consensus standard as means of determining how wide a margin, if at all, should be accorded to the government.

³⁵ Case of *Cha'are Shalom ve Tsedek v France* (Merits), judgment of 27 June 2000, Application No 00027417/95.

³⁶ Wadham and Mountfield op cit at 14.

³⁷ E. Benvenisti "Margin of Appreciation, Consensus and Universal Standards" *International Law and Politics*, vol. 31 1999

³⁸ Benvenisti op cit at 845.

An additional difficulty associated with the application of the doctrine is the tendency of the European Court and Commission to simply accept a government's claim that, for instance, an emergency existed at the time it failed to apply the right in question. It is submitted that the better view, as expressed by the International Law Commission, is that a regional human rights court or commission "should make their own 'objective determination' of whether an emergency exists, and, if so, whether the measures adopted were strictly necessary to deal with that emergency"⁴⁰.

Given the differing cultural, religious, ethnic and political differences at both inter- and intra- state levels in Africa, it is foreseeable that the African Court will place heavy reliance on the doctrine of the margin of appreciation in order to accommodate or even prevent differences of opinion. How the African Court does this will certainly have the effect of either relegating or improving its worth as a credible judicial protector and overseer of human rights law.

Reference has already been made to the varying types of differences in Africa that have the potential to create conflict. The history of Africa bears testament to the fact that many of these differences have resulted and continue to result in civil and international armed conflicts which have often been the result of a failure to respect the human rights of an entire people, such as a minority ethnic group.

The African Court will be faced with the difficult task of having to draw the line between supermajoritarianism and the rights of minorities. This is a particularly complex area, given the fact that democracy requires majority rule. If the African Court has as its aim the setting of universal standards of human

³⁹ Marks *op cit* at 74.

⁴⁰ Cited in Marks at 76.

rights, it is very likely that the doctrine of margin of appreciation will detract from the attainment of such standards.⁴¹ Benvenisti⁴² argues that “...the doctrine is inappropriate when conflicts between majorities and minorities are examined” and that “...no deference to national institutions is called for...”. In his view, international bodies should address the imbalances (between the rights of minorities and the rights of majorities) that democracy creates.⁴³

A democracy by its very nature leads to a power imbalance in the political stakes, making minorities “political captives of the majority”⁴⁴. There is therefore a very real likelihood that executive policies of a democratic state will lead to decisions (including judicial decisions) that give deference to the will of the majority. To subsequently allow a state a margin of appreciation is to negate the value of minority rights that are usually not provided for in domestic human rights legislation. One need only refer to the events that unfolded in Rwanda during the course of 1994 in order to contextualise this assertion. In that ethnic conflict⁴⁵, the majority Hutus perpetrated massive violations of human rights and genocide against the minority Tutsis whose participation in government was limited by the laws of the country. It is submitted that in this type of situation, it would be inappropriate to allow the respondent government a margin of appreciation.⁴⁶

An exception to this would be where a state compensates for the power imbalance by enacting effective legislation and “...setting up effective

⁴¹ See O’Shea op cit at 1322.

⁴² Benvenisti op cit at 847.

⁴³ Ibid.

⁴⁴ Benvenisti op cit at 848.

⁴⁵ For a discussion of the conflict, see Mahmood Mamdani, *When Victims Become Killers: Colonialism, Nativism and the Genocide in Rwanda*, 2002, Princeton University Press.

⁴⁶ For further examples, see Makau wa Mutua “The African Human Rights Court” 21 *Hum. Rts. Q.* 342 at 344 (1999).

institutional guarantees...”⁴⁷ that are designed to protect minorities within its territory. Benvenisti suggests that granting a state some latitude in this situation “...could offer an incentive for heterogeneous communities to establish such procedures and thereby avoid external rebuke”⁴⁸. In determining whether or not the doctrine of margin of appreciation should be applied, the effectiveness of the domestic legislation and institutional guarantees should be decisive.

In *United States v Carolene Products Co.*⁴⁹, the court expressed the view that a supranational human rights body should examine “statutes directed at particular religious, or national, or racial minorities,” and look at “whether prejudice against discrete and insular minorities may...call for a correspondingly more searching judicial inquiry”. This sentiment was echoed, albeit in a different context, some fifty years later by Judge Martens in his dissenting opinion in *Brogan and Others v United Kingdom*.⁵⁰ The learned judge opined that⁵¹

“...in cases where the treatment the applicant (in the European Court) is complaining about is in every respect in conformity with one or more specific and precise provisions of national law, both logic and truthfulness demand that the first step in assessing whether the application of that law constitutes a violation of the (European) Convention should be to review whether that law is in conformity with the (European) Convention. If the latter question is to be answered in the affirmative, the answer to the former will almost always be in the negative”.

⁴⁷ Benvenisti op cit at 849.

⁴⁸ Ibid.

⁴⁹ *United States v Carolene Products Co.* 304 U.S. 144, 152-53 n.4 (1938) (Cited in Benvenisti op cit at 850). Hereinafter the *Carolene Products* case.

⁵⁰ Case of *Brogan and Others v United Kingdom* (Merits), Judgment of 29 November 1988 (Hereinafter “the *Brogan* case”).

It is submitted that the approach adopted in the *Carolene Products* case read together with Judge Martens' insightful and logical opinion should be adopted by the African Court prior to states being allowed a margin of appreciation. Africa is at present a combination of democracies and dictatorships necessitating an enquiry by the African Court into the compatibility of an impugned national law with the African Charter before any margin of appreciation is allowed. This approach will go a long way towards establishing a continent-wide standard simultaneously at both regional and national levels. The additional benefit would be improved inter state relations and a possible reduction in inter-ethnic conflict.

A lack of recognition and understanding of the needs of minorities, be they ethnic, political, religious or otherwise, is not unique to Africa. The European Convention contains a general anti-discrimination clause⁵² but no specific provision prohibits discrimination against the membership of a national minority *per se*⁵³. In Europe, one of the minorities that has been subjected to ongoing discrimination is the European Romanies (Gypsies) who consist of a population in Europe of approximately eight to ten million people⁵⁴. Pursuant to a survey⁵⁵ of the Romanies in Central and Eastern Europe by the United Nations High Commissioner for Refugees, a report, published in March 1993, stated that the Romanies were "...subject to both passive and active ethnic prejudice....".

⁵¹ The *Brogan* case at paragraph 7 of Judge Martens' dissenting opinion.

⁵² Article 14 of the European Convention provides that

“(t)he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”.

⁵³ L. Clements, PA Thomas and R Thomas "The Rights of Minorities: a Romany Perspective" The Patrin Web Journal, 3 September 1999. Website of: www.osce.org/inst/odhr/docs/bulle4-4.htm

⁵⁴ Ibid.

⁵⁵ Cited in Clements *et al.*

The value of supranational judicial intervention in such cases is borne out by Judge Pettiti's dissenting opinion in *Buckley v United Kingdom*⁵⁶ that "... the European Court had, in the Buckley case, an opportunity to produce, in the spirit of the European Convention, a critique of national law and practice with regard to Gypsies and travellers in the United Kingdom that would have been transposable to the rest of Europe, and thereby partly compensate for the injustices they suffer".

The injustices suffered by ethnic minorities in Africa may be linked to the artificial drawing of boundaries during the continent's colonial era. Seemingly incompatible ethnic groups, each with their own set of customs, traditions and beliefs, were required to live together when they had previously never coexisted on one territory.⁵⁷

It is possible that the African Court will be called upon to adjudicate a dispute between an African applicant who lives as the Romanies do and alleges a violation of Article 12(1) of the African Charter by a state. This Article guarantees the right to freedom of movement and residence. It is submitted that the built in restriction in the provision, which makes the guarantee subject to the individual abiding by the law, gives states the latitude to restrict the right in so far as minorities are concerned. Nothing in Article 12 (1) requires the law by which the individual must abide to be founded on the principle of equality. Therefore a government that practices any form of institutionalised apartheid, as was previously the case in South Africa, may claim that it was entitled to place limitations on the applicant's right on the grounds that the internal laws of the country allocated designated areas for certain groups of people. Obviously, this

⁵⁶ *Buckley v United Kingdom*, judgment of 8 July 1986.

would severely limit the said court's ability to interfere in such circumstances. It will be suggested, *infra*, that restrictions of the kind encountered in Article 12(1) require that the doctrine of margin of appreciation should not be applied at all. This would hold true despite the finding by the African Commission in *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria*⁵⁸ that a state cannot "use its national laws to defeat the manifest purpose of the Charter".⁵⁹

The notion that the African Court could achieve precisely what Judge Pettiti alluded to in the *Buckley* case, above, is attainable. It is the logical result of sifting through the experiences of the European human rights system, discarding the narrow approach and opting for the most appropriate way to deal with what is a specific African problem.

However, this is not to say that the only minorities that the African Court may have to protect will be ethnic ones. Homosexuals may be construed as a minority as well. Remarks by persons in positions of authority in Africa suggest that homophobia is ever prevalent⁶⁰. It is therefore foreseeable that the African Court may have to adjudicate cases in which the applicant alleges that a state's domestic laws violate his right to equality under Articles 2 and 3 of the African Charter. However, neither article specifically prohibits discrimination on the basis of a person's sexual orientation. It is submitted that in such a case the African Court should adopt the approach of the Human Rights Commission set

⁵⁷ See further Makau wa Mutua "The Banjul Charter and The African Cultural Fingerprint: An Evaluation of the Language of Duties" *Virginia Journal* (1994-5) vol.35, 339 at 342.

⁵⁸ Communications 140/94, 141/94 and 145/95.

⁵⁹ CA Odinkalu, "The role of case and complaints procedures in the reform of the African regional human rights system" *African HRLJ* Vol. 1, No. 2, 2001, 225 at 241.

⁶⁰ Most notably the remarks of Zimbabwe's President Robert Mugabe and Obed Mlaba, Mayor of the eThekweni Municipality in KwaZulu/Natal in South Africa. See generally *Behind the Mask* (20 - 30 April 2001) "Durban Mayor: apology for homophobic statement (website:

up under the International Covenant on Civil and Political Rights, namely that sexual orientation is included in the concept of “sex”.⁶¹

Where the application of the doctrine of margin of appreciation to the plight of homosexuals is concerned, it is submitted that the view of the European Commission in *Sutherland v United Kingdom*⁶² is to be preferred. In that case, the European Commission examined whether there “was a reasonable relationship of proportionality between the means employed and the aim sought to be realised” and felt that it was in this regard that it had to bear in mind “the margin of appreciation which the respondent government enjoys in assessing whether and to what extent differences justify different treatment”⁶³. The European Commission concluded⁶⁴ that given the fact that a difference in treatment of heterosexuals and homosexuals “impinges on a most intimate aspect of affected individuals’ private lives, the margin of appreciation must be relatively narrow”.

In the earlier case of *Dudgeon v United Kingdom*⁶⁵, the applicant challenged the law that was then in force in Northern Ireland which made buggery between consenting gay men a criminal offence. While the European Court recognised that one of the aims of the impugned legislation was to protect vulnerable members of society, it also stated⁶⁶ that “(a)lthough members of the public who regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts, this cannot

www.mask.org.za) and SAPA-AFP "Mob wrecks gay rights stand at book fair" 3 August 1996 (website: www.anc.org.za/anc/newsbrief/1996/news0805)

⁶¹ *Toonen v Australia* CCPR/C/50/D/488/1992.

⁶² *Sutherland v United Kingdom*, Application no. 25186/94, report of the European Commission adopted on 1 July 1997

⁶³ *Sutherland* at paragraph 55.

⁶⁴ *Sutherland* at paragraph 57.

⁶⁵ *Dudgeon v United Kingdom* (1981) 4 EHRR 149.

⁶⁶ At paragraph 60.

on its own warrant the application of penal sanctions when it is consenting adults alone who are involved”.

ii) **Substantial Consensus**

A particular difficulty with the manner in which the European Court and Commission have applied the doctrine of margin of appreciation is the “substantial consensus”⁶⁷ requirement. While this may have some value, it is submitted that in an African context determining whether there is consensus among member states on a certain issue may be difficult, if not impossible due to differing conceptions that prevail.

For instance, with respect to women’s rights and cultural rights, the practice of female genital mutilation perhaps best illustrates the type of conflicting interests of the individual *vis-a-vis* the collective that the African Court may be required to adjudicate. It is unlikely that the African Court will be in a position to establish any consensus on the issue as female genital mutilation is practised by a large number of African states (some such states have already enacted legislation prohibiting the practice) while, at the same time, condemned by many other African states.⁶⁸ One of the criticisms levelled against the substantial consensus requirement is that it “...unnecessarily subjects the application of the (European) Convention to domestic practice and law”.⁶⁹ As stated, *supra*, the difficulty in Africa will be the establishment of any consensus at all.

⁶⁷ See f.n 30 *supra*.

⁶⁸ Source: World Health Organisation Press Release "World Health Organisation Tells Third Committee Debate on Advancement of Women Female Genital Mutilation Could be Eliminated in Three Generations", 19 October 1998, GA/SHC/3477 at 1.

MacDonald asserts that the European Court, in requiring substantial consensus “forfeits its aspirational role by tying itself to a crude, positivist conception of ‘standards’... and prevents the emergence of a coherent vision of the Court’s function”.⁷⁰ Benvenisti⁷¹ suggests that the consensus requirement is merely a “convenient subterfuge for implementing the court’s hidden principled decisions” allowing the European Court to “eschew its responsibilities”. Requiring a substantial consensus to guide the width of the margin of appreciation detracts from the idea of the universality of human rights.

iii) **Claw back Clauses**

Claw back clauses constitute restrictions that are built into human rights provisions, most notably in the African Charter. These internal modifiers “...qualify rights and permit a state to restrict” those rights “to the extent permitted by domestic law”.⁷² A typical example of such a clause is to be found in Article 6 of the African Charter which provides that “(e)very individual shall have the right to liberty and to the security of his person. No one may be deprived of this freedom *except for reasons and conditions previously laid down by law*”.⁷³ This provision, while recognising the right to liberty and security, removes the certainty of the right in the second part of the provision. In other words, the individual is given the right and simultaneously deprived of it because it is subjected to domestic constraints that are often unnecessary and may or may not be artificial.

⁶⁹ O’ Shea op cit at 1312.

⁷⁰ R. t. J MacDonald, “The Margin of Appreciation” in *The European System for the Protection of Human Rights*, 1993 at 123.

⁷¹ Benvenisiti op cit at 852.

⁷² Mutua op cit at 359, f.n. 62.

Dlamini⁷⁴, among others, has criticized the extensive use of claw back clauses in the African Charter because they limit the impact of the African Charter's provisions by giving member states "too much autonomy allowing them to violate human rights with impunity". These clauses allow limitations that are "almost totally discretionary". Mutua⁷⁵ has described claw back clauses as a "weakness in the African system".

The difficulty that the African Court will be faced with is how to apply the doctrine of margin of appreciation when it receives an application that alleges a violation of a provision of the African Charter that includes a claw back clause. It is submitted that the first step in considering this question is to identify exactly which provisions of the African Charter contain claw back clauses. These are the provisions that relate to: the rights to life⁷⁶, liberty and security of the person⁷⁷; the freedoms of conscience, profession and religion⁷⁸, association⁷⁹, assembly⁸⁰, movement and residence⁸¹; and the right to participate in government⁸².

Dlamini⁸³ points out that the subjection of the latter right to the provisions of the (domestic) law carries with it the implication that in a one-party state the right is not violated. Furthermore, he states that even military regimes are accommodated by the claw back clause in Article 12 because it gives African

⁷³ Emphasis added.

⁷⁴ CRM Dlamini, *Human Rights in Africa*, 1995, Butterworths, at 94.

⁷⁵ Mutua, f.n. 40, *supra*.

⁷⁶ Article 4.

⁷⁷ Article 6.

⁷⁸ Article 8.

⁷⁹ Article 10.

⁸⁰ Article 11.

⁸¹ Article 12.

⁸² Article 13.

⁸³ Dlamini *op cit* at 88.

governments “a wide discretion” to determine what political order they will implement and this easily includes a one-party state.⁸⁴

It is submitted that the African Court should avoid applying the doctrine of margin of appreciation where an applicant alleges a violation of a provision containing a claw back clause. The reason for this is clear: the inclusion of a claw back clause or internal modifier means that the right in question has from the inception of the African Charter been automatically subjected to restrictions. To apply the doctrine would be to destroy the right almost completely, a kind of double jeopardy, thereby rendering the provision an empty promise that should not have been included in the African Charter in the first place.

Defining a claw back clause as an internal modifier draws attention to the fact that the impugned right already suffers the drawback of being defined, implemented and applied in a manner that may deprive the provision of any real substance. Reference has been made elsewhere⁸⁵ to the dire consequences that may result for nationals of a state where any form of institutionlised apartheid, disguised or not, is practised.

The disadvantages of applying the doctrine of margin of appreciation in these circumstances are not limited to the immediate impact they may have on individuals. There is a more sinister result: a failure to establish a long term workable and credible regional human rights regime, leaving Africans with little or no recourse when their rights are violated. Clearly, this would lead to the African Court becoming a white elephant, being attacked by the very criticisms that have plagued the African Commission.

⁸⁴ Ibid.

⁸⁵ *Supra* at 14.

The African Court must avoid the lethargy that the African Commission has suffered from. A regional human rights court is needed on this continent now perhaps more than ever before. It would be disastrous for Africa if the regional human rights system were to enter a state of regression after the adoption of the Protocol, a milestone that recognises the tragedy of a lack of a regional judicial human rights body in the African Charter.

c) Derogations

The doctrine of margin of appreciation has, on several occasions, been applied in the context of derogations. States sometimes derogate from treaty obligations on the basis that a national state of emergency has been declared. Dlamini argues that derogation clauses limit a state's conduct in two ways: firstly, the circumstances in which a derogation is permitted are limited to times of war and public emergency; and, secondly, certain rights may not be derogated from at all⁸⁶. In his view, derogation clauses differ from claw back clauses in that the former gives the individual a greater degree of protection than the latter.⁸⁷ It will be shown by reference to cases decided by the European Court that this is true to some extent.

In several cases before the European Court, applicants have alleged that the United Kingdom violated the provisions of the European Convention. The United Kingdom is a party to the European Convention and is therefore bound to respect and enforce the provisions of the Convention. It is necessary to examine some of these cases in order to fully appreciate the European Court's stance on

⁸⁶ Dlamini op cit at 87.

⁸⁷ Ibid.

derogations in the context of states of emergency. Thereafter, the extent to which the African Charter permits such derogations will be canvassed.

In the *Brogan* case⁸⁸, the European Court was required to determine whether the government of the United Kingdom and Northern Ireland (“the government”) had acted in breach of its obligations under Article 5(5) of the European Convention⁸⁹. Four men had been detained under section 12⁹⁰ of the Prevention of Terrorism (Temporary Provisions) Act 1984⁹¹. On the day following his arrest, each applicant was informed by police officers that the Secretary of State for Northern Ireland had agreed to extend his detention by a further five days under section 12(c) of the 1984 Act. None of the men was brought before a judge or other judicial officer authorised by law to exercise judicial power, nor were any of them charged after their release.

The European Court held that even the shortest period of detention, that is four days and six hours, failed to satisfy the requirement of promptness in Article 5(3). The government was also found to be in violation of Article 5(5) which requires that victims of detention in contravention of the European

⁸⁸ See f.n. 50, *supra*.

⁸⁹ Article 5(3) provides, in part, that:

“(e)everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other judicial officer...”.

⁹⁰ Article 12 provides, in part, that

“12 (1) [A] constable may arrest without warrant a person whom he has reasonable grounds for suspecting to be ... (b) a person who is or has been concerned in the commission, preparation or instigation of acts of terrorism to which this Part of this Act applies; ... (3) The acts of terrorism to which this Part of this Act applies are (a) acts of terrorism connected with the affairs of Northern Ireland; ... (4) A person arrested under this section shall not be detained in right of the arrest for more than forty-eight hours after his arrest; but the Secretary of State may, in any particular case, extend the period of forty-eight hours by a period or periods specified by him. (5) Any such further period or periods shall not exceed five days in all. (6) The following provisions (requirement to bring accused person before the court after his arrest) shall not apply to a person detained in right of the arrest ... (d) Article 131 of the Magistrates' Courts (Northern Ireland) Order 1981; ... (8) The provisions of this section are without prejudice to any power of arrest exercisable apart from this section.”

Convention be given an enforceable right to compensation at the level of national law. In the United Kingdom, no provision for the compensation of the four detainees existed and no derogation by the government in respect of Article 5(3) was in force at the time the applicants were arrested. The majority felt that the “Court (was) not required to examine the impugned legislation, *in abstracto...*” but should “confine itself to the circumstances of the case before it”⁹².

The majority stated that “(j)udicial control of interferences by the executive with the individual’s right to liberty is an essential feature of the guarantee embodied in Article 5 (3)”⁹³. The European Court’s decision appears to be fair and in conformity with the requirements of due process.

On 22 December 1988, the Secretary of State for the Home Department made a statement in the House of Commons expressing the reluctance of the government to pursue judicial control over decisions to arrest and detain suspected terrorists. According to the Secretary, proper regard had to be paid to the “tremendous pressures that are already faced by the judiciary, especially in Northern Ireland”⁹⁴. He further explained that the “information about terrorist intentions, which often forms part of the case for an extension of detention” may be more accessible to the terrorist organisations “as a consequence of judicial procedures”⁹⁵. For these reasons, the government gave notice that it had availed itself of the right of derogation (under Article 15 of the European Convention) to the extent that the exercise of powers under section 12 of the 1984 Act might be

⁹¹ Hereinafter “the 1984 Act”.

⁹² The *Brogan* case at paragraph 53.

⁹³ At paragraph 58.

⁹⁴ Quoted in *Brannigan and McBride v United Kingdom*, judgment of 22 April 1993, at paragraph 30 (Hereinafter “the *Brannigan* case”).

⁹⁵ *Ibid.*

inconsistent with the obligations imposed by Article 5(3). The basis of the derogation was that there existed a public emergency in relation to “terrorism connected with the affairs of Northern Ireland in the United Kingdom”⁹⁶.

Subsequently, the European Court held, in *Ireland v United Kingdom*⁹⁷, that as far as the determination of the presence of a public emergency and the nature and scope of derogations necessary to avert it are concerned a “wide margin of appreciation should be left to the national authorities”⁹⁸.

Marks⁹⁹ sets out four reasons for according a respondent government a wide margin of appreciation in the context of derogations:

- 1) A government acts during a state of emergency on the basis of urgency and on information that it may not be able to publicize for the reasons given, *supra*, by the government for derogating. Marks’ view is that it would not then be correct for the European Court to decide “with the benefit of hindsight on those issues”. With respect, it is submitted that this view fails to recognise that the task of the regional human rights court is precisely to decide issues in an impartial manner with the benefit of hindsight. To detract from this would, to a large extent, render the European Court an ineffective means of overseeing and protecting human rights in Europe.
- 2) The conclusion that an emergency exists and the determination of the appropriate measures required to deal with that situation are “political”

⁹⁶ Ibid.

⁹⁷ *Ireland v United Kingdom* Publ Eur Ct HR, Ser A, No 25.

⁹⁸ At paragraph 207.

⁹⁹ Marks *op cit* at 74 -5.

judgments which judges are not equipped to deal with, making them inappropriate assessors. It is submitted that “political” judgments often sacrifice guaranteed rights on the altar of expediency. For this reason, the judge is, contrary to Marks’ assertion, better equipped to deal with such situations because he or she is more likely to be unbiased and is therefore capable of giving greater effect to the rule of law and, consequently, to the guaranteed rights.

- 3) In order for a government to fulfill its responsibility of maintaining law and order, its discretion must be respected. In this regard, it is submitted that too much deference is given to the sovereignty of the state. It is possible that the “discretion” to which Marks refers is capable of accommodating state action that has an effect that is contrary to the maintenance of law and order.
- 4) A government may “respond to an adverse decision regarding a derogation by denouncing the (European) Convention”¹⁰⁰. It is submitted that while this concern has merit, it lies dangerously close to the subversion of guaranteed rights in favour of the political whim of governments.

A member state of the European Union is entitled, in certain circumstances, to derogate from the provisions of the European Convention under Article 15 thereof. The circumstances referred to are those of “war or other

¹⁰⁰ Ibid.

public emergency threatening the life of the nation". In such times, derogations are allowed but only "to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with the state's "other obligations under international law". According to Marks¹⁰¹, these particular requirements constitute the "preconditions for a valid derogation". In respect of an emergency threatening the life of a nation, it must be imminent, it must affect the entire nation, the continuance of the organised life of the community must be threatened and the danger must be exceptional¹⁰².

The second precondition is that derogations are allowed but only "to the extent strictly required by the exigencies of the situation", provided that such measures are not inconsistent with the state's "other obligations under international law". The practical difficulty with this requirement is that the history of the European Court points to an unquestioning acceptance by the latter of the government's reasons for believing that a derogation was required¹⁰³. There appears to be no doubt surrounding the government's bona fides. Its opinion is accepted as fact.

After the success of the applicants in *Brogan*, the European Court was called upon, in the *Brannigan* case, to decide on whether the government's derogation was valid and whether the margin of appreciation should be narrower. Despite strong arguments by the applicants that that the margin should be narrower, the European Court was of the view that the government should be accorded a wide margin of appreciation. However, the human rights lobby did achieve some degree of success in this case in that the European Court stated¹⁰⁴

¹⁰¹ Marks op cit at 72.

¹⁰² Marks op cit at 77.

¹⁰³ See generally the *Ireland* case and Marks op cit at 80.

¹⁰⁴ At paragraph 43.

that “Contracting Parties do not enjoy an unlimited power of appreciation”. Furthermore, “...in exercising its supervision the Court must give appropriate weight to such relevant factors as the nature of the rights affected by the derogation, the circumstances leading to, and the duration of, the emergency situation”¹⁰⁵.

At this juncture, it must be noted that the African Charter, unlike its European counterpart, does not contain a general derogation clause. Mutua has observed that this omission is “all the more serious because the Charter in effect permits states through the claw back clauses to suspend, *de facto*, many fundamental rights in their municipal laws”.¹⁰⁶ While the claw back clause seeks to limit a “guaranteed” right, a derogation clause is employed by a state during states of emergency thus allowing states to free themselves from their obligation to enforce and apply certain rights. However, some rights do remain non-derogable. Therefore, while article 15 of the European Convention contains a derogation clause that permits derogations from the provisions of that Convention only “(i)n time of war or other public emergency threatening the life of the nation”¹⁰⁷, it also sets out non-derogable rights in article 15(2). Thus, the right to freedom from torture or inhuman or degrading punishment, the right not to be subjected to slavery, and the prohibition on the application of *ex post facto* laws (whether under national or international law) are preserved even under the conditions provided for in article 15(1). Furthermore, article 15(3) requires a party who wishes to so derogate to “keep the Secretary-General of the Council of

¹⁰⁵ Ibid.

¹⁰⁶ Makau Mutua, “The African Human Rights System: A Critical Evaluation”, website of http://hdr.undp.org/docs/publications/background_papers/MUTUA.pdf

¹⁰⁷ Article 15(1) of the European Convention.

Europe fully informed of the measures which it has taken and the reasons therefor.”

A derogation clause in the African Charter, is conspicuous by its absence. There is not even so much as a statement of non-derogable rights, thereby giving states free reign to abuse their citizens and negate what are supposed to be guaranteed rights. Mugwanya points out that despite this shortcoming, guideline II 4 (i) issued by the African Commission for national periodical reports, requires “states to report on whether there is a provision in their laws for derogation and under what circumstances derogations are possible”.¹⁰⁸ A guideline remains a guideline and despite the aforementioned requirement, one cannot ignore the fact that the African Charter falls short of international standards in so far as the issue of derogation is concerned.

It is submitted that in conflict-ridden Africa, the African Court will have to exercise great caution in assessing the validity of derogations. States of emergency have been declared more times in Africa than one can remember. The key to a workable approach to derogations is for the African Court to first investigate whether or not the derogation was valid, taking into account the preconditions referred to above. However, the African Court must avoid the European Court’s seemingly blind acceptance of a member state’s claim that in its view the exigencies of the situation required derogations from guaranteed rights. Ideally, the African Court should conduct an investigation into the circumstances that led the member state to derogate from the impugned provision and independently conclude whether or not the derogation was justified. If the derogation was, in the African Court’s opinion, not justified, then

¹⁰⁸ GW Mugwanya, “Examination of state reports by the African Commission: A critical appraisal” *African HRLJ*, vol. 1, No. 2, 2001, 268 at 275.

the finding will most likely be that the state has violated a guaranteed right of the African Charter.

It is submitted that where the court concludes, after independently investigating the circumstances of the derogation, that the latter was justified, the doctrine of margin of appreciation may be applied unless the impugned provision contains a claw back clause or the right is of such a nature that the application of the doctrine is inappropriate.

PART III

ARTICLES 17 AND 22 OF THE PROTOCOL

Thus far, this article has examined the application of generally recognised principles that are applied by the European Court and Commission in the interpretation and implementation of the provisions of the European Convention. One particular feature of the Protocol that is worthy of praise is Article 17 read together with Article 22.

Article 17 requires independence on the part of the judges that are to sit on the bench of the African Court. Article 17(2) provides that “(n)o judge may hear any case in which the same judge has previously taken part as agent, counsel or advocate for one of the parties or as a member of a national or international court or a commission of enquiry or in any other capacity. Any doubt on this point shall be settled by decision of the Court”. Article 22 which is entitled “Exclusion” provides that “(i)f a judge is a national of any State which is a party to a case submitted to the Court, that judge shall not hear the case.

This approach is similar to the practice of national courts where a judge or magistrate who has an interest in a matter over which he is presiding is required to recuse himself. This is not to say that the *bona fides* of the international judge is being called into question. Rather, it is a means of preventing even unintended bias, thereby lending greater credence to the African Court’s judgments. The perceptions of both Africans and outside observers are crucial to the success of the African Court. The requirement that the judge in a matter not be a national of the state of either party to the dispute will be the

beginning of justice being seen to be done. This, in turn, will encourage the belief of member states and their citizens that judicial recourse at a supranational level is a viable option. Governments will be particularly loathe to violate human rights provisions once they realise that there will be no political bias within the African Court that can protect them. Clearly, the repercussions of this belief for individuals and groups is greater respect for their human rights.

Article 22 of the Protocol is in line with the practice of the European Court which requires, in Rule 13 of the Rules of Court¹⁰⁹, that “(j)udges of the Court may not preside in cases in which the Contracting Party of which they are nationals or in respect of which they were elected is a party”. The Rule is appropriately entitled “Inability to preside”. It is suggested that Article 17 read with Article 22 illustrate a clear intention to prevent any possible bias that could manifest itself in the African Court’s judgments, providing even greater justification for the need to apply the doctrine of margin of appreciation in a manner that is impartial and fair. A contrary approach would have the effect of negating that intention.

¹⁰⁹ European Court of Human Rights, Rules of Court, Strasbourg 1999, as in force at 1 November 1998 website of www.echr.coe.int/

PART IV

CONCLUSION

The Protocol to the African Charter on Human and Peoples' Rights is a giant leap in the right direction for African people who have, to date, suffered first at the hands of colonialists and then at the hands of the “leaders” they had expected to bring them out of the darkness of the past. Reality has proved that in many instances, such “leaders” have had no difficulty in subverting human rights norms applicable to their people. National laws are often used by governments to justify state conduct that detracts from the important values such as equality, freedom and dignity that underlie human rights provisions in instruments such as the African Charter. These values are founded on a sense of morality that is aimed at regulating human conduct to ensure respect for the human person.

The adoption of the Protocol is a recognition of the general failure of most African governments to regulate their conduct and hence a failure to respect the people that they govern. Now that Africa has taken the initiative to establish the African Court, it would indeed be a travesty of justice for the African Court to fall into the quagmire in which the African Commission found itself. This article has attempted to achieve a means of circumventing such a situation.

The African Court must take heed of the criticisms that have been levelled against other regional human rights courts and commissions. A failure to do so would result in Africa’s proud achievement, the adoption of the Protocol, becoming an exercise in futility. There can be no doubt that the African Court

will need to develop tools of interpretation during the course of its deliberations especially in the light of the vast differences in ethnic, cultural, religious and political differences of opinion that prevail in a continent dogged by the supremacy of politics over the rule of law.

It is submitted that applying the doctrine of margin of appreciation may be necessary in certain circumstances but not in others. The African Court should apply the doctrine in the stricter sense suggested in this article in order to ensure that the rule of law with its inherent respect for human rights prevails over political machiavellianism. Allowing states a wide margin of appreciation especially where claw back clauses are concerned would be to return Africa to a point where no regional court exists because states would feel free to subvert human rights norms in the knowledge that the African Court is a political institution that is more concerned with appeasing governments than achieving its mandate. It would also fly in the face of Article 22 of the Protocol which is designed to emphasise the independence of the bench.

It is submitted that the African Court must establish itself as a truly judicial structure that does not pay deference to the political whims of government institutions that employ the right to derogate to give effect to unacceptable and mostly illegal conduct. Africa has entered a crucial phase in its development that necessitates a new attitude and approach to human rights. The African Court is capable of achieving this and must do so for the betterment of the continent as a whole and the people who live on it.

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