

Accommodating diversity: Is the doctrine of margin of appreciation as applied in the European Court of Human Rights relevant in the African human rights system?

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DECLARATION

I, **Herbert Rubasha**, hereby declare that this dissertation is original and has never been presented in any other institution. I also declare that any secondary information used has been duly acknowledged in this dissertation.

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DEDICATION

To my late brother **Pilot Matabaro**, I would have loved your assuring company and the encouragements you used to show me in every carrier I undertook. I realize though that individual interests could not be more than those of vulnerable thousands who were being massacred. The brotherly lessons were worth lifetime. For moulding my life, I dedicate this work to you.

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PREFACE

A 'black woman ... asked her white female colleague what she saw when she looked in the mirror. 'I see a woman' the colleague said. She asked a white male colleague and he said 'I see a human being'. But the black woman said she saw a 'black woman' when she looked in the mirror.'

D M Jones, (academician and author) World Conference on Human Rights, UN.Doc. A/CONF.157/ASRM/8-A/CONF. 157/PC/59, April 2 1993.

The foregoing quote seems to suggest that rights appear to have different implications among different peoples depending upon their particular political, religious, social, and cultural orientations. The European Commission of Human Rights remarked that to mirror human rights as the same for everyone and everywhere would be misleading. For to freeze cultural practices in status quo by seeking to impose a uniform culture would even be at odds with international human rights foundation purpose of seeking progressive improvement in human condition through change. It is against such sentiments that margin of appreciation was introduced by the Commission and later espoused by the Court to accommodate diversities obtaining in High Contracting Parties.

The purpose of this study is to interrogate the doctrine of margin of appreciation as applied in the ECtHR and establish amenable lessons to the African human rights system. As such the author will be able to draw appropriate and informed recommendations on the prospects of the doctrine in African context. In other words, the study proceeds from the approach that 'diversity' alone is not enough to guarantee application of margin of appreciation. Rather, a variety of factors come into consideration while weighing whether margin of appreciation should be granted to states. Indeed, such benchmarks will inform the discourse of this study while at the same time acknowledging that a comparative study between European and African systems cannot be possible. The premise for disqualifying a comparison assumes that margin of appreciation presupposes a democratic society. Thus, while the member states of the ECHR have attained high levels of human rights records, some of their counterparts in Africa are still marred by embarrassing human rights records.

LIST OF ABBREVIATIONS

AHRLR	African Human Rights Law Reports
AFCHPR	African Commission on Human and Peoples' Rights
AFCtHPR	African Court of Human and Peoples Rights
AU	African Union
CC	Constitutional Court
DRC	Democratic Republic of Congo
ECHR	European Convention on Protection of Human Rights
ECJ	European Court of Justice
ECnHR	European Commission on Human Rights
ECtHR	European Court on Human Rights
HRC	Human Rights Committee
IACHR	Inter-American Commission on Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICJ	international Court of Justice
IRA	Irish Republican Army
OAU	Organization of African Unity
SA	South Africa
SALR	South African Law Report
SC	Supreme Court
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
US	United States

CHAPTER ONE:

INTRODUCTION

1.1 Background of the study

Profound diversity is a persistent characteristic of the international community.¹ The implications of this diversity, however, have increasingly generated controversy within international human rights system, challenging its tendency towards universalism.² The European Court for Human Rights (ECtHR or Court) has set a hallmark precedent by allowing states certain discretion to do things as befits their situations.³ This latitude is what is known as margin of appreciation. Margin of appreciation can be though distinguished from the general discretion left by the European Convention on Protection of Human Rights (ECHR or Convention) to states in how to implement detailed human rights protection in their domestic law.⁴ While the doctrine of margin of appreciation is used in the Court's reasoning to measure and police states' discretion to interfere with or otherwise limit human rights in specific instances.⁵ In essence, it expresses that Contracting Parties have some space in which they can balance for themselves conflicting public needs.

The margin of appreciation doctrine's implications for universality can be seen as far back as the well-known 1976 case of *Handyside*.⁶ The ECtHR was called upon to discuss to what extent free expression could be limited in order to protect morals. The Court stated that:

It is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place which is characterized by a rapid and far-reaching evolution of opinions on the subject. Consequently, article 10(2) leaves to the Contracting States a margin of appreciation.⁷

The practice of recognizing and respecting states' margin of appreciation was derived from the case-law of the Court and European Commission of Human Rights (ECnHR), not from the text of

¹ D Lee Donoho 'Autonomy, self-Governance, and the margin of appreciation: Developing a jurisprudence of diversity within universal human rights', (2001) 15 *Emory International Law Review* 391, 391.

² E Brems, 'The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights', (1960) 56 *Heidenberg Journal International Law Review* 240.

³ As above.

⁴ Art I of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 213 UNTS (entered into force 3/09/1953).

⁵ J Brauch, "The margin of appreciation and the jurisprudence of European Court of Human Rights: Threat to the rule of law" (2004/2005) 11 *Columbia Journal of European Law* 113, 2.

⁶ *Handyside v the United Kingdom*, 24 ECtHR (ser A) 1976.

⁷ *Handyside* (n 6 above) 22.

the Convention itself.⁸ Its relevance can be raised by the Court on its own initiative, or by the Contracting Parties themselves, by way of a defence to the allegation that they have violated a Convention right.

1.2 Statement of the research problem

The judicial function of the ECtHR and the African Commission for Human and Peoples' Rights (African Commission or Commission), carries the promise of setting universal standards for the protection and promotion of human rights. These universal aspirations are, to a large extent, compromised by the counter-arguments of country specificity claims. The regional African human rights meeting in Tunis illustrated the importance of relativism in Africa as an essential reality:

..... no ready-made model can be prescribed at the universal level since the historical and cultural realities of each nation and the traditions, standards and values of each people cannot be disregarded.⁹

In the European system, the doctrine of margin of appreciation has been developed to mediate between such diverging interests. Drawing from the ECtHR experience and recent developments in *Garreth Anver Prince v South Africa*¹⁰ (*Prince case* or annexure) decide by the African Commission, this study seeks to answer the following questions:

- a) What is the basis of the African Commission to abandon its function of checking and overcoming national policies and practices that often violate human rights in national jurisdictions by giving margin of appreciation to national authorities?
- b) What are the underlying considerations for application of the doctrine in ECtHR?
- c) What is the basis for the application of the doctrine of margin of appreciation in Charter?
- d) What is the criterion used to determine whether a specific culturally inspired practice amounts to a legitimate action or a violation of human rights?
- e) Finally, is it relevant to allow Charter member states to apply margin of appreciation?

1.3 Objectives of the study

In cognizance of the fact that cultures are not homogeneous or constant but rather contestable, fluid and evolutionary, this study endeavours a critical analysis of the doctrine of margin of appreciation in the ECtHR jurisprudence as a legal mayhem with no or limited relevance to African human rights system. This criticism is largely constructed on the contention that the

⁸ H Yourow, *The Margin of Appreciation Doctrine in the Dynamics of Europe an Human Rights Jurisprudence*, Kluwer Academic Publishers (1996) 13.

⁹ Tunis Declaration Item 5, U.N. Doc. A/CONF.157/AFRM/14-A/CONF. 157/PC/57, 1992.

¹⁰ *Garreth Anver Prince v South Africa*, Communication No 255/2002, Adopted by the 36th Ordinary Session of the African Commission on Human and Peoples' Rights, 2004 Dakar - Senegal. The case is hereby attached as annexure.

doctrine flouts the principle of universality of human rights. As such, the objectives of this study are to:

- a) Examine the scope and context of application of margin of appreciation in African context drawing from the ECtHR experience.
- b) Weigh the implications of applying the doctrine in African human rights system.
- c) Analyze the implications of Prince's case where the doctrine was applied by the Commission for the first time.

1.4 Significance of the study

While the significance of national and regional peculiarities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of the states, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.¹¹ Indeed, such a statement corroborates the primary function of national jurisdictions to comply with human rights standards. This study proceeds to investigate the underlying considerations that favour national margin of appreciation over the regional judicial body in protecting human rights. In other words, it takes a keen study of the doctrine's jurisprudence the ECtHR and lessons that can be drawn into the African system.

1.6 Literature review

The subject of the doctrine of margin of appreciation has evoked a considerable amount of comment in the academic literature. A number of books, journals and articles have been written on the broad subject of the doctrine. In spite of this, it has not been easy to find literature that addresses the precise issues raised by this study. In addition, there is little that addresses the doctrine of margin of appreciation in the African context. The utility of the existing literature, in terms of books, case laws, journals, articles and Internet sources can however not be refuted.

The scholarly works of Yutaka Arai-Takahashi¹², Howard Charles Yourow¹³ and Eva Brems¹⁴ form major contributions to this study. They discuss margin of appreciation doctrine in the jurisprudence of ECtHR context. Evelyn Ankumah¹⁵ and Stephen Kafumba¹⁶ make reference to

¹¹ United Nations World Conference on Human Rights, Vienna Declaration and Programme of Action, U.N. Doc. A/COF.157/24 (Part I) (1993).

¹² A Yutaka *The margin of appreciation doctrine and the principle of proportionality in the jurisprudence of the ECHR*, Hart publishing (2002).

¹³ Yourow (n 8 above).

¹⁴ E Brems, *Human Rights: Universality and Diversity*, Kluwer Law International (2001).

¹⁵ E Ankumah *The African Commission on Human and Peoples Rights, Practice and Procedures*, Martinus Nijhoff (1996).

margin of appreciation in Africa but do not assess and appreciate the relevance of the doctrine in African human rights system. Fatshah Ouguergouz makes case on a comprehensive agenda of African Charter on Human and Peoples' Rights (ACHPR or African Charter) and sustainable democracy in Africa.¹⁷ He does not either too assess the applicability or relevance of the doctrine in African system.

In addition, extensive contributions have been made in form of articles albeit confinement to the European system. Jeffrey Brauch's article presents a historical development and origin account of margin of appreciation in the ECtHR case-law.¹⁸ He goes further to examine the threat that the doctrine poses to the mandate of the Council of Europe to protect rule of law. Paul Mahoney observes marvellous richness of diversity and cultural relativism as an obligation on ECtHR to act as a force contributing to their preservation, or at least, not to undermine it by seeking to impose rigidly uniform solutions valid for all different democratic societies making up the ECHR community.¹⁹ Like Ouguergouz, Richard Gittleman,²⁰ and M Mutua²¹ works allude to clawback clauses as the potential avenues for member states to limit rights guaranteed in the African Charter.

Furthermore, historical cases such as the *Lawless*²², *Handyside*²³ not only inform the study with the Court's views on margin of appreciation but also its criteria on the scope and context of application. Finally, the recent *Prince case*²⁴ presents an insight of the Commission's view in relation to the doctrine. The Commission noted that the principle of margin of appreciation informs the Charter by recognizing the primacy of respondent state in being better positioned than a regional Commissioner to adopt national rules, polices and guidelines in promoting and protecting human and peoples' rights:²⁵

¹⁶ S Kafumba, *A study on the application of margin of appreciation in the African system*, Dissertation for partial fulfillment of LLM degree, University of Pretoria (2000).

¹⁷ F Ouguergouz *The African Charter on Human and Peoples' Rights, A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa*, Martinus Nijhoff Publishers (1993).

¹⁸ Brauch (n 5 above).

¹⁹ P Mahoney 'Marvelous richness or individual cultural relativism' (1998) 19 *Human Rights Law Journal* 1, 2.

²⁰ R Gittleman 'The African Charter on Human and Peoples' Rights: A legal analysis' (1982) 22 *Virginia Journal of International Law* 4.

²¹ M Mutua 'The Banjul Charter and the African Culture fingerprint: An Evaluation of the Language of Duties' (1995) 35 *Virginia Journal of International Law* 339.

²² *Lawless v Ireland*, 1 ECtHR (ser. A) (1976).

²³ n 6 above.

²⁴ *Prince case* (n 10 above).

²⁵ *Prince case* (n 10 above) 51.

.....the respondent state has incessant direct and knowledge of its society, its needs, resources, economic and political situation, legal practices, and the fine balance that need to be struck between the competing and sometimes conflicting forces that shape society.²⁶

Despite plausible works on margin of appreciation doctrine in ECtHR jurisprudence, the author observes that the doctrine is less developed if not ignored by the African Commission. Also, none of the scholarly works has attempted to assess the relevance of the doctrine in African context. Indeed, it is the reason for consideration of this subject as an unfettered domain of research.

1.7 Methodology

The research mainly consists of library based data with documented facts on this subject being surveyed. The study adopts both critical and active research methods. As the subject under consideration is of particular pertinence to contemporary Africa, this study is not of academic interest only.

1.8 Limitations of the study

This research is an overview of ground policy considerations that inform the application of margin of appreciation in ECtHR and lessons amenable to African human rights system. It does not aver to undergo a comparison study between the two regional human rights systems for their contexts of function mismatch.

1.9 Overview of chapters

Chapter one introduces the study and the context in which it is set. It highlights the basis and structure of the study. Chapter two makes reference to the connotation, origin and development of the doctrine of margin of appreciation. It discusses also contours and varying degrees of the doctrine's application with particular regard to respect of the rule of law. In addition, difficulties linked to the doctrine are highlighted. Chapter three highlights policy grounds underlying margin of appreciation in the ECtHR. It starts from most decisive policy grounds and moves to weaker ones. Chapter four examines the legal basis for application of the doctrine of margin of appreciation under the African Charter. It further notes the attitude of African states through their submissions claiming margin. The *Prince* case as the first of its kind to invoke margin of appreciation is discussed. Chapter five attempts to identify the defensibility and indefensibility of the doctrine in African human rights system. Chapter six consists of a summary of the presentation and the conclusions drawn from the entire study.

²⁶ As above.

CHAPTER 2

UNDERSTANDING THE DOCTRINE OF MARGIN OF APPRECIATION

2.1 Introduction

'Margin of appreciation' is a doctrine that was first developed and applied in the case-law of European Court and Commission of Human Rights.²⁷ Brauch contends that the birth of the doctrine largely draws from the structure of the Convention's provisions which articulate restriction on the rights guaranteed.²⁸ This chapter proceeds to highlight the connotation, origin and development of the doctrine. Further, it refers to variation of the scope of doctrine granted, contextual application and difficulties linked to the doctrine.

2.2 Defining and identifying the concept of margin of appreciation

The 'margin of appreciation' is a doctrine the Court uses to interpret certain Convention provisions. It generally refers to the amount of discretion the Court gives national authorities in fulfilling their obligations under the Convention.²⁹ It is somewhat analogous to a standard of review.³⁰ Yourow defines the margin of appreciation as:

The latitude of deference or error which the Strasbourg organs will allow to national legislative, executive, administrative and judicial bodies before it is prepared to declare a national derogation from the Convention, or restriction or limitation upon a right guaranteed by the Convention, to constitute a violation of one of the Convention's substantive guarantees. It has been referred as the line at which international supervision should give way to a State Party's discretion in enacting or enforcing its laws.³¹

Upon the adoption of the Convention in 1950, it was envisaged as the lowest common denominator. However, the diverse cultural and legal traditions embraced by each contracting state made it difficult to identify uniform European standards of human rights. Macdonald emphasized that the process of realizing an European system of human rights protection and the uniform standard of human rights must be gradual because

²⁷ Yourow (n 8 above) 15.

²⁸ Brauch (n 5 above) 2. He makes reference to second paragraphs of articles 8-11 of the Convention.

²⁹ T O'Donnell 'The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights' (1982) 4 *Human Rights Quarterly* 474, 478.

³⁰ R Macdonald *Margin of Appreciation in the European System for the Protection of Human Rights*, Martinus Nijhoff, Dordrecht (1993) 84.

³¹ Yourow (n 8 above) 13.

the entire legal framework rests on the fragile foundation of the consent of the Contracting Parties. The margin of appreciation gives the flexibility needed to avoid damaging confrontations between the court and Contracting States over their respective spheres of authority and enables the Court to balance the sovereignty of Contracting Parties with their obligation under the Convention.³²

Through its reliance on the European Court judgments, the Inter-American Court for Human rights (IACHR) has recognized the doctrine of margin of appreciation.³³ The United Nations (UN) Human Rights Committee (HRC) in *Aumeeruddy-Cziffra and 19 other Mauritian Women v Mauritius* case, where a discriminatory measure against married women was at issue, the Committee implied the national margin of appreciation in assessing the scope of protection afforded to family life when it stated as follows:

The committee is of the opinion that the legal protection or measures a society or a state can afford to the family may vary from country to country and depend on different social, economic, political and cultural conditions and traditions.³⁴

In *Prince case* where the complainant alleged violation of the right to religion, dignity, employment and culture life, the Commission invoked the doctrine of margin of appreciation in motivating its recommendation:

....margin of appreciation doctrine informs the African Charter in that it recognizes the respondent state in being better disposed in adopting national rules, policies and guidelines in promoting and protecting human and peoples' rights as it indeed has direct and continuous knowledge of its society, its needs, legal practices.....the fine balance that need to be struck between the competing and sometimes conflicting forces that shape its society.³⁵

Margin of appreciation is not limited to the sphere of international human rights. The European Court of Justice (ECJ) in Luxembourg, World Trade Organization (WTO) and General Agreement on Trade and Tariffs (GATT) also bear some resemblance to the arguments based on margin of appreciation and judicial self-restraint.³⁶

2.3 The origin and development of the doctrine

The term 'margin of appreciation' comes from the French term *marge d'appréciation*.³⁷ The doctrine was used in both classical martial law and in the jurisprudence of the French *Conseil d'Etat* and other continental institutions in determining the appropriate amount of discretion Courts

³² Macdonald (n 30 above) 123.

³³ Advisory opinion OC-4/84 of January 19 1984, proposed amendment to the naturalization provisions of the Constitution for Costa Rica, IACHR, A 4 (1984). 36, 58-59 and 62-63.

³⁴ *Aumeeruddy-Cziffra and 19 other Mauritian women v Mauritius*, Doc. A/36/40, 134.

³⁵ *Prince case* (n 10 above) 51.

³⁶ Yutaka (n 12 above) 5.

³⁷ S Greer *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights*, Council of European Human Rights Files No. 17 (2000) 5.

should give to administrative bodies.³⁸ An important but often overlooked point is that the doctrine is not mentioned anywhere in the Convention itself, even in its drafting history (*travaux préparatoires*).³⁹ The concept was first used in connection with the Convention in the 1958 case of *Greece v. United Kingdom*.⁴⁰ The case involved a complaint by Greece about the way the United Kingdom (UK) was administering the island of Cyprus.⁴¹ The UK invoked article 15 of the Convention in defense.⁴² Article 15 allows states parties to derogate from Convention provisions when a public emergency threatens the life of a nation.⁴³ In conformity with the procedure at the time, the complaint was first brought to the ECnHR, which then made a recommendation to the Court.⁴⁴ In a report to the Court, the ECnHR observed that:

The government should be able to exercise a certain measure of discretion in assessing the extent strictly required by the exigencies of the situation.⁴⁵

The Court never addressed this recommendation because there was a political settlement, thus averting a judicial decision.⁴⁶ The first decisive discussion of the margin of appreciation came in arguments before the Court in *Lawless v. Ireland*.⁴⁷ In that case, G. Lawless claimed that the Republic of Ireland was improperly using preventive detention in violation of Convention articles 5 and 6.⁴⁸ In defense, Ireland pointed to article 15 of the Convention, claiming that preventive detention was a necessary response to the public emergency of terrorist acts by the Irish Republican Army (IRA).⁴⁹ The phrase ‘margin of appreciation’ was used in the Commission’s

³⁸ Yourow (n 8 above) 14.

³⁹ As above.

⁴⁰ *Greece v UK*, European Commission on Human Rights, Year Book (1958-1959).

⁴¹ *Greece v UK* (n 40 above) 174.

⁴² As above.

⁴³ H Condé, *A Handbook of International Human Rights Terminology* (1999), 34-35. He defines derogation as: ‘The act of a state suspending the application and enjoyment of certain human rights upon its declaration of a state of public emergency affecting the life of a whole nation. Derogation allows the state to take measures to deal with the emergency without fear of violating human rights norms during the derogation period.’ Art 15 of the Convention provides: ‘In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation provided that such measures are not inconsistent with its other obligations under international law.’

⁴⁴ The case arose before Protocol 11, which created a full-time Court that took over the functions of the former Commission and the Court.

⁴⁵ *Greece v UK*, (n 40 above) 176.

⁴⁶ Yourow (n 8 above) 16.

⁴⁷ *Lawless* (n 22 above).

⁴⁸ *Lawless* (n 22 above) 45-46.

⁴⁹ *Lawless* (n 22 above) 57.

report in the *Lawless* case, which said, in relation to the determination of whether there was an emergency situation in Ireland that would justify the suspension of some articles of the Convention:

...having regard to the high responsibility that a government bears to its people to protect them against any threat to the life of the nation; it is evident that a certain discretion - a certain margin of appreciation - must be left to the government.⁵⁰

The reason offered was based in the nature of the Convention as an international law document. The responsibility placed on High Contracting Parties by article 1 to secure the Convention rights for persons in that state meant that the primary obligation fell on the state authorities themselves, and the Commission would not place itself in the position of the government. Rather, its task was to examine the domestic decision, and decide whether it was compatible with the Convention. In doing this, the Commission would allow some discretion to the government.

In *Handyside*,⁵¹ the Court reiterated this approach. The Convention mechanism is subsidiary to the national system, and decisions relating to the need to apply limits to certain rights (in this case the need to protect "morals" under the second paragraph of article 10) were to be taken in the first instance by the national authorities. Then, in any adversarial proceedings, the Strasbourg organs would review this decision, rather than place themselves in the position of the national authorities and take a fresh decision for themselves:

...by reason of their 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 [the limitations required to protect morals] as well as on the necessity of a restriction or penalty intended to meet them.⁵²

The margin of appreciation then is more a matter of who takes the decisions, rather than what those decisions might be. In order to avoid trespassing on a state's sovereignty, the Court would intervene only when it is absolutely necessary to do so. However, the discretion is not unlimited as it goes hand in hand with a European supervision.⁵³

⁵⁰ *Lawless* (n 22 above) 82.

⁵¹ *Handyside* (n 6 above).

⁵² *Handyside* (n 6 above) 22.

⁵³ *Handyside* (n 6 above) 23.

2.4 Variation in the width of margin of appreciation

The margin of appreciation will vary in its width, according to a variety of criteria. It will be narrower where there is a substantial degree of consensus among member states on a certain issue,⁵⁴ broader where there is none.⁵⁵ Roger Alford describes the thickness of margin of appreciation as dependent on consensus and not absolute.

The margin of appreciation is a key concept within ECtHR law and gives states discretion in questions of particular sensitivity. What is important, however, is that the margin of appreciation does not constitute a *carte blanche* to do as one wishes. As a common consensus emerges, particularly on issues of sensitivity or issues in relation to which the law may be in a transitional stage, the margin will become narrower until it is no longer acceptable for a state to operate in a manner inconsistent with the Convention rights as given effect by common European practice. The margin of appreciation therefore decreases in size as common consensus increases.⁵⁶

In addition, the nature of the right may be such that the Court deems a wider or narrower margin is appropriate. For instance, the examination of limits on freedom of expression has seen a narrower margin than questions of property rights.⁵⁷ Another factor is the aim that the limitation in question is intended to pursue. In instances, where the aim is protection of national security, the margin will normally be a wide one.⁵⁸ The margin has been most prominent where the issue is balancing the need to protect a Convention right against some legitimate reason for restricting it, such as the need to protect morals, or to protect the rights of others⁵⁹ as well as the need to protect the life of the nation in emergency times.⁶⁰

2.5 Context of application

The Strasbourg organs apply margin of appreciation in three contexts. The first context refers to due process rights secured under the European Convention⁶¹, the personal freedoms

⁵⁴ *Sunday times v United Kingdom*, 30 ECtHR (Ser. A) 42 (1979) 36-37.

⁵⁵ *Handyside* (n 6 above) 22.

⁵⁶ R Alford, *Gay rights and the ECHR's margin of appreciation*, available at :<
<http://www.opiniojuris.org/posts/1149694813.shtml>> (accessed on 10/09/2006).

⁵⁷ V Dijk and V Hoof, *Theory and Practice of the European Convention on Human Rights* (3ed.) (1998), 88.

⁵⁸ *Leander v Sweden* (Ser. A) 116, 43.

⁵⁹ Arts 8-11 ECHR (n 3 above) guarantee the four most basic personal freedom rights in a democratic society: the right to respect private and family life; freedom of religion; freedom of expression and; freedom of peaceful assembly and association respectively.

⁶⁰ Art 15 (n 3 above).

⁶¹ Arts 5 & 6 (n 3 above).

guarantees⁶² and the right to property provided in article 1 of the First Protocol.⁶³ References to margin of appreciation have almost consistently been invoked in assessing the standard necessary in a democratic society under the second paragraph of articles 8-11. Non-discrimination under article 14 and derogation in a state of emergency under article 15 form the second and third contexts respectively, in which the doctrine is applied.

2.6 Limitation clauses and margin of appreciation

Rights and freedoms can compete, and states may limit citizens' rights or curtail their freedoms for certain specified and legitimate purposes.⁶⁴ Despite explicit interference with rights provided under articles 8-11, 14 and 15, a further examination is always required to determine whether margin meets the three requisite standards established in the case-law.⁶⁵ The first standard requires that the law prescribe any interference with the Convention right. Second, such interference must pursue a legitimate aim. Third, a measure must be necessary in a democratic society.⁶⁶ The following sub-sections discuss the standards.

2.5.1 In accordance with prescribed law

The Convention concept of legality requires first that there must be an identifiable and established legal basis in domestic law for Convention rights. In the absence of such basis, no derogation from rights can be justified, no matter how worthy its objects.⁶⁷ The existence of a domestic legal basis for an action, however, is necessary but insufficient condition to render lawful, in Convention terms, an infringement of a right. To construe a lawful fetter on a Convention provision, the applicable rule must be accessible, in two ways. First, it must be available to people likely to be affected by it, at least with the help of a lawyer.⁶⁸ Second, the citizens must be reasonably able to foresee how the legal rules are likely to be applied to the circumstances of a given case. In *Silver v UK*, it was noted

⁶² Arts 8-11 (n 3 above).

⁶³ Art 1 of the European Convention on Protection of Human Rights and Fundamental Freedoms as amended by Protocol No.11, 213 U.N.T.S.

⁶⁴ H Mountfield 'The concept of lawful interference with fundamental rights' in: J Jewell and J Cooper *Understanding Human Rights Principles*, Hart publishing (2000) 5.

⁶⁵ Yutaka (n 12 above) 9.

⁶⁶ As above.

⁶⁷ *Latridis v Greece* ECtHR judgment 25 March 1999, 62.

⁶⁸ *Sunday Times* (n 54 above) 49.

that a norm cannot be regarded as a law unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.⁶⁹

It follows thus that if an ostensible rule of domestic law does not fulfill these criteria, action taken in reliance upon it will not be sufficiently foreseeable to amount to a law for Convention purposes.

2.5.2 Legitimate aim

The ECtHR has rarely found a violation of the Convention rights by reference to the second standard.⁷⁰ Partly, this finds resonance in the degree of democratic governance that has prevailed in the member states of the Council of Europe for over a period of time. The interference has to amount to a pressing social need. In *Sunday Times*, the Court stated: '*what is necessary is more than what is desirable or reasonable, although it need not be indispensable.*'⁷¹ Clearly, the more important the rights in the scheme of the Convention, the more convincing reasons are required to justify a restriction in them. Hence a legitimate aim has to prove proportionality test as a pressing social need. The assessment of this standard is often carried out in conjunction with the standard, 'necessary in a democratic society', which introduces us to the next sub-section.

2.5.3 Necessary in democratic society

The ECtHR has for long recognized the rights in the ECHR as essential features of a democratic society. It has placed a particular stress on the role of freedom of expression; *inter alia*: freedom of the press, in a democracy. In *Lingens v Austria* the Court said:

Freedom of press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. More generally, freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention.⁷²

Above all, the Convention bodies have developed underlying considerations for applying this standard as a delineating line between the responsibilities of national authorities and the European Court. By doing this, the respondent state must justify that the interference is both

⁶⁹ *Silver v UK*, 5 EHRR 347, (1983) 87-88 (prison orders and instructions).

⁷⁰ See *Darby v Sweden* where the Court found that the refusal to exempt a non registered foreign worker, as opposed to a registered worker from a church tax did not pursue the legitimate aim: Judgment of 23 October 1990 (Ser. A) 187.

⁷¹ *Sunday Times* (n 54 above) 59.

⁷² *Lingens v Austria*, 8 EHRR 407 (1986) 42.

relevant and sufficient to reveal a pressing social need in a democratic society. Further, such interference must be proportionate to the legitimate aim pursued.⁷³

2.6 Margin of appreciation and rule of law

The concept of rule of law is an ideal to people and nations holding widely divergent views of politics, economics. Great thinkers throughout history have advocated for rule of law. For Aristotle:

Rightly constituted laws should be the final sovereign; and personal rule, whether it be exercised by a single person or a body of persons, should be sovereign only in those matters on which law is unable, owing to the difficulty of framing general rules for all contingencies, to make an exact pronouncement.⁷⁴

The rule of law and the desire to restrain arbitrary actions of government officials were prime motivators of both the English and American Revolutions.⁷⁵ Thomas Paine wrote, '*In America the law is king. For as in absolute government the king is law, so in free countries the law ought to be king; and there ought to be no other*'.⁷⁶ Equally, the Council of Europe is dedicated to promoting the rule of law throughout Europe. Commitment to the rule of law has been made a requirement for membership in the Council.⁷⁷ It follows that depending on how a state in question embraces rule of law, the corresponding margin will be granted. Normally, a wide margin of appreciation is granted to states perceived to uphold the rule of law as opposed to narrow margin granted undemocratic states.

2.7 An overview critique of margin of appreciation doctrine

The doctrine has been linked to a number of difficulties. First, the Convention does not provide any express legitimation for the doctrine and as a result, it is perceived as exclusive judge-made choice of Strasbourg judges and Commissioners. Secondly, Mahoney argues that deference to national authorities amounts to the notion of judicial-restraint which has led to abdication of Convention enforcement duty provided under article 19 of the ECHR.⁷⁸ Thirdly, cession of

⁷³ Handyside (n 6 above) 48-49.

⁷⁴ Brauch (n 5 above) 127.

⁷⁵ R Woods & J Brauch, 'Faith, learning and Justice' in: Alan Dershowitz's "The Genesis of Justice: Toward a Proper understanding of the relationship between the bible and modern justice", (2001) 36 *Virginia Law Review* 1, 55-59.

⁷⁶ T Paine *Common Sense*, in: Nelson F. Adkins (ed.) *Common Sense and Other Political writings* (1953) 32.

⁷⁷ Art 3 of the Statute of the Council of Europe, T.S. No. 1, May 5 1949.

⁷⁸ Art 19 of the ECHR creates an obligation on the Court to ensure the observance of the engagements undertaken by the High Contracting Parties. Critics of the doctrine of margin of appreciation submit that such

inappropriate contexts of over-broad discretions to national authorities to restrict guaranteed human rights would run counter to the universality of human rights and defeat the purpose of the Convention which is to remove protection of human rights from the reserved domain of the state and make it an international responsibility.⁷⁹

2.8 Conclusion

This chapter concludes that understanding margin of appreciation necessitates examining a number of contexts in which the doctrine applies. Areas of its application, width and limitations have been developed under the Court's jurisprudence with special attention to the concept of democratic society which secures basic conditions for progress and self-fulfillment of individuals. The place of the doctrine yet remains contested in both the Court and academic circles. Some scholars view the doctrine as slippery and likely to erode the existing Court's *acquis* jurisprudence by giving undue deference to local conditions, traditions and morals. Depending on how the Court weights the importance of the right at issue against the legitimate aim pursued by the state, the width of margin tends to be either narrow or broad. More significant, the doctrine seems to undertake the role of mediation between the Convention and member states especially in matters unforeseen by the framers of the Convention.

deference undermines the credibility of the Strasbourg system by denying the individual the level of international protection to which he or she would otherwise have been entitled under the Convention.

⁷⁹ P Mahoney 'Judicial activism and judicial-self restraint in the European Court of Human Rights: Two sides of the coin'. (1990) 11*Human Rights Law Journal* 12, 81.

CHAPTER 3

THE DOCTRINE OF MARGIN OF APPRECIATION AND POLICY CONSIDERATIONS UNDERLYING ITS APPLICATION IN THE JURISPRUDENCE OF ECtHR

3.1 Introduction

The margin of appreciation doctrine is a vital interface between the standards in the Convention and the decision making processes of the Court when it interprets and applies those standards. How it works, and policy considerations underlying its application in the Court's jurisprudence will inform the discussion in this chapter. Such policy grounds cover the spectrum ranging from those cohorts most determinative of broad margin to those likely to narrow the scope of discretion.

3.2 Policy grounds underlying margin of appreciation

3.2.1 National security

Considerations on national security and prevention of serious crimes have undoubtedly furnished strong public objectives susceptible to a wide margin of appreciation in the jurisprudence of ECtHR. Article 15 of the European Convention deals with the state power to derogate from individual rights that are otherwise protected under the Convention.⁸⁰ It follows that when governments are called upon to account for interferences with individual rights, a frequently adduced defence is the security argument.⁸¹ For the purposes of this section, only three rights will be discussed due to word constraint i.e. the right to privacy, freedom of expression and public emergency.

I. The right to privacy

The Court recognizes a wide margin of appreciation with regard to restriction of the right to protection of privacy in the interest of national security. This was done in *Klass*, when the Germany authorities were granted a measure of discretion in fixing the conditions under which to prepare a system of secret surveillance in the fight against terrorism. The Court stated that:

⁸⁰ Art 15 (1) ECHR (n 4 above).

⁸¹ E Brems '*The margin of appreciation of the European Court of Human Rights: Accommodating diversity within Europe*' in: P Forsythe & P McMahon '*Human rights and diversity*', University of Nebraska Press, (2003) 96.

Democratic societies nowadays find themselves threatened by highly sophisticated forms of espionage and terrorism, with the result that the state must be able, in order to effectively counter such threats, to undertake the secret surveillance of subversive elements operating within its jurisdiction.⁸²

In effect, the Court endorsed the position of the Germany authorities by upholding the existing domestic legislation granting powers of secret surveillance over mail, post and telecommunications under exceptional conditions, deemed necessary in a democratic society in the interests of national security and prevention of crime. It is therefore certainly not for the Court to substitute national authorities for any assessment of what might be the best policy in this field⁸³, the Court observed. Humphrey Waldock, appearing before the Court on behalf of the Commission in *Lawless* made another articulate and swaying campaign for margin of appreciation under national security:

The question of whether or not to employ exceptional powers under article 15 involves problems of appreciation and timing for a government which may be most difficult, and especially difficult in a democracy. The Commission recognizes that the government has to balance the ills involved in a temporary restriction of fundamental rights against even worse consequences ... for the people and perhaps dislocations ... of fundamental rights and freedoms, if it is to put the situation right again. Article 15 has to be read in the context of the rather special subject-matter with which it deals: the responsibilities of a government for maintaining law and order in a time of war or any other public emergency threatening the life of the nation. The concept of the margin of appreciation is that a government's discharge of these responsibilities is essentially a delicate problem of appreciating complex factors and of balancing conflicting considerations of the public interest; and that, once the Commission or the Court is satisfied that the government's appreciation is at least on the margin of the powers conferred by article 15, then the interest which the public itself has in effective government and in the maintenance of order justifies and requires a decision in favour of the legality of the government's appreciation.⁸⁴

Undoubtedly, the contemporary situation more than ever, requires states to appropriately respond to threats of terrorism. Albeit the above concerns, there is also a real danger that states could overreact to threats of terrorism. This rather jeopardizes the very legitimate concerns at stake and the ability of the Convention to protect human rights in High Contracting Parties.

II. Freedom of expression

The European human rights apparatus is subsidiary to the protection of rights in individual nations. The Convention leaves to each Contracting Party, in the first place, the task of securing

⁸² *Klass v Germany*, 28 ECtHR (Ser. A) (1978) 48-49.

⁸³ As above.

⁸⁴ Yorouw (n 8 above) 17.

the rights and freedoms it enshrines.⁸⁵ In *Hadjianastassiou v Greece*, the Court upheld the conviction of the officer for disclosing some technical knowledge he had acquired in his capacity as an officer in charge of a project for the design and production of a guided missile to a private company.⁸⁶ The Court judged that this information was capable of causing considerable damage to national security and that the Greek military Courts cannot be said to have overstepped the limits of margin of appreciation which is to be left to national authorities in matters of national security.⁸⁷

III. Emergency situations

High security threats have often been qualified as public emergency threats to the life of the nation. In that case such as in event of war, article 15 of the Convention allows states to derogate from their Convention obligations to the extent strictly required by the exigencies of the situation. In *Brannigan and McBride*, the Court held:

...it falls in the first place to each Contracting State, with its responsibility for the life of its nation to determine whether that life is threatened by a public emergency, and if so, how far is it necessary to go in attempting to overcome the emergency.⁸⁸

Such deferential attitude in the jurisprudence of the Court towards the national authorities both with respect to their decisions as to the presence of an emergency and as to the nature and scope of the measures necessary to avert that situation has since become a common staple of judicial rulings on matters related to national security.⁸⁹ Macdonald notes that it is possible that the margin of appreciation is at its widest when the Court is considering whether derogations are strictly required at a time of grave public emergency and at its narrowest when there is alleged violation of a person's very private and personal life.⁹⁰

⁸⁵ *Handyside* (n 6 above) 22.

⁸⁶ *Hadjianastassiou v Greece*, ECHR publications, (Ser A), vol.252, 16 December 1992, 45, 47.

⁸⁷ As above.

⁸⁸ *Brannigan & McBride v UK*, 258 ECHR, (Ser. A) 1993, 49. The Court appeared to rely on the reason that by direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and the scope of derogations necessary to avert it.

⁸⁹ *Brems* (n 14 above) 633.

⁹⁰ J McDonald The margin of appreciation in the jurisprudence of the European Court of Human Rights, in *International Law at the Time of its codification – Essays in Honour of Robert Ago* 187, (1987) 208.

3.2.2 Moral considerations

The Strasbourg organs have consistently invoked margin of appreciation when ascertaining the existence of a pressing social need of interfering measures adopted in moral and cultural dimension. Mahoney remarked that while the Convention can be seen as establishing a legal community with common ethos in human rights matters, underlying that legal community is an inexhaustible cultural and ideological variety among the member states of the ECHR.⁹¹ In interpreting and applying the Convention therefore, the Court ought to act as a force contributing to the preservation of that marvelous richness of diversity, or at least, should not undermine it by seeking to impose rigidly uniform solutions varied for all the different democratic societies making up the Convention community.⁹²

Two reasons have largely been responsible for the development of margin of appreciation in the context of public morality. First, lack of either a uniform concept of morality among member states or static notion of morality in modern age, as standards of values vary from one society to another and are changing over the course of time. In *Handyside*, the Court found:

...the requirements of morals vary from time to time and from place to place, especially in our era which is characterized by a rapid and far-reaching evolution of opinions on the subject.⁹³

Secondly, the view that national Courts have first hand knowledge of the peculiar culture, tradition, morality and religion in their societies, are considered more suitable than the international judges to assess and adjudicate such issues. The Court held:

...In the area of morals, 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.⁹⁴

Moreover, the Convention is not a human rights code requiring that the same uniform solution be adopted by each and every national authority.⁹⁵ By setting universal minimum standards, the Convention allows national authorities choice.

⁹¹ Mahoney (n 19 above) 2-3.

⁹² As above.

⁹³ *Handyside* (n 6 above) 22.

⁹⁴ As above.

⁹⁵ Mahoney (n 19 above) 4.

3.2.3 State sovereignty

The development of human rights and humanitarian law has gradually eroded the core of state sovereignty authorities, and this is nowhere more noticeable than in the process of European integration.⁹⁶ Nevertheless, there remains a residue of sovereignty, the evaluation of which may be left to national discretion.

I. Immigration controls

Under international law, general immigration controls, including admission to and expulsion from territory, fall within what is considered to be specifically sovereign jurisdiction.⁹⁷ The Strasbourg organs have held that member states have the undeniable sovereign right to control aliens' entry into and residence in their country.⁹⁸ In *Abdullaziz and others*, the Court cemented its position by stating that:

Moreover the Court cannot ignore that the present case is concerned not with family life, but also with immigration, and that, as matter of well-established international law and subject to its treaty obligations, a state has a right to control the entry of non-nationals into its country.⁹⁹

However sovereign factors cannot be decisive especially when pressing humanitarian elements are eminent in cases of expulsion and deportation, where applicants would risk life¹⁰⁰ or face the risk of being exposed to conditions amounting to inhuman and degrading treatment.¹⁰¹

II. Election systems

The choice of an election system under article 3 of the First Protocol of the Convention, which guarantees the right to free election, remains a strong hold of national sovereignty.¹⁰² The Strasbourg organs have defended this deferential approach on the ground that the rights to vote and stand for elections are not expressly provided in article 3 of the First Protocol, and therefore

⁹⁶ Yutaka (n 12 above) 209.

⁹⁷ Yutaka (n 12 above) 210.

⁹⁸ *Amuur v France*, ECtHR judgment of 25 June 1996.

⁹⁹ *Abdullaziz and others v UK*, ECtHR Judgment of 28 May 1985, (Ser A) No. 94.

¹⁰⁰ *Soering v the UK*, judgment of 7 July 1989 Series A, 161. The decision concerned extradition of a person (Soering) who would run the risk of suffering from death row phenomenon.

¹⁰¹ *Chahal v the United Kingdom*, judgment of 15 November 1996. The case concerned deportation order issued to a Sikh separatist leader, who complained to that his deportation to India, would expose him to real risk of ill-treatment at the hands of security forces.

¹⁰² Yutaka (n 12 above) 211.

creating a vacuum for High Contracting Parties to regulate the domain. The Court seems to acknowledge such concern based on historical and political perspective, emphasizing that a particular system of election, which may not be acceptable in one state, may nonetheless be justified in another and that a diversity of possible choice on this matter, is perfectly legitimate.¹⁰³ In *Mathieu-Mohin and Clerfayt*, the Court remarked that margin of appreciation would not be overstepped so long as freedom of expression of the opinion of the people in the choice of legislature is ensured.¹⁰⁴ Mahoney however warns that sovereignty must not be understood in the sense of the state being the supreme or not being accountable, but rather in the sense of freedom of different societies to disagree, to choose different solutions according to their own notions and needs.¹⁰⁵

3.2.4 Religion

Similar reasoning to those used in morality cases have been fielded in issues touching upon the role and significance of religion in society. The margin of appreciation doctrine has been explicit, *inter alia*, in blasphemy cases. In Austria, at the request of the Roman Catholic Diocese, the Otto-Preminger-Institute planned film show series were seized on the accounts of disparaging religious doctrines, an act prohibited by the Austrian penal code. Before the ECtHR, the film was found blasphemous and forfeited.¹⁰⁶ The Court drew a parallel line with cases concerning restrictions for the purposes of morals, showing that it is not possible to discern through out Europe a uniform conception of the significance of religion in society, even within a single country such conceptions may vary. In *Wingrove*, the Court in a more appealing and emphatic fashion said:

...moreover, as in the field of morals, and perhaps even to a greater degree, there is no uniform European conception of the requirements of the protection of rights of others in relation to attacks on their religious conviction. What is likely to cause substantial offence to persons of a particular religious persuasion will vary significantly from time to time and from place to place, especially in an era characterized by an ever growing array of faith and dominations.¹⁰⁷

The Court considered the position of the government of UK on the issue as both relevant and sufficient for the purposes of article 10 (2) and that their decision cannot be said to reveal any signs of arbitrary nature or excessiveness. Moreover, such unwarranted offences on the

¹⁰³ *Gitonas v Greece*, ECtHR Judgment of 1 July 1997, 39.

¹⁰⁴ *Mathieu-Mohin and Clerfayt v Belgium*, Judgment of 2 March 1987, (Ser. A) 113, 54.

¹⁰⁵ Mahoney, (n 19 above) 3.

¹⁰⁶ *Otto-Preminger-Institute v Austria*, 20 September 1994, Publication of ECHR, (ser A) 295-A, 22.

¹⁰⁷ *Wingrove v the UK*, 26 November 1996, Reports of Judgments and decisions, 1996 – V, 64.

consciousness of people call for the intervention of the government to protect freedoms of its citizens.

3.2.5 European consensus

The element of consensus has become one of important facets in determining the scope of the margin of appreciation in the ECtHR jurisprudence.¹⁰⁸ In general, consensus factor functions in two scenarios: First, the more diverse the laws and experiences of the member states of the Council of Europe, the broader should be the margin of appreciation. For example, the lack of a consensus on how public records should record the sex of an individual who has undergone a sex change operation was found to be the determining factor in *Rees v UK*.¹⁰⁹ The Court noted that some states allowed birth certificate changes and others did not.¹¹⁰

Secondly, the more there is consensus on a particular issue, the narrower the margin of appreciation should be.¹¹¹ The rationale is that if there is a strong consensus against a particular state practice, that practice must not be 'necessary in a democratic society'. In *Dudgeon*, the Court struck down Ireland's sodomy law under article 8 upon finding that the vast majority of member states no longer prohibited sodomy and thus prosecutions for sodomy were not anymore necessary to protect morals in a democratic society.¹¹²

As compared with the era when that legislation was enacted, there is now a better understanding, and in consequence an increased tolerance, of homosexual behaviour to the extent that in the great majority of the member states of the Council of Europe, it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied; the Court cannot overlook the marked changes which have occurred in this regard in the domestic law of the member states.¹¹³

¹⁰⁸ J Schokkenbroek 'The basis, nature and application of margin of application doctrine in Case-Law of the European Court of Human Rights' (1998), 19 *Human Rights Law Journal* 34.

¹⁰⁹ *Rees v United Kingdom*, 106 ECtHR (Ser. A) 1986.

¹¹⁰ As above. See also *Handyside* (n 6 above) 28, where translations of the book appeared and circulated freely in the majority of the member states of the Council of Europe. But the Court found the need for deference in the area of morals to be compelling. Though the Court essentially rejected the "European consensus" evidence, stating that Contracting States have each fashioned their approach in the light of the situation obtaining in their respective territories; the Court had regard, *inter alia*, to the different views prevailing there about the demands of the protection of morals in a democratic society. The fact that most of them decided to allow the work to be distributed does not mean that the contrary decision of the UK was a breach of Art 10 (2).

¹¹¹ Mahoney (n 19 above) 5.

¹¹² *Dudgeon v UK*, 45 ECtHR (Ser.A) 1981.

¹¹³ *Dudgeon v UK* (n 112 above) 60.

By drawing a comparison from the practices ensuing in member states, the Court was largely informed by the glaring consensus that had been built over a period of time and thus could not act against the will of supposedly endorsed practices in High Contracting Parties.

3.2.6 Socio- economic policy

The Strasbourg organs have consistently conferred upon member states discretionary powers as regards the choice and implementation of particular socio-economic activities.¹¹⁴ Issues concerning education provide an illustrative analysis of margin of appreciation. Indeed, the task of framing and implementing education policy can be shaped by distinct cultural values and historical experiences, requiring prudent assessment of specific needs among member states. The combination of elements of legitimacy, subsidiarity and cultural diversity present a sound rationale for judicial restraint by Strasbourg organs.¹¹⁵ The Court in *Valsamis* acknowledged that the decision to set up and implement a school curriculum involves questions of expediency on which it is not for the Court to rule and whose solution may legitimately vary according to the country and era.¹¹⁶ Accordingly, the margin would not be overstepped insofar as limitations of the Court to the governments remain within the contours of what a 'democratic society' may perceive as the public interests.

3.2.7 Positive obligations

The Convention rights are framed in such a way that guarantees negative rights, well-renown as the first generation rights consisting of political and civil rights. Equally, the Strasbourg organs have consistently held that positive obligations are inherent in many provisions of the Convention.¹¹⁷ The extent to which states account towards positive obligations cannot however be determined uniformly, with the scope of obligations hinging on policy choice of member states in allocation of their limited resources. Conceivably, the extent to which positive steps should be taken also depends on other factors such as the severity of effect that a failure of a government to act causes on the rights as well as personal circumstances of an individual.

In *Özgür Gündem*, the Court noted that the scope of this obligation will inevitably vary, having

¹¹⁴ Yutaka (n 12 above) 214. See also *Anthanassaglon and Others v Switzerland*, Judgment of 6 April 2000, 54.

¹¹⁵ *Valsamis v Greece*, Judgment of 18 December 1996. According to the Court, It did not find any violation to art 2 of the First Protocol in relation to the suspension from school of a girl belonging to religion of Jehovah's witnesses who refused to take part in parades on the basis of her religious beliefs.

¹¹⁶ *Valsamis v Greece* (n 115 above) 31-32.

¹¹⁷ Yutaka (n 12 above) 217.

regard to the diversity of situations obtaining in Contracting States, the difficulty involved in policing modern societies and choices which must be made in terms of priorities and resources.¹¹⁸ While the Court allowed margin of appreciation to Turkey, it seemed to make an emphatic appreciation that positive obligations under the Convention are also obligations of result, meaning that states are free to choose the means to realize such results.

3.3 Policy grounds upholding judicial active review

Despite the relatively wide margin of appreciation allowed on the above grounds, the Court's jurisprudence reveals various variables that tend to narrow the parameters of national discretion. These variables help to determine the type and scope of standards that the Convention seeks to enforce within member states. In the process, the Strasbourg organs are willing to engage in meticulous examination of the merits on case-by-case basis, paying close and critical regard to the effects of interference. The following sub-sections thus highlight some of the fundamental rights regarded as the bulwark of European democracy whose interference requires the state in question to adduce weighty evidence to justify the necessity.

3.3.1 Non-derogable rights and other fundamental rights

The Strasbourg organs have characterized a number of rights as fundamental rights in a democratic society, calling for strict scrutiny of any restriction.¹¹⁹ These rights include the right to life, the prohibition of torture, the prohibition of discrimination, the right to private and family life, as well as freedom of expression among others.

I. Core rights

In a theory paper on the underlying principles of the doctrine, the deputy registrar of the Court states that margin of appreciation operates only on the second level of protection offered by the European Convention:

The Convention can be seen to provide two degrees of protection: firstly, against naked, bad-faith abuse of power by governmental authorities of the kind that occurred in Europe in the 1930s and 1940s; secondly, against limitations on liberty which although perhaps imposed in good faith in the general interest of the community as a whole, place a disproportionate burden on the individual. It is only in the second context, once the first degree of protection has been assured, that the doctrine of margin of appreciation comes into play, that is to say, only if the preliminary conditions of normal democratic governance have been shown to exist.....Absence of a legitimate aim or of good faith, as well as abuse of power or arbitrariness, render the

¹¹⁸ *Özgur Gündem v Turkey*, judgment of 16 March 2000, 43.

¹¹⁹ Brems (n 81 above) 106.

doctrine inoperative.¹²⁰

In situations of torture and arbitrary killings, the ECtHR has expressed zero tolerance by refusing to grant margin of appreciation to national authorities.¹²¹ The absence of margin of appreciation seems also to be related to the formulation of the right to life (article 2) and the prohibition of torture (article 3) both of ECHR. These rights have been dubbed as absolute rights susceptible to enforcement even in times national emergence. The provision on the right to life however does contain a limitation clause. Yet the proportionality principle is very strict with regard to deprivation of life and only justified when it results from the use of force that is more than 'absolutely necessary' for the enumerated purposes.¹²² The emphasis on strictest scrutiny logically leaves room to presume that it entails at least the smallest margin of appreciation. Yet the formulation of article 2 and 3 of the ECHR cannot only be relied upon to explain why there is no room or little room for state discretion under these provisions. The real reason for refusal of a domestic margin of appreciation seems to lie in the Court's appreciation of the importance of those rights. Callewaert summarized the right to life as being the supreme right and the prohibition of torture as one of the most clearly universal.¹²³

II. Other fundamental rights in a democratic society

The Court has further identified a narrower margin of appreciation where free speech especially political speech is at issue.¹²⁴ Equally, the Court has found a narrower margin of appreciation where matters of personal autonomy are implicated by a state action. For example, in *Dudgeon* the Court struck down a sodomy law noting, '[t]he present case concerns a most intimate aspect of private life. Accordingly, there must exist particularly serious reasons before interferences on the part of the public authorities can be legitimate for the purposes of paragraph 2 of article 8.'¹²⁵

¹²⁰ Mahoney (n 19 above) 4.

¹²¹ *Güleç v Turkey*, Reports of Judgments and decisions, 1998-IV, No 80, 81; *Ergi v Turkey*, Reports of Judgments and decisions, 1998-IV, No 81, 85; *Yasa v Turkey*, Reports of judgments and decisions, 1998-IV No. 88, 104. It is in these cases that the ECtHR was confronted with archetypal gross human rights violations of torture and arbitrary killings.

¹²² *Ergi v Turkey* (n 121 above) 79. In the words of the Court, use of the term 'absolutely necessary' suggests that a stricter and a more compelling test of necessity must be employed from that normally applicable when determining whether state action is necessary in a 'democratic society' under paragraphs 2 of articles 8-11 of the Convention. In particular, the force used must be proportionate to the achievement of the aim.....

¹²³ J Callwaert quoted by Brems in: *Human Rights: Universality and Diversity* (2001) 9.

¹²⁴ In *Muller v. Switzerland*, the Court found that Switzerland did not violate article 10 when it convicted an artist of obscenity and confiscated his works, 133 ECtHR (Ser. A) (1988) 22, 25.

¹²⁵ *Dudgeon* (n 112 above) 21. See also *Smith v. UK*, 1999-VI ECtHR 45, 81. The Court's cursory explanation for why state acts limiting personal autonomy merit a particularly narrow margin of appreciation is that "tolerance and broadmindedness" are "two hallmarks" of a democratic society.

With regard to matters concerning article 14 which prohibits discrimination involving differential treatment on grounds of race, sex or birth, the Strasbourg organs have tended to apply most stringent scrutiny, leaving little hope for margin of appreciation.¹²⁶ A range of case-law strongly corroborates the view that racial equality and social harmony are among the Convention's foundational values, calling for a particular assertive review.¹²⁷

3.4 Conclusion

Given the multiplicity of policy grounds that inform the Court's course of interrogation, one observes that each of the factors on its own is non-decisive and that they only have a relative weight in the overall assessment of the width of margin in each case. Further, the Court's jurisprudence on margin of appreciation reveals an element of shared responsibility of enforcement, where Contracting Parties have the initial task of implementing the guaranteed rights and freedoms and the Court having the ultimate power of decision. Such powers even become more stringent when core rights are at issue.

¹²⁶ See *Abdulaziz, Cabales and Balkandali v the UK*, judgment of 28 May 1985, 78.

¹²⁷ In *Remi v France*, both the Court and the Commission required the national Courts to take note even of the evidence which was not conclusively proven but 'not ... manifestly devoid of merit' in order to dispel any suspicion of the tribunal's racial impartiality. Judgment of 26 April 1996, 48 and Commission's Report of 30 November 1994, 43-4.

CHAPTER 4

ASSESSING MARGIN OF APPRECIATION AND ITS APPLICABILITY IN AFRICAN HUMAN RIGHTS JURISPRUDENCE

4.1 Introduction

In comparison with other human rights instruments, the African Charter is characterized by a lack of provisions regulating conditions under which the rights it protects can be derogated. Ouguergouz argues that it is rare to find absolute rights in the realm of international human rights.¹²⁸ This chapter looks at the birth of the African Charter and the discretion left to member states as a basis for margin of appreciation through limitation of rights. It further examines the normative basis of the doctrine in the Charter and grounds that are often invoked by Charter member states to qualify limitations of rights. Finally, a recent case breaking the tradition of the African Commission jurisprudence to recognize margin of appreciation is interrogated.

4.2 The birth of the African Charter and considerations of margin of appreciation

Like the European and American continents, Africa has created its own regional human rights protection system. The system is based on the African Charter¹²⁹ which entered into force on October 21 1986, upon ratification by a simple majority of member states of the Organization of African Unity (OAU).¹³⁰ Until the adoption of the African Charter, the OAU had shown relatively little interest in human rights. Two separate and opposing motivations seem to underlie the creation of the African Charter. First, the universalistic drive where African states did not want to remain behind in the global movement towards human rights.¹³¹ Secondly, the desire to affirm African identity and specificity.¹³² For the purposes of this study, the latter will largely attract our analysis. Besides, within universal human rights aspirations, Africans seemed enthusiastic to add

¹²⁸ Ouguergouz (n 17 above) 429. An example of an absolute right is prohibition of torture in both art 3 of ECHR and art. 7 of ICCPR.

¹²⁹ The African Charter on Human and Peoples' Rights, June 27, 1981, OAU Doc. CAB/LEG/67/3/Rev.5 (1981). (entered into force, 21/10/1986).

¹³⁰ The African Charter was adopted in 1981 by the 18th Assembly of Heads of State and Governments of the OAU, the Official body of African States.

¹³¹ P Gonidec, *Un espoir pour l'homme et les peuples Africains? La Charte Africaine des droits de l'homme et des droits des peuples, le mois en Afrique* (1984) 24.

¹³² Brems (n 81 above) 92.

an African input with certain emphasis, additions and interpretations derived from the African context.¹³³

In an address delivered to the meeting of experts during the preparation of the draft of the African Charter, the then Senegalese president, Leopold Sedar Senghor alluded to the interrelationship of the twin goals of universality and specificity.¹³⁴ Senghor who in 1951 participated in the drafting of the ECHR as a member of the French Parliament warned the drafters to constantly keep in mind the African values of civilization and the real needs of Africa.¹³⁵ Conceivably, with the real needs of Africa, Senghor seemed to underscore the peculiarities which underlie the uniqueness of African countries.

Partly, the African Charter can be read as a document of self-affirmation of newly independent states, questioning mainstream international law, the elaboration of which they had not participated. Yet this was done in a moderate manner. Rather than rejecting universality or completely redrawing human rights, the purpose was to create an instrument that was more adequate to deal with issues in a more African context and in which particular rights would receive particular attention according to African circumstances and sensibilities.¹³⁶ Subscribing to this view, Senghor observed that we should borrow from modernization only that which does not misrepresent our civilization and deep nature, avoiding in particular libertarian freedom, irresponsibility and morality.¹³⁷ In other words, Senghor seemed to suggest states to choose solutions according to their own notions and needs.

4.3 Identifying the normative basis of the doctrine under the African Charter

4.3.1 Clawback clauses under the Charter and the margin of appreciation

The jurisprudence of African Commission reveals that it does not permit member states to restrict the exercise of substantive rights under the Charter.¹³⁸ None of the human rights provided by the

¹³³ As above.

¹³⁴ Address delivered by Leopold Senghor, in: P Kunig, W Benedick and C Mahalu, *Regional Protection of Human Rights by International Law: The Emerging African System*, *verfassung und Recht in: übersee*, Beiheft 12, Baden-Baden, Nomos Verlagsgesellschaft, (1985) 121-124.

¹³⁵ Senghor (n 134 above) 122.

¹³⁶ *J Matringe Tradition et modernité dans la Charte Africaine des droits de l'homme et des peuples*, Brussels- Bruylant, (1996) 16-17.

¹³⁷ Senghor (above n 134) 124.

¹³⁸ Ankumah (n 15 above) 177.

African Charter however carries an absolute guarantee.¹³⁹ Most of the clauses substantially qualify the limitations by explicitly making their use by states subject to at least two basic conditions i.e. the restriction must be laid down by law and they must endeavour to secure legitimate objectives.¹⁴⁰ Other Charter clauses simply lay down the requirement that there must be no arbitrariness which espouses the requisite of legality meaning the interference has to be prescribed by the law.¹⁴¹ Further, some clauses no more than require the limitation to be lawful¹⁴² or necessary for public order.¹⁴³

These clawback clauses are however not the same as derogation clauses and do not provide an individual with the same degree of protection provided by derogation clauses contained in other Conventions.¹⁴⁴ Derogation clauses restrict a state's conduct towards its nationals by defining circumstances in which the derogation may occur as well as non-derogable rights.¹⁴⁵ While clawback clauses restrict rights *ab initio*. As a result, clawback clauses tend to be less precise than derogation clauses because the restrictions they permit are almost totally discretionary.¹⁴⁶

Such an imprecise wording typical of the African Charter has been seen to give leeway to the limitation of the rights guaranteed under the Charter.¹⁴⁷ Hence while noting that the African Charter does not contain any derogation clause, one author does not scruple to say that:

By no means, however can this omission be interpreted as excluding the right of derogation. On the contrary this right is deeply rooted in what Anglo-Saxon literature terms as 'clawback clauses', which are defined as clauses that entitle a state to restrict the granted rights to the extent permitted by domestic law'... this is the content of the exception to which articles 8 to 14 of the Charter make the rights and freedoms laid down by

¹³⁹ Ouguergouz (n 17 above) 429.

¹⁴⁰ See e.g. ... subject only to necessary restrictions provided by law in particular those enacted in the interest of national security, the safety, healthy, ethics and rights and freedoms of others (art 11) of the African Charter.

¹⁴¹ No one may be arbitrarily deprived of his right (art. 4) ...no one may be arbitrarily arrested or detained (art. 6) of the African Charter.

¹⁴² See e.g. ... within the law (art 9 (2)), provided that he abides by the law (art 10 (1) of the African Charter.

¹⁴³ Subject to law and order... (art 8) of the African Charter.

¹⁴⁴ Art 27 of the American Convention for the Protection of Human Rights, O.A.S T.S. No. 36 at 1. O.A.S. Doc. OEA/ser. L/V/II.23 Doc. 21 rev. 6 entered into force July 8, 1978: Art 15 ECHR.

¹⁴⁵ As above. Note for example that arts 2 and 3 of ECHR are considered non-derogable rights.

¹⁴⁶ Gittleman (n 20 above) 691 – 692.

¹⁴⁷ Nonetheless, this lack of precision is not a unique feature of the African Charter, even though it does not always reach a comparable level; hence as Michel Melchoir observed, 'The essential difficult posed by the ECHR is that it is full of vague notions, concepts which are not defined or are imprecise. "Notions 'vagues' ou 'indéterminées' et 'lacunes' dans la Convention Européenne des Droits de l'Homme", in: F Matscher & H Petzold (eds.), Protecting Human Rights: The European Dimension – Studies in Honour of G Wiarda, (Carl Heymanns Verlag KG Cologne), (1988) 411.

them subject. Failing any other specification, these clauses grant states unlimited scope for interference with freedoms. It could be said that they void the recognized right of its substance, or even that, essentially, they are purely potestative clauses.¹⁴⁸ The states parties therefore enjoy a purely discretionary power to suspend the recognized freedoms.¹⁴⁹

Impliedly, one can believe that these clauses provide a ground for limitation of respective rights under Charter, but what is to be made of those civil and political rights, and economic, social and cultural rights, as well as peoples' rights in the Charter without any reference to limitation? According to Ouguergouz, the definition of clawback clauses is too wide to fit the content of clauses postulated to qualify limitations. Besides, he strongly contends that such interpretations would defy the principle of good faith established under the Vienna Convention by giving meaning to the Charter which the drafters never envisaged.¹⁵⁰ Inadequate as it may sound, the following sub-section attempts a legal justification through article 27 (2) as a general limitation clause to bridge the legal vacuum.

4.3.2 The potential of article 27 (2) of the ACHPR as a general limitation clause

Article 27 (2) reads 'the rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest'. Ironically, limitations of this article are formulated as qualifications of exercise of the right by individual as opposed to traditional limitation clauses such as article 29 (2) of the Universal Declaration of Human Rights (UDHR)¹⁵¹ and article 4 of International Covenant on Civil and Political Rights (ICCPR)¹⁵² which

¹⁴⁸ Michel Virally, defines a potestative clause as one which permits "an exception, a derogation, even the total release from one's obligations, in circumstances which are defined solely by the party availing himself of it and with virtually total freedom", *Des moyens utilisés dans la pratique pour limiter l'effet obligatoire des traités* in: *les Clauses échappatoires en matières d'instruments internationaux relatifs aux droits de l'homme. Quatrième colloque du département des droits de l'homme, Université Catholique de Louvain, (Bryuylant, Brussels), (1982) 16.*

¹⁴⁹ Rachel Murray observes that "It could be argued that derogations may be permitted through the use of clawback clauses and margin of appreciation they give to states", *The African Commission on Human and Peoples' Rights and international Law*, Hart Publishing, Oxford and Portland, Oregon, 2000, 126.

¹⁵⁰ Ouguergouz (n 19 above) 432.

¹⁵¹ Art 29 (2) of the UDHR provides that "In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and meeting the just requirements of morality, public order and general welfare in a democratic society."

¹⁵² Art 4 (1) of the ICCPR provides that "In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law."

qualify the restriction of the right by the state. Plainly, the qualifications contained in article 27 (2) are, if anything, actually intended to limit the exercise by the individual of his rights, rather than to precisely circumscribe the power of states to restrict such exercise.

As a result, and contrary to articles 29 (2) of UDHR and 4 of ICCPR, the enumeration of limitation grounds is not expressly limitative in article 27 (2) to justify adequacy for reliance on the article. Nevertheless, with sufficient goodwill on the side of the African Commission, its interpretation can make this dissimilarity wane by broadening its meaning to include 29 (2) of UDHR or 4 of ICCPR. Moreover, the limitation grounds are themselves comparable. The only conspicuous distinction is the absence of legality requirement in article 27 (2) of the ACHPR. The next subsection surveys how the African Commission can use articles 60 and 61 to seek inspiration in the limitation clauses of other international instruments to interpret article 27 (2) of the ACHPR in such a way it becomes an adequate limitation clause.

4.3.3 Interpreting article 27 (2) broadly through articles 60 and 61 to infer a general limitation clause

For René Degni-Segui, articles 60 and 61 make the African Charter an open-ended text adaptable to a number of universal instruments.¹⁵³ Depending on the creativity of the African Commission, the provisions could be used to compensate for any gaps or omissions in the African Charter.¹⁵⁴ Through articles 60 and 61 of the Charter, the African Commission can seek inspiration in limitation clauses of other human rights Conventions such as article 29 (2) of the UDHR or 4 of the ICCPR to qualify article 27 (2) of the Charter as an adequate limitation clause. Indeed, such inspiration toward international human rights instruments have been reaffirmed by African states on two occasions.¹⁵⁵

law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

¹⁵³ R Degni-Segui, 'L'apport de la Charte Africaine des droits de l'homme et des peuples au droit international de l'homme' (1971) *African Journal of International and Comparative Law* 727. See also arts 60 and 61 of the ACHPR which inspire the Commission to draw from other international laws which the parties to the present Charter are members.

¹⁵⁴ As above.

¹⁵⁵ Preamble of the Addis Ababa Charter (para 8) and the African Charter (para 3).

4.4 Grounds for states' practices towards the doctrine of margin of appreciation

In the human rights field, as elsewhere, states generally tend to construe any international undertaking as a relinquishment of sovereignty rather than an expression of it.¹⁵⁶ It is therefore no surprise that, as far as possible, they try to limit the number of their international obligations or at least if it becomes politically imperative to undertake such obligation, to limit their legal scope. In so doing, they claim margin of appreciation. The successive exposé briefly highlights some of the grounds.

4.4.1 Better placement argument

The better argument has been used by national authorities as a justification to deal with matters obtaining from their jurisdiction since they claim familiarity with local situations, sensitivities and peculiarities. This is more the case when the outcome of a case is strongly determined by factual elements ensuing on the ground. As such, national authorities use their discretion to accommodate diversity as the local situations are assessed in light of sensitivities that are culturally valued.¹⁵⁷

In *Kenneth Good v Botswana (Good case)*, the government of Botswana justifying the expulsion of Good from its territory said it was in the best interests of its national security which the state itself was better placed and capable of assessing.¹⁵⁸ Quoting the umbrella purpose of the Charter as promotion of peoples' rights, Botswana interpreted the word 'peoples' to mean two groups. First, individuals in their individual capacity. Secondly, 'peoples' as a community or group. As a nation, the government submitted that its community has determined how they should be governed, the type of government they want and have given their president executive power to expel a foreigner as he deems best. Moreover, they argued that their rights as a community cannot be less than those of an individual.¹⁵⁹ Against such claims, the African Commission may not wish to be seen as second-guessing the respectable decision that was reached by democratic representatives, who must weight different priorities, requirements and concepts of distributive justice.

¹⁵⁶ Equally informing is the famous *dictum* of the Permanent Court of International Justice in its judgment of 17 August 1923. The Court declined to see in the conclusion of any Treaty by which a state undertakes to perform or refrains from performing a particular act an abandonment of its sovereignty. The S.S. "Wimbledon", Judgment No. 1, PCIJ, (Ser A) & No.1 25.

¹⁵⁷ *Johansen v Norway*, ECtHR reports of judgments and decisions, 7 August 1996 – III, No. 13, 64.

¹⁵⁸ *Kenneth Good v Botswana*, Communication No. 313/205, 5.10. (The matter is still before the African Commission pending settlement).

¹⁵⁹ *Good Case* (n 158 above) 5.8 and 5.9.

4.4.2 The principle of subsidiarity

The principle of subsidiarity is generally understood to mean that in a community of pluralism, the larger social unit should assume responsibility for functions only in so far as the small social unit is unable to do so.¹⁶⁰ In other words, states are smaller units while the Charter system is a larger social unit. Article 1 of the African Charter provides that:

Member state of the Organization of the African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them.

Accordingly, member states are entrusted with the primary responsibility to secure effective enjoyment of human rights under the Charter. The Charter seems to establish standards for the protection of rights which it guarantees, while leaving states free, firstly, to go beyond these standards, and secondly, to select the legal ways and means of protecting them. On the basis of these features, one can describe the Charter as an instrument which harmonizes the law of contracting member states around a minimum standard of protection. In *Legal Resources Foundation v Zambia*, the Commission indicated that responsibility of implementing the Charter at national level is the preserve of the State.¹⁶¹ Boven, concurring with the above position remarks that human rights are first and foremost protected domestically and that international procedures exist to complement the domestic protection of human rights.¹⁶² In *Prince case*¹⁶³, the government of South Africa alluded to the principle of subsidiarity as natural delimitation of functions between national authorities of state parties to the African Charter and the Charter itself. Making submissions to Commission, the government stated as follows:

The national authorities should have the initial responsibility to guarantee rights and freedoms within the domestic legal orders of the respective states, and in discharging this duty, should be able to decide on appropriate means of implementation. To this end, the African Commission should construct its role as subsidiary, as narrower and supervisory competence in subsequently reviewing a State's choice in light of the standards set by the provisions of the Charter. In terms of this construction, the African Commission should not substitute domestic institutions in interpreting and application of the national law.¹⁶⁴

¹⁶⁰ H Petzold 'The Convention and principle of subsidiarity' in: R Macdonald et al. (eds.) *The System of Protection of Human Rights*, Kluwer Academic Publishers (1993) 42.

¹⁶¹ *Legal Resources Foundation v Zambia*, Communication 211/98, 59.

¹⁶² V Boven "The International System of Human rights: An overview" in: P Alston (ed) (1997) 10.

¹⁶³ *Prince case* (n above 10) 37.

¹⁶⁴ As above.

Noticeably, this would also be interpreted as disguised warning chiefly intended to avoid undue tension between the two institutions in future. In fact, it was another way for the government to assert its discretionary power over the matter.

4.4.3 In accordance with the law

Under clawback clauses, states have always claimed competence especially in circumstances where the Charter makes a mention 'in accordance with the law', 'subject to the law', 'provided by the law', 'within the law'..... In *Good case*, the government of Botswana argued that it was common cause that the complainant was a non national admitted into Botswana and likewise he had been expelled in accordance with the law.¹⁶⁵ In its further submissions; Botswana claimed that law does not exist in vacuum. It exists to serve a particular community:

.....law is an embodiment of the principles of morality, humanity and dignity.... of crucial importance is that law here refers to domestic law of the state party concerned. There is no room for thinking otherwise since the Charter respects and maintains the supremacy of the laws of State Parties.¹⁶⁶

According to Sudan, its Decree on the Process and Transitional Powers Act 1989 was sufficient in terms of law to guarantee declaration of public emergency.¹⁶⁷ In such circumstances, states claim competence of their domestic laws through the Charter's clawback clauses.¹⁶⁸ Donnelly holds that these clauses give margin to states over certain matters in their jurisdictions provided the issue at stake is regulated.¹⁶⁹

4.4.4 Emergency situations

The responsibility of a government to maintain law and order certainly comes under serious challenge in times of war or any other public emergency threatening the life of the nation.¹⁷⁰ At this critical point, governments tend to assume responsibilities of discharging these delicate problems by appreciating complex factors of conflicting considerations of public interest. In

¹⁶⁵ *Good case* (n 158 above) 6.3.

¹⁶⁶ *Good case* (n 158 above) 6.1.

¹⁶⁷ *Amnesty International and Others v Sudan* (2000) in: *African Human Rights Law Reports* 297 (ACHPR 1999) 99.

¹⁶⁸ F Viljion 'Review of the African Commission on Human and Peoples Rights' in: C Heyns, C (ed) (1997) *Human Rights Law Journal in Africa*, Kluwer Law International 47-50.

¹⁶⁹ J Donnelly *International Human Rights*: Boulder Westview Press Inc. (1993) 91.

¹⁷⁰ O Gross & F Aolain, 'From Discretion to Scrutiny: Revisiting the Application of Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights' (2001) 23 *Human Rights Quarterly* 625, 632.

Constitutional Rights Project and another v Nigeria, the government head of delegation noted that:

What the government did was to salvage a situation that was bad. And what ever laws it made at that time, I want this Commission to look at it in terms of [the government] holding a solution to the problem, not as if this were geared to any particular group of people or human rights activists.....the government felt that it had to avoid chaos and it restored an interim government, rather than even perpetuating its own regime. I think the Commission should rather look carefully into that because it was not an ordinary situation.¹⁷¹

Often, when governments are faced with threats, be *bona fide*, self-made or counterfeited, the general tendency is to declare national emergencies. For Khamil, an Egyptian official who submitted the state's Report to the 11th session in 1992 of the African Commission¹⁷², declaration of state of emergency is not an unusual measure since it is expressly provided for in other international human rights instruments like the ICCPR and UDHR.¹⁷³

4.4.5 Protecting the rights of others

In the *Fourie case*, Judge Sachs writing for the Constitutional Court of South Africa that was unanimous on all matters except in relation to the remedy noted that:

...this Court had in five consecutive decisions highlighted that South Africa has a multitude of family formations that are evolving rapidly as our society develops, so that it is inappropriate to entrench any particular form as the only socially and legally acceptable one; there was an imperative constitutional need to acknowledge the long history in our country and abroad of marginalization and persecution of gays and lesbians although a number of breakthroughs have been made in particular areas; there is no comprehensive legal regulation of the family law rights of gays and lesbians; and finally, our Constitution represents a radical rupture with the past based on intolerance and exclusion, and the movement forward to the acceptance of the need to develop a society based on equality and respect by all for all.¹⁷⁴

Precisely, Sachs seemed to imply that at issue was the need to affirm the character of society as one based on tolerance and mutual respect. The test of tolerance is not how one finds space for people with whom, and practices with which, one feels comfortable, but how one accommodates the expression of what is discomfiting. Hence, Sachs pointed that it was in the margins of national authorities to accommodate such diversity inhibited by societies. Moreover, such discomforts call upon the intervention of the government to protect its citizens.

¹⁷¹ *Constitutional Rights Project and Another v Nigeria* (2000) in: *African Human Rights Law Reports* 191 (ACHPR 1998) 10.

¹⁷² African Commission on Human and Peoples Rights, Examination of State Reports, 11th Session, March 1992 Egypt – Tanzania, 21 & 23.

¹⁷³ Arts 4 ICCPR (n 152 above) & 29 UDHR (n 151 above).

¹⁷⁴ *Minister of Home Affairs and Another v Fourie and another*, CC, CCT 60/04, Judgment of 1 December 2005. Available at: <http://www.concourt.gov.za/site/gaylesb.htm> (accessed on 24 September 2006).

4.5 The doctrine of margin of appreciation in the African Commission's jurisprudence

The 'margin of appreciation' as seen, is a doctrine developed in the case-law of the ECtHR.¹⁷⁵ It serves a number of functions that are linked to judicial role, such as in particular, expression of judicial-restraint on government policy decisions and as an interpretational tool.¹⁷⁶ The African Commission had never in its jurisprudential history made a decision recognizing the doctrine until the recent *Prince* case.¹⁷⁷ Yet more important, margin of appreciation is to be understood as an approach particularly intended by African Commission, as a supranational body, to boost enforcement of human rights standards in member states.

4.6.1 *Garreth Anver Prince v South Africa*

I. Synopsis of factual background of the case

The complaint was filed with the Commission by Garreth Anver Prince, a South African national. Prince alleged that despite his satisfying academic requirements for admission as an attorney and his willingness to register for a one year contract of community service, the Law Society of Cape of Good Hope declined to register his contract.¹⁷⁸ The complainant maintained that the refusal was based on his disclosure, made in his application with the Law Society, that he had two previous convictions for possession of cannabis and his expressed intention to continue using cannabis as inspired and required by his Rastafarian religion.¹⁷⁹

II. Submission of the Complainant

In light of the above background, Prince decided to petition before the Commission alleging violation of his human rights on the grounds of unlimited proscriptions which generally impaired use or possession of cannabis by Rastafarians even for *bona fide* religious purposes. Such generalization he noted failed to distinguish between Rastafarian and drug abusers by grouping genuine religious observation with criminality.¹⁸⁰ As relief from the Commission, the Complainant prayed for exemption entitlement of sacramental use of cannabis to accommodate him reasonably manifest his beliefs in accordance with his Rastafarian religion.¹⁸¹

¹⁷⁵ Brems (n 14 above) 360.

¹⁷⁶ As above.

¹⁷⁷ See annexure for further details.

¹⁷⁸ *Prince case* (n 10 above) 2.

¹⁷⁹ *Prince case* (n 10 above) 3.

¹⁸⁰ *Prince case* (n 10 above) 30.

¹⁸¹ *Prince case* (n 10 above) 6.

III. The decision of the Commission and margin of appreciation

While examining freedom to manifest one's religion, the Commission realized that legal restrictions preventing a person from performing actions dictated by his or her convictions diminish the right, nevertheless, it should be noted that such freedom does not in itself include a general right of an individual to act in his or her belief. As such, the right to hold religious belief should be absolute; the right to act on those beliefs should not.¹⁸² Concurring with the position of the government, the Commission concluded on this point that the right to practice one's religion must yield to the interests of society in an open and democratic society.¹⁸³

The African Commission basing on the UN HRC decision in *K. Singh Bhinder v Canada*¹⁸⁴ restricting the manner of manifestation of one's religious practices, upheld restrictions in South African legislations on the use and possession of cannabis as reasonable and serving a general purpose and that the Charter's protection of religion is indeed not absolute.¹⁸⁵ It further noted that the reasons for limitations of rights and freedoms as espoused under article 27(2) of the Charter must be founded on legitimate grounds where the evils of limitations are strictly proportional to the aim pursued and absolutely necessary in a democratic dispensation. Conceding to the state's margin of appreciation, the Commission reiterated that the practice was an undesirable dependence-producing substance and that the state had responded within the limits of its margin.¹⁸⁶

On the right to intrusion of his right to occupational choice, the Commission remarked that obligation incumbent on the state to protect the right of everyone access to labour market should be construed to allow restrictions depending on the nature and requirements of employment.¹⁸⁷ In such circumstances, given the legitimate interest the state had in restricting the use and possession of cannabis, it held that the complainant's occupation challenge can not be overcome should he chose to continue in defiance of legitimate restrictions. In other words, despite his liberty to occupational call, the Commission objected to the creation of a leeway to circumvent restrictions legitimately constructed for the good of the entire society.¹⁸⁸ Thus the Commission concludes that his choice disqualified him from inclusion by choosing to confront legitimate

¹⁸² *Prince case* (n 10 above) 41.

¹⁸³ As above.

¹⁸⁴ The UN CHR Communication No. 208/1986.

¹⁸⁵ *Prince case* (n 10 above) 43.

¹⁸⁶ As above.

¹⁸⁷ *Prince case* (n 10 above) 46.

¹⁸⁸ As above.

restrictions. In so finding, the Commission simply validated the discretionary powers of the respondent state.

Further, noting the critical role of cannabis alleged by the complainant as an inspiration to social interaction through worship of the Creator amongst Rastafarian followers, the Commission pointed out that participation in one's culture or religion should not be at the expense of the overall good of the society.¹⁸⁹ Given the outweighing balance in favour of the society, the Commission found the respondent state to have acted within its limits.

With respect to the principle of subsidiarity and the doctrine of margin of appreciation, the Commission accepted the fact that the two doctrines inform the African Charter like any other international or regional human rights instrument does in its respective supervisory functions.¹⁹⁰ The Commission further stated that the doctrines establish the primacy competency and duty on respondent state to promote and protect human and peoples' rights within its domestic order through article 56(6) of the African Charter which among other things, requires complainants to exhaust local remedies before filing a complaint before the Commission.¹⁹¹ It also noted that member states are given the required latitude under specific articles allowing them to introduce limitations.

The upshot of the *Prince* case is that it plausibly raises a number of questions. First, what are implications for allowing the respondent state margin of appreciation? Secondly, how wide is wide the margin granted? Thirdly, what happens to the supranational supervisory function of the Commission?

IV. Implications of the decision on the respondent state

Margin of appreciation expresses the notion that national authorities of each member state to the Charter ought to be allowed a certain measure of discretion in implementing the standards enshrined in the Charter. Through the doctrine, the Commission was able to defer to the respondent state a certain leeway in choosing appropriate response to matters affecting protection of rights within the state's jurisdiction. The following are some of the reflections on the Commission's decision.

¹⁸⁹ *Prince case* (n 10 above) 48.

¹⁹⁰ *Prince case* (n 10 above) 52.

¹⁹¹ As above.

The decision demonstrates primacy entrusted in the respondent state to give an opinion on the context of Charter rights in question. In its findings, the Commission stated that:

.....It recognizes its supervisory role and that it could not substitute itself for domestic procedures found in the respondent state which strive to give effect to the promotion and protection of human rights. It further takes cognizance of the fact that as a regional body it cannot, in all fairness, claim to be better situated than local Courts in advancing human and peoples' rights in member states.¹⁹²

Conceivably, the Charter leaves each member state in the first place, the task of securing the rights and freedoms it enshrines since state authorities are in a better position than an international Commissioner to give an opinion on the appropriate content of these requirements as well as on the necessity of the restriction or penalty intended to meet them.

Mindful of the environment under which margin of appreciation operates i.e. respect of limits such as in accordance with the law, necessary in a democratic society and pursuing legitimate aim, the decision demonstrated the confidence that the Commission had in the respondent state's level of rule of law. The Commission in its findings noted that the restrictions imposed were reasonable in that they seemed to serve general purpose with legitimate aim for the overall good in an open and democratic society.¹⁹³ Moreover, the Commission noted that it was careful not to contradict the decision of an esteemed judicial body as such would carry seeds of possible conflict between domestic and international legal systems.¹⁹⁴

The Commission further seemed to have used the doctrine as a design to balance the sovereignty of the respondent state with the need to ensure the observance of the engagements undertaken by the member states under the Charter. Macdonald argues that margin of appreciation gives the flexibility needed to avoid damaging confrontations between the ECtHR and the Contracting States over their respective spheres of authority and enables the Court to balance the sovereignty of Contracting Parties with their obligations under the Convention.¹⁹⁵ Equally, the African Commission appeared cautious not to upset the careful balances struck within the young and developing human rights system of member states of the AU.¹⁹⁶

The decision further demonstrates a liberal approach adopted by the African Commission towards the doctrine of margin of appreciation. Both articles 60 and 61 of the ACHPR as epitomized in the

¹⁹² As above.

¹⁹³ *Prince case* (n 10 above) 43.

¹⁹⁴ *Prince case* (n 10 above) 37.

¹⁹⁵ R Macdonald *The Margin of Appreciation in the European System of Human Rights* (1993) 123.

¹⁹⁶ See annexure para 37.

foregoing discussion leave an open-ended text which gives discretion to the African Commission to draw inspiration from other international instruments to address the anomalies obtaining from the Charter. Thus this particular decision can be said to find much of its *raison d'être* in the creativity of the African Commission.

V. The issue of the width of margin of appreciation granted

The jurisprudence of ECtHR indicates that the scope of margin of appreciation to member states varies amongst other factors, according to the nature of the Convention right at issue, its importance to the individual and the nature of activities concerned.¹⁹⁷ As a result, the wider the margin of appreciation granted, the more discretion the states are allowed in striking their own balance between individual rights and collective interests, in function of their particularities of their situation.¹⁹⁸

In the *Prince case*, the Commission weighed the importance of the individual right at issue against the importance of the aim pursued by the respondent state in limiting the right. The government alleged protection of general interests of society.¹⁹⁹ According to the Commission, the general rule of article 27 (2), meant that no one has a right to engage in any activity offending the rights and freedoms' recognized elsewhere.²⁰⁰ In light of the weight of individual interests, the Commission took into account both the importance of the interest at stake and the seriousness of interference. The outcome was couched in the manner that while the right to manifest one's religious beliefs should be absolute, the right to act on those beliefs should not be absolute. As such the right to one's religion must yield to the interests of the society in some circumstances.²⁰¹ In other words, much as the minorities like Rastafarians may freely choose the form of exercising their culture, yet, that should not grant them unfettered power to violate the norms that keep the whole nation together.

VI. The supervisory function of the Commission and national margin of appreciation

Despite the primary role accorded to the respondent state to secure promotion and protection of human rights, the domestic margin of appreciation does not adopt a hands-off approach, but

¹⁹⁷ *Sunday Times case* (n 54 above) 65.

¹⁹⁸ *Brems* (n 14 above) 336.

¹⁹⁹ *Prince case* (n 21) 37.

²⁰⁰ *Prince case* (n 10 above) 43.

²⁰¹ *Prince case* (n 10 above) 41.

rather goes hand in hand with the Commission's supervision.²⁰² The African Commission objected to the respondent state's implied restrictive construction of the doctrine which sought to superimpose itself over the Commission. For such precedent, the Commission noted would tantamount to ousting its mandate to monitor and oversee the implementation of the African Charter.²⁰³

Commenting on the ECtHR case-law, Brauch remarked that its task in exercising supervisory jurisdiction is not to take the place of competent national authorities, but rather to review the decisions delivered pursuant to their power of appreciation.²⁰⁴ This does not mean that supervision is limited to ascertaining whether the respondent state exercised its discretion reasonably, carefully and in good faith, the Court further looks at the interference complained of in light of the case as a whole and determine whether it was proportionate to the legitimate aim pursued and whether the reasons adduced by the national authorities to justify it are relevant and sufficient.²⁰⁵ In so doing, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principle embodied in the Convention. Moreover, the decision has to be based on acceptable and reasonable assessment of facts.²⁰⁶

4.6 Conclusion

The doctrine of margin of appreciation is novel in the jurisprudence of the African Commission. The doctrine is not found anywhere in the provisions of the African Charter which supposedly impedes its consideration. Nevertheless, a critical interrogation of the Charter reveals vacuity in the general limitation clause of article 27(2) whose liberal interpretation by the Commission *via* articles 60 and 61 of the ACHPR can inspire the doctrine with legal fortification. Besides, states have on occasions insinuated that they are in a better position than an international Commissioner to respond to their domestic needs. It follows thus that any finding for margin of appreciation certainly has to grapple with a variety of policy considerations. Finally, the doctrine of margin of appreciation as witnessed in *Prince* divulges a concession to national authorities, one of the central themes of criticisms albeit the margin of appreciation granted the state is never unlimited.

²⁰² *Prince case* (n 10 above) 53.

²⁰³ As above.

²⁰⁴ Brauch (n 6 above).

²⁰⁵ As above.

²⁰⁶ *Grigoriades v Greece*, ECtHR 2575, 2589, (1997) 25-26.

CHAPTER 5

THE DEFENSIBILITY OR INDEFENSIBILITY OF THE DOCTRINE UNDER THE AFRICAN HUMAN RIGHTS SYSTEM

5.1 Introduction

The ACHPR is not an accident of history. It might not have been created if the African states were not convinced that these rights were part of shared political, culture, and legal values already underlying the African legal systems.²⁰⁷ It was the intention of drafters to reflect this. Nevertheless, apart from this common background, important differences still subsist to date among member states. This chapter winds up the discussion of this study by assessing the relevance of margin of appreciation. To do this, the chapter analyses the defensibility and indefensibility of the doctrine in African human rights system.

5.2 Assessing defensibility and indefensibility of margin of appreciation in African human rights context

Margin of appreciation is criticized but also cherished. It is worth to attend to pros and cons made of the doctrine to discern an objective conclusion. The following discussion thus focuses on the balance.

5.2.1 Defensibility of margin of appreciation

I. Cultural relativism

Hatch noted that the call for tolerance was an appeal to the liberal philosophy regarding human rights and self-determination. It expressed the principle that others had to be able to conduct their own affairs as they see fit, which includes their lives according to beliefs of their society.²⁰⁸ For Chan

... human rights are general and vague. They allow plenty of room for reasonable disagreements over their scope and limitation. Thus a diversity of approaches can be legitimate as far as these disagreements are concerned. Because of their specific political moralities and societal contexts, Asian states can claim a wide

²⁰⁷ Mutua (n 21 above) 345-359.

²⁰⁸ E Hatch, *Cultural and Morality: the relativity of values in anthropology*, in: H Steiner and P Alston (1995) 196.

(but surely not arbitrary) margin of appreciation in interpreting the proper scope and limitation of human rights. Asian states are entitled to claim no less than this. But also no more.²⁰⁹

Indeed, this is a reminder of how diverse and heterogeneous the member states of the African Charter are, with local traditions and cultural values. As such, decision-making on issues of human rights becomes a difficult process. Rather it requires a prudent approach by the African Commission to accommodate diverse values manifested in member states through different possible ways consistent with fundamental rights. The doctrine of margin of appreciation can serve as a meticulous recognition and legitimation of diversities in legal traditions and cultures among member states.

II. Enforcement of human rights

Contextual differences encountered in Africa are much more fundamental and far-reaching than those existing at the community and national level. Moreover, the Charter has no strong system for judicial enforcement of human rights at the continental level. Brems argues that human rights enforcement is more often political than judicial in nature.²¹⁰ After all, any determination made with respect to human rights violation will indulge an element of deference to national authorities either in enforcement form or weighing contextual based arguments.²¹¹ Thus, the relative weakness of human rights enforcement at the universal level argues in favour of margin of appreciation for the national authorities which have an even more important role as first-line guardians of human rights.²¹² From a strategic perspective, the fact that the decision making bodies at universal or regional level enjoy less recognition and support may further argue for a receptive attitude to particularist national concerns.

III. Exclusive regimes of member states

Services linked to the army, civil service or prisons appear to inherently entail limitation of freedoms.²¹³ This may be justified by assuming that individuals in such constricted situations can be presumed to accept the limitations of their freedoms related to that situation, to the extent that one voluntarily joins the army or the civil service, and that a criminal can be said to accept prison

²⁰⁹ J Chan 'The global view of human rights', available at: http://www.hreoc.gov.au/hr_explained/global_view.html (accessed on 06/10/2006).

²¹⁰ Brems (n 14 above) 363.

²¹¹ As above.

²¹² As above.

²¹³ Brems (n 14 above) 378.

sentence as a consequence of his crime.²¹⁴ For example, corresponding to the various ranks in the army are differing responsibilities which in their turn justify certain inequalities of treatment in their disciplinary sphere.²¹⁵ In the civil world though, a similar situation would be labeled class justice, and be considered a serious form of discrimination.²¹⁶ The ECtHR noting on particular characteristic of the military life on individual stated:

The hierarchical structures which are a feature of life in the armed forces may colour every aspect of the relations between military personnel, making it difficult for a subordinate to rebuff the approaches of an individual of a superior rank or withdraw from a conversation initiated by him. Thus, what would in the civilian world be seen as an innocuous exchange of ideas which the recipient is free to accept or reject, may, within the confines of military life, be viewed as a form of harassment or the application of undue pressure in abuse of power.²¹⁷

Indeed, the proper functioning of an army is hardly imaginable without legal rules designed to prevent servicemen from undermining military discipline. As such national authorities seem to have preference in determination of these matters.

IV. Ensure effective response to current threats

The development of phenomenal challenges has exposed African states to new global threats. These include terrorism, internet crimes, child trafficking, homosexuality, drug trafficking among others.²¹⁸ While the extent of international terrorism in Africa has arguably been limited, it has not been absent. Besides lack of national legislations to deal with these new threats, efforts to devise a common strategy at continental level appear difficult if not impossible. This is because of the divergent opinions held on what constitutes these threats, even within a state.²¹⁹ Nonetheless, the imperative nature of these problems demands a prompt response for continuity of our societies. Margin of appreciation presupposes that member states enjoy a better position to deal with these threats. For example, despite divergence on homosexuality issues in Africa, the Constitution Court of South Africa appreciated such sexual orientation worth protection.

²¹⁴ As above.

²¹⁵ *Angel and Others v Netherlands*, 8 June 1976, ECtHR Publications (Ser. A) No. 22: 72.

²¹⁶ As above.

²¹⁷ *Larissis and Others v Greece*, 24 July 1998, ECtHR Reports of Judgments and Decisions, (Ser. A) No. 65: 50-51.

²¹⁸ Kafumba (n 16 above) 48.

²¹⁹ See section 1 of South Africa's proposed Anti-Terrorist Bill in the Report of the South African Law Commission Discussion Paper 92. In particular, criticisms arose from the definition of what constitutes a terrorist act, and from the detention without trial provisions.

...in the open and democratic society contemplated by the Constitution there must be mutually respectful co-existence between the secular and the sacred. The function of the Court is to recognize the sphere which each inhabits, not to force the one into the sphere of the other. The objective of the Constitution is to allow different concepts about the nature of human existence to inhabit the same public realm, and to do so in a manner that is not mutually destructive and that at the same time enables government to function in a way that shows equal concern and respect for all.²²⁰

V. Socio-economic considerations

Margin of appreciation to national authorities in matters of socio-economic suggest avoidance of unnecessary usurpation of the role of a legitimate government in prioritizing choices that are suitable and called for in their communities. According to Heyns, it is controversial in many jurisdictions to make socio-economic rights justiciable by domestic Courts.²²¹ The Protocol establishing the African Court of Human and Peoples Rights (ACtHPR or African Court) by making socio-economic rights in the African Charter justiciable in a regional Court, breaks new ground.²²² It is unprecedented to give power over the national budgets to an international tribunal and it remains to be seen to what extent this could work. Due to their nature of realization, socio-economic rights require participation of national authorities to assess best policies and make appropriate commitment of scarce resources.

VI. Ensure enhanced future cooperation of member states

It is fair to observe that there has been a significant level of reluctance on the part of member states to ratify the Protocol establishing the African Court. It took five years for the African Charter to come into effect.²²³ It took nearly six years before the Protocol came into effect, and it may take even longer for the ACtHPR to function.²²⁴ The reason for such delay has been contemplated as fear on the part of states to relinquish their sovereignty to a regional judicial body.²²⁵ Recently, a more serious concern, however, is the relationship of the African Court with the domestic situation. There is concern that the Court will undermine domestic Courts and as such would be 'unconstitutional', viewed from the domestic perspective. Introducing margin of appreciation under the African Charter would reinvigorate the somewhat unenthusiastic collaboration between the member states and the Charter organs.

²²⁰ *Fourie case* (n 174 above) 2.

²²¹ C Heyns 'The African Regional Human Rights: In need of Reform?' (2001) 2 *African Human Rights Law Journal* 2 167.

²²² As above.

²²³ N Pityane, 'Reflections on the African Court on Human and Peoples' Rights' (un published paper) (2003) 1.

²²⁴ As above.

²²⁵ Ouguergouz (n 17 above) 421.

VII. Implied trends of margin of appreciation

As the foregoing discussion in chapter 4 has indicated, there is already a determined trend among African states to claim better understanding of their situation as opposed to what is normally perceived as interferences. Even at the drafting of the Charter, Senghor urged drafters to constantly keep in mind the African unique values.²²⁶ For Matringe, the most significant preoccupation of the African Charter was to balance between tradition and modernity.²²⁷ Yet aspects of enforcement mechanisms are perceived as peculiar African features, particularly the non-binding decisions of the Commission. This has been explained from an African tradition perspective, in which conciliation prevails over confrontation, and thus consensus is preferred to judicial settlement of disputes.²²⁸ The maintenance of harmony would be more important than the determination of guilty or innocence.²²⁹ Such claims would seem to be common defence of some Charter member called upon to answer allegations of human rights violations.

With more than 700,000 prisoners awaiting trial in prison and devastated judicial infrastructure, the government of Rwanda decided to revive the traditional community-based system of justice called *Gacaca* to heal the nation.²³⁰ Since 1996, about 2500 people have been tried under the conventional Court system.²³¹ According to the Justice Ministry, the population that was in the hills at the time of the genocide would be 'witness, judge and plaintiff.'²³² The government argues that *Gacaca* is not intended to punish but rather reinvigorate harmony in the socially torn society. Overwhelmed by the complex situation and pressing social need obtaining from the aftermath of 1994 genocide, one can deduce that Rwanda has claimed margin of appreciation in dealing with the legacy of genocide.

²²⁶ Senghor (n 134 above) 122.

²²⁷ Matringe (n 136 above) 16-17.

²²⁸ A Christine 'Human rights in Africa', *Harvard international Review* (1985), 18.

²²⁹ E Kotey, *The African Charter on Human and Peoples' Rights: An exposition, analysis and critique.* (1982) 85 *University of Ghana Law Journal* 152.

²³⁰ M Pitsch, *The Gacaca law of Rwanda. Possibilities and prospects in adjudicating genocide suspects.* Working Paper for NUR-UMD Partnership, August (2002), 2. According to Pitsch, one government official described the situation as follows: ...the sheer bulk of genocide suspects and cases due for trial has placed severe strain on Rwanda's criminal justice system which is already crippled by poor infrastructure and the death of professionals during the genocide. Rwanda's prisons are heavily congested, and the cost of feeding and clothing prisoners is a drain on the economy. The lack of an adequate number of prosecutors, judges, and lawyers to try cases exacerbates the already bad situation. At the present rate, it would take over 200 years if Rwanda was to rely on the conventional Court system to deliver justice.

²³¹ Gabiro, Gabriel and Julia Crawford. 'Preparation for Unprecedented Justice System.' *Hirondelle News Agency*, 3 April 2001, 4.

²³² As above.

5.3.2 The indefensibility of the doctrine of margin of appreciation

I. Minority v majority risk

The history of minority oppression is not recent. Throughout the world, there are groups within each community that tend to be persistently outvoted, and hence, under-represented in the political process. They are the discrete and insular minorities, who are in a very real sense political captives of the majority.²³³ Without political influence and faced with prevalent resentment, minorities rely upon the judicial process to secure their interests.²³⁴ But because the national judicial process is often dominated by judges of the majority, it may be reluctant to protect the minorities. In such scenario, the international judicial and monitoring organs are often their last resort and only reliable avenue of redress.

The margin of appreciation doctrine may be theoretically justified as a means to promote democracy within communities.²³⁵ Yet, whenever the minorities exist, democracy is prone to undermine their interests. Majorities often monopolize political power through popular votes and thus use democratic forums to secure their selfish interests at the expense of the minority.²³⁶ In view of this inherent deficiency in the democratic system, especially in Africa where ethnic majority politics are predominant, national policies may warrant no reverence when minority rights and interests are implicated.²³⁷ Thus, in such circumstances, margin of appreciation would only seem to endorse the suffering plight of the minority. However, this study contends that such generalization of Africa would be misleading rather than informing with regard to some countries like South Africa which have recently shown considerable maturity in the degree of democracy.

II. Universality of human rights

The notion that human rights are universal stems from the philosophical view that human rights are inextricably linked to the preservation of human dignity. This means that respect for individual dignity is due equally to one and all, regardless of circumstance.²³⁸ Donoho commenting on the

²³³ E Benvenisti 'Margin of appreciation, consensus and universal standards' (1999) 31 *Journal of International Law and Politics* 843, 848.

²³⁴ M. Robert 'The origins of judicial activism in the protection of minorities' (1982), 1287 *Yale Law Journal* 91. See also *Organization Mondiale Contre Torture and Other v Rwanda* (2000) in: *African Human Rights Report* (ACHPR 1996) 24.

²³⁵ Benvenisti (n 233) 849.

²³⁶ As above.

²³⁷ For example, the 1994 genocide in Rwanda where the majority ruling group of Hutu unleashed massacre against the helpless Tutsi. Darfur is also is another Genocide in making.

²³⁸ M Piechowiak 'What are human rights? The concept of human rights and their extra legal justification' in: Hanski et al others (1999) 5 & 3 at 5.

universality nature of human rights noted that the widespread adoption of international treaties has established that human rights are universal in scope and content.²³⁹ The doctrine of margin of appreciation with its principled recognition of moral relativism and contextual realities may appear at odds with the concept of universality of human rights. Benvenisti argues that the doctrine risks undermining seriously the power entrusted in the international or regional bodies to enforce human rights values.²⁴⁰ It follows therefore, that states are expected to respect and apply international standards as enshrined in international human rights instruments. For the African Commission, primacy of national law over international law would defeat the purpose of codifying certain rights in international law, the whole essence of treaty making and the rights and freedoms enshrined in the Charter.²⁴¹ Hence, margin of appreciation in this context would be understood as one of the avenues derogating from the universality nature of human rights.

III. Prematurity of democracy in African countries

Democratic governance and respect for human rights are the foundations for political, social and economic progress.²⁴² They are also inherent to the goal of human development. It is clear however that post-colonial democratic experiment in Africa do not reflect a proud and successful history. Instead, waves of democracy have been countered by counter-waves.²⁴³ African victories in recent decades in overcoming colonial rule, apartheid, and other Cold War era forms of dictatorship, have marked important progress, empowering Africa's people and unleashing their own vision.²⁴⁴ While democratic advances have been made across the continent, serious challenges still remain. As is the case everywhere, democracy in Africa is a work in progress.²⁴⁵

Such account though questions Africa's endeavours to apply margin of appreciation with its attendant consequence of entrusting discretionary power to member states to deal with local situations obtaining in their jurisdictions. While the doctrine suggests a wide margin in the ECtHR,

²³⁹ Donoho (n 1 above) 1.

²⁴⁰ Benvenisti (n 233 above) 843.

²⁴¹ *Media Rights Agenda v Nigeria* (2000) in: *African Human Rights Law Reports* 200 (ACHPR 1998) 208.

²⁴² United Nations Development Programme. *Human Development Report 2002: Deepening democracy in a fragmented world*. Oxford: Oxford University Press (2002) 4.

²⁴³ M Mutua 'Why Redraw the Map of Africa: a Moral and Legal Inquiry' (1995) 11 *Michigan International Law* 16.

²⁴⁴ see L Diamond 'Promoting real reform in Africa' available at <http://www.chr.upac.za/ggp/coursematerial/int_law/africa%20chapter%20for%20Gyimah's%20book.rev.10-03-03.doc> (accessed on 16/10/ 2006). The author cites examples of South Africa, Ghana, Botswana and Mauritius among others as emerging democracies in Africa.

²⁴⁵ E Baimu 'The African Union: Hope for better protection of human rights in Africa?' (2001) 2 *African Human Rights Law Journal* 229, 229.

this has been linked among other factors, to high levels of democracy obtaining in High Contracting Parties.²⁴⁶ In other words, margin of appreciation requires to be used in an open and democratic society characterized by tolerance, pluralism and broadmindedness.²⁴⁷ In light of the above contrast between Africa and Europe, it would seem unsafe to apply margin of appreciation while the context and framework in Africa are not amenable to the use of the doctrine.

IV. Transitional argument

Margin of appreciation is possibly a transitional doctrine some say.²⁴⁸ The introduction of human rights is still taking root in member states of the world community. Once the system is established according to this view, the harmonized standards of the ECHR will give rise to neither need nor justification for deference to national authorities on matters of inherent individual rights.²⁴⁹ Equally, as more member states incorporate the Charter into their domestic legal regimes and the common standards reach their climax, one may even be tempted to question the *raison d'être* of margin of appreciation in Africa.²⁵⁰

V. Rhetoric device

The doctrine of margin of appreciation may be considered as no more than a rhetoric device used to soften confrontation or give to Strasbourg judges some sense of protection against accusations of usurpation of their mandate when deciding against a national measure.²⁵¹ Yutaka argues that despite express and repeated suggestions to margin of appreciation, the Strasbourg have instead opted to engage in their own review of the merits in applying the strict standard of proportionality.²⁵² In other words, margin of appreciation may serve nothing more than the role of

²⁴⁶ References to democracy and democratic society are numerous in the ECHR as well as in its case-law. The preamble mentions that human rights and freedoms are best maintained by an effective political democracy. Express mention of the concept of democracy is also found in the second paragraphs of articles 8-11 of the Convention as well as article 2(3) and 4 of the Fourth Protocol.

²⁴⁷ See in *Manoussakis and others v Greece*, where the Court stressed the “need to secure true religious pluralism, an inherent feature of democratic society”, in determining margin of appreciation and striking a proportionate balance: judgment of 26 September 1996, 44.

²⁴⁸ Yutaka (n 12 above) 232.

²⁴⁹ As above.

²⁵⁰ See R Singh ‘Is there a role for margin of appreciation in national law after the human rights act?’ 15 *European Human Rights Review Law Journal* 22, (1999), 5. The author urges margin of appreciation in domestic legal systems will hamper the effective incorporation of the Convention rights.

²⁵¹ Yutaka (n 12 above) 232.

²⁵² As above.

“window-dressing”. As such, its import would seem inconsequential and thus, presenting no genuine interest for African human rights system.

4.4 Conclusion

The application of margin of appreciation is one which takes a conscious investigation of circumstances relating to particular claims. It serves as a tool to accommodate a wide range of particularity claims related to cultural relativism as well as economic, social and political contexts. Some critics nevertheless view it as a potential avenue for perpetuation of human rights violations. Notwithstanding their ideas, this study observes that the current Africa transitional integration process would hardly be conceivable in disregard of diversity values embraced by AU member states. Besides, universal connotations for such notions as ‘morals’ or ‘public interests’ would only create endless confrontations between the African Court/Commission and member states.

CHAPTER 6

CONCLUSIONS AND RECOMMENDATIONS

6.1 Introduction

The question of margin of appreciation in dispensation of justice by an international judicial or quasi-judicial organ is more than a theoretical contemplation. This chapter proceeds to give a synopsis of the conclusions drawn from the entire study and specific recommendations to both the Commission and the member states as key players in African human rights scheme.

6.2 Summary and Conclusions

The doctrine of margin of appreciation is a natural product of distribution of enforcement powers between the Strasbourg organs and member states. It delineates the competence of national authorities and a legitimate area conferred on the Commission. Its application is informed by a number of considerations. They range from socio-economic, political to cultural peculiarities among member states.²⁵³ The scope of the width of margin depends on nature of the right, aim pursued, duty incumbent on the state, surrounding circumstances and existence or non-existence of common ground in democratic societies.²⁵⁴ The study has found that the underlying policy considerations for the application of margin of appreciation in European Convention system apply *mutatis mutandis* in African human rights system albeit variation of contexts obtaining in the two systems. Such variations of contexts according to this study, call for a stringent approach rather than a dismissive one. For diversity is a reality. In the words of Madeline, the expression 'human rights' carries different meanings, resonates differently in various parts of the world, and within countries depending on political preferences, ethnic association, religious views and, importantly, economic status...²⁵⁵

Expressions characterizing margin of appreciation as abdication of the Commission's duty of adjudication are not decisive either. It assumes that what the Charter gave the individual has been given back to national authorities by the exercise of judicial self-restraint. The study has shown that the doctrine of margin of appreciation serves as a natural distribution of powers between the

²⁵³ Brems (n 14 above) 362.

²⁵⁴ Mahoney (n 19 above) 5.

²⁵⁵ A Madeline in her first speech after being appointed as the United Nations High Commissioner for Human Right, The global view of human rights, available at: <http://www.hreoc.gov.au/hr_explained/global_view.html> (accessed on 06/10/2006).

Commission and the national authorities. Indeed, it is a shared responsibility for enforcement, with the Commission having ultimate power of decision.²⁵⁶

The critics of margin of appreciation also submit that the doctrine is not contained in the Charter and hence may be abused or risks defying universality of human rights. Notwithstanding their founded fears, the study observes that even the ECHR does not provide for the doctrine yet the Court applies it. As such, African states like their European counterparts experience threats which call for margin of appreciation. While the risk of abusing the doctrine may be true, it is also worth noting that such generalization may be misleading. In addition, it is recognized that human rights are neither absolute nor uniform to everyone, everywhere at all times. Therefore, to superimpose a human rights code would exclude those people whose practice do not identify with that code and hence fail to accommodate everyone.

Moreover, the African Charter has been subjected to stringent criticisms due to its apparent inability and conservatism to improve the situation.²⁵⁷ The Charter was drafted in a world that no longer exists. In the early 1980s Africa was emerging from colonialism, apartheid was alive and well, the cold war was raging, and the idea of human rights had gained only tentative acceptance. Kéba M'baye, scholarly believed to be 'the father of the African Charter' said that 'the Charter was the best that could be achieved at the time'. True as it might be, but there is need to appreciate that times have changed and more should and can be achieved. Mahoney while commenting on evolution of democracy wrote that the drafters of the ECHR could not have kept a blind eye of the fact that, for example, freedom of expression meant something different in 1950 from what it meant 50 or 100 years earlier.²⁵⁸

²⁵⁶ *Prince case* (n 10 above) 53.

²⁵⁷ Heyns (n 221 above) 156.

²⁵⁸ Mahoney (n 81 above) 64.

6.3 Recommendations to the African Commission and Court

6.3.1 Take precautionary judicial activism

It is disputable that in the process of legal adjudication judges merely uncover and expound pre-existing law without making any new law; or that a single correct solution can be reached in every case by logical application of relevant rules of law.²⁵⁹ Judicial activism means that judges modify the law from what it previously was or from what was previously stated in existing legal texts, often there by substituting their decision for that of elected representatives.²⁶⁰ The indeterminacy or vague nature of the Charter can be used by the African Commission and Court to fill the gaps through the process of judicial activism. In so doing, recourse should be made to margin of appreciation in circumstances which befit. Moreover, stringency to endorse genuine concerns of a legitimate government may sometimes lead to disregard of the Charter and proceed the way it wishes with no degree of supervision at all.

6.3.2 Need to interpret the Charter in light of present day conditions

The African Charter of 1981 was clearly not intended to last for one day, but to provide for future generations the kind of continuing protection that a national constitution provides for individual liberty. Dickson of the Canadian Supreme Court observed:

A constitution... is drafted with an eye to the future. Its function is to support a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or a Charter of Rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot be easily repealed or amended. It must, therefore, be capable of growth and development overtime to meet new social, political and historical realities often unimagined by its framers.²⁶¹

Mahoney commenting on the ECHR observed that it was not an instrument for only 1950s generation but also for the future generations to come.²⁶² In other words, the text was not frozen to the connotations it had at the time of drafting and may not consequently bear any legitimate future connotations. For that it is to assume that the aim pursued by the drafters, as expressed in the text, was to establish a static Convention. Likewise, it would defeat the spirit of the African Charter to construe its text as static and frozen. As such, having regard to contemporary challenges such as civil wars, terrorism, child trafficking among others calls for such liberal

²⁵⁹ M Mchugh 'The Function of Law Making in Judicial Process', Part I & II, 15 *Australian Law Journal* (1988) 116.

²⁶⁰ Mahoney (n 79 above) 58.

²⁶¹ *Hunter v Southam* 2 S.C.R. 145, (1984) 155.

²⁶² Mahoney (n 79 above) 62.

understanding by the African Commission and Court to allow member states live to these challenges.

6.3.3 Be informed by empirical evolution

In order to reduce to a minimum the inevitable elements of judges and Commissioners looking at society's values through their own spectacles, there should be some methodology or evidence upon which they can base their decisions. The evolving standards of the Charter should be informed by empirical evidence and should not simply be plucked from the sky by the judges or Commissioners.²⁶³ For example in *Dudgeon*, the ECtHR relied on the developments that had occurred in the legislations of High Contracting Parties in order to discern a unifying factor which the respondent state had not followed.²⁶⁴ Accordingly, the African Commission and Court ought to have regard to the degree of consensus and the manner in which member states address litigations at issue. Such approach would help make informed decision and ease likely tensions between the African Commission and Court and member states by allowing margin where due on the basis of consensus.

6.3.4 Identify guiding values

Understanding of fundamental values pursued by a legal instrument helps to identify a set of solutions that match the aspirations and expectations of its people that it purports to protect. Chief Justice Warren of the American Supreme Court wrote that the meaning of the constitution should be drawn from the evolving standards of decency that mark progress of a maturity society.²⁶⁵ Indeed, it is paramount for the African Commission and Court to take cognizance of democratic values and different ethos in human rights matters obtaining in member states to discern satisfying results to claims under its attention. Such findings may include among others, the need to leave states settle their concerns as befits the interests of their society.

²⁶³ See N. Rachel Pine, *Speculation and reality: The role of facts in judicial protection of fundamental rights* (1998) 136 *University of Pennsylvania Law Review* 655. She argues *inter alia*, that “standards of constitutionality should be informed by empirical truth”.

²⁶⁴ *Dudgeon* (n 112 above).

²⁶⁵ *Drop v Dulles* 35 U.S. 86 (1958) 100-101.

6.4 Recommendations to member states

6.4.1 Support both the Court and Commission's work

The Commission's lack of resources to undertake a wide range of investigations into socio-economic, political and cultural effects obtaining in Charter member states impairs the Commission efforts towards reaching informed decisions. This study contends that a fully supported African Commission and Court, both morally and financially, would enhance efforts to make case-by-case analysis from different member states and make judicial self-restraint where necessary.

6.4.2 Promote democracy and rule of law

Margin of appreciation as a designed response to state claims takes cognizance of the degree of liberty and freedom enjoyed by the concerned society. The Commission for example, warned the government of Nigeria not to override fundamental rights guaranteed by the constitution and international law, for such restriction on rights diminishes public confidence in rule of law.²⁶⁶ According to Richard, a democratic society must be governed by rule of law which protects its people from anarchy, allow them to plan their affairs with reasonable confidence that they can know in advance the legal consequences of actions and guarantee against official arbitrariness.²⁶⁷ It is against such trust within a government that the Commission can have confidence that discretionary powers will not be abused.

6.4.3 Consider amendments to the Charter

Judicial activism as discussed above raises the scope of judges to fill the gaps of indeterminate and open-textured legal instruments. This sometimes may illegitimately enlarge their role in society to one of legislating on general policy matters and of exceeding their contemplated function of interpretation. To avoid a situation where Commissioners or judges may act as makers and re-makers of social policy at their whim, member states should amend the Charter to make it a living instrument with contemporary challenges of Africa.

²⁶⁶ *Media Rights Agenda v Nigeria* (n 241 above) 208.

²⁶⁷ F Richard 'The Rule of Law as a Concept in Constitutional Discourse, (1997) 97 *Colombia Law Review* 1, 2.

6.4.4 Invoke margin in imperative situations

A limitation may never have a consequence that the right itself becomes illusory. The Commission in *Media Rights Agenda v Nigeria* remarked that the reasons for possible limitations must be founded in a legitimate state interests and the evils of limitation of rights must be strictly proportionate with and absolutely necessary for the advantages envisaged.²⁶⁸ In other words, any restriction should be an exception not a principle. Member states should thus invoke margin of appreciation out of a pressing social need. As such, the African Commission and Court have to satisfy that national authorities based their decision on acceptable assessment of relevant facts.

6.5 Conclusion

This study concludes that framing and implementing policies can be shaped by distinct cultural values and historical experiences, requiring prudent assessment of specific needs by concerned states. The combination of factors of legitimacy, subsidiarity and cultural diversity that inform Strasbourg organs can likewise present a sound rationale for judicial restraint to the African Court and Commission. In fact, universality of human rights does not mean that the rights of every human being are the same for everyone, all of the time and in every circumstance. However, in applying margin of appreciation, sufficient attention should be paid by the Court and Commission to ascertain whether the interference meets the standards of an open and democratic society founded on legitimate public interests in which case the evils of limitations of rights must be strictly proportionate with and absolutely necessary for the advantages which are to be achieved. As such, the Commission or Court should retain the ultimate power to oversee and monitor the implementation of the African Charter in member states.

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²⁶⁸ *Media Rights Agenda v Nigeria* (n 241 above) 211.

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ANNEXURE

255/2002 – Garreth Anver Prince /South Africa

Rapporteur:

32nd Session: Commissioner Chigovera

33rd Session: Commissioner Chigovera

34th Session: Commissioner Chigovera

35th Session: Commissioner Chigovera

36th Session: Commissioner Chigovera

Summary of Facts

1. The complaint is filed by Mr. Garreth Anver Prince, a South African citizen of 32 years old, against the Republic of South Africa.
2. The Complainant alleges that despite his completion of the academic requirements for admission as an attorney in terms of the Attorney's Act 53 of 1979, and despite his willingness to register for a contract of community service for a period of one year, which is a requirement under the said ACT, the Law Society of the Cape of Good Hope (the Law Society) declined to register his contract of community service.
3. The Complainant alleges that the Law Society's refusal to register him was based on his disclosure, made in his application with the Law Society, that he had two previous convictions for possession of cannabis under section 4(b) of the Drugs and Drug Trafficking ACT and his expressed intention to continue using cannabis. The Complainant stated that the use of cannabis was inspired and required by his Rastafari religion. The Law Society held that such a person was not a fit and proper person to be admitted as an attorney.
4. The Complainant alleges that reasoning and meditation are essential elements of the religion. The use of cannabis is central to these essential practices of the religion that serve as a form of communion. He alleges that the use of cannabis was believed to open one's mind and helped Rastafari gain access to the inspiration provided by Jah Rastafari, the Living God. He further alleges that the use of Cannabis in Rastafari religion was the most sacred act surrounded by very strict discipline and elaborate protocol. The use of the herb, as it is

commonly known, is to create unity and assist in establishing the eternal relationship with the Creator.

Complaint

5. The Complainant alleges violations of Articles 5, 8, 15 and 17(2) of the African Charter on Human and Peoples' Rights.
6. The Complainant prays that he be entitled to an exemption for the sacramental use of cannabis reasonably accommodating him to manifest his beliefs in accordance with his Rastafari religion.

Procedure

7. The undated complaint was received at the secretariat on 12th August 2002.
8. On 16th August 2002, the Secretariat wrote to the Complainant acknowledging receipt of the complaint, and informing him that his complaint has been registered and scheduled for consideration at the Commission's 32nd Ordinary Session.
9. At its 32nd Ordinary Session held from 17th – 23rd October 2002 in Banjul, The Gambia, the African Commission considered the complaint and decided to be seized thereof.
10. On 4th November 2002, the Secretariat wrote to the complainant and Respondent State to inform them of this decision and requested them to forward their submissions on admissibility before the 33rd Ordinary Session of the Commission.
11. On 19th December 2002, the Secretariat received the Complainant's written submissions on admissibility of the communication, which was forwarded to the Respondent State on 17th February 2003. In the same letter, the Secretariat reminded the Respondent State to forward its written submissions on the admissibility of the communication before the 33rd Ordinary Session.
12. By a Note Verbale of 31st March 2003, which was not received in a legible print out form, the Respondent State confirmed receipt of the Commission's correspondences and requested the Commission to extend the deadline for the submission of its response on the admissibility of the complaint for another three months.

13. On 8th April 2003, the Secretariat wrote to the Respondent State confirming receipt of their correspondence and requesting them to resend the said request to it as the same did not reach the Secretariat in a legible print out form.
14. By a fax of 5th May 2003, the Respondent State confirmed its request for more time to enable it prepare and forward its written submissions on admissibility of the communication to the Commission.
15. At its 33rd Ordinary Session held in Niamey, Niger from 15th to 29th May 2003, the African Commission examined the communication and postponed its decision on admissibility to its 34th Ordinary Session granting the Respondent State more time as per its request.
16. On 12th June 2003, the Secretariat wrote to the complainant and the Respondent State informing them of this decision and further reminding the latter to forward its written submissions on admissibility of the same before the 34th Ordinary Session of the Commission.
17. On 12th September 2003, the Secretariat of the African Commission received the written submissions on admissibility of the Respondent State. This was forwarded to the complainant on 23rd September 2003.
18. At its 34th Ordinary Session held in Banjul, The Gambia from 6th to 20th November 2003, the African Commission examined the complaint and declared it admissible.
19. On 10th December 2003, the Secretariat wrote to the parties informing them of this decision and further requesting them to forward to the African Commission their respective written submissions on the merits of the communication before the 35th Ordinary Session.
20. On 12th March 2004, the Respondent State forwarded its written submissions on the merits of the communication and expressed its wish to lead oral arguments on the matter during the 35th Ordinary Session of the African Commission, receipt which the Secretariat acknowledged on 17th March 2004. A similar request to address the African Commission orally was sent to the African Commission by the complainant on 11th and 23rd March 2004.
21. On 17th March 2004, the Secretariat of the African Commission forwarded a copy of the Respondent State's written submissions on the merits to the complainant.

22. By a Note Verbale of 21st May 2004, the Respondent State informed the Secretariat that the parties in the matter have consulted on the date for the hearing of the communication by the African Commission and kindly requested the latter to consider the same on the 29th May 2004, which date would be most suitable for them to appear.
23. The parties have concluded their exchange of submissions on the merits. They are now both requesting the African Commission to allow them to lead oral arguments to complement their submissions on the same. The African commission granted them audience as requested to enable them complement their written submissions and to enable the African Commission to engage the parties during their presentations.
24. At its 35th Ordinary Session held in Banjul, The Gambia from 21st May to 4th June 2004, the African Commission examined the complaint and decided to defer its decision on the merits to the 36th Ordinary Session.
25. On 17th June 2004, the Secretariat informed both parties of this decision.
26. At its 36th Ordinary Session that took place from 23rd November to 7th December 2004, the African Commission considered the communication and took a decision on merits thereto.

LAW

Admissibility:

27. Since both parties have not contested the issue of admissibility of this communication, and since the complaint complies with the requirements under Article 56 of the African Charter, the African Commission decided, unanimously, to declare it admissible at its 34th Ordinary Session held in Banjul, The Gambia from 6th to 20th November 2003.

Decision on Merits:

28. As per the original complaint, the Complainant is a 32 years old man who wishes to become an attorney in the courts of South Africa. Having satisfied all the academic requirements of the South African Attorney's Act (the Act), he applies to register a contract of community service with the Law Society of the Cape of Good Hope (the Law Society). Under the same Act, registering articles of clerkship or performing community Service, as Mr. Prince wished to do, is another requirement that an applicant should fulfil before he/she could be admitted as an attorney to practice before the High Court. Per the provisions of the Act, the applicant, such as

Mr. Prince should serve for a period of one year. Before serving so, however, the Act requires that the applicant should provide proof to the satisfaction of the Law Society that he/she is “fit and proper person.” In his application to the Society, and as part of the legal requirement, Mr. Prince disclosed not only that he had two previous convictions for possession of cannabis under the Drugs and Drug Trafficking Act (the Drugs Act) but that he intended to continue using cannabis as inspired and required by his Rastafarian religion.

29. The Law Society declined to register Mr. Prince’s contract of community service taking the view that a person who, while having two previous convictions for possession of cannabis, declares his intention to continue using the substance, is not a “fit and proper person” to be admitted as an attorney. Mr. Prince alleged that the Law Society’s refusal to register meant that as long as he adhered to the requirements of his Rastafari faith, he would never be admitted as an attorney. Accordingly, Mr. Prince brought this complaint alleging violation of Articles 5, 8, 15, and 17(2) of the African Charter. In his prayers to the African Commission, the complainant requested the African Commission to find the Respondent in violation of the said Articles, and that he be entitled to an exemption for the sacramental use of cannabis reasonably accommodating him to manifest his beliefs in accordance with his Rastafari religion.

30. In elucidating his claims, the complainant cites two South African statutes as having an impact on the practice of the Rastafarian religion: the Drugs Act and the Medicines and Related Substances Act (the Medicines Act). The former lists cannabis as an undesirable dependence-producing substance and prohibits its use and possession, in line with the stated purpose of the Act: to prohibit the use and possession of dependence-producing substances and dealing in such substances. It, however, exempts the use or possession of this substance in certain circumstances such as for medicinal purposes, subject to the provisions of the Medicines Act, which in turn regulates the registration of medicines and substances. The latter Act, however, prohibits the use or possession of cannabis except for research and analytical purposes. The complainant alleges that the purposes of the prohibitions contained in these two Acts coincided and hence both Statutes proscribed the sacramental use of cannabis and therefore impacted upon the religious practices of Rastafari. The proscriptions are unlimited in terms that they also encompassed the use or possession of cannabis by Rastafari for bona fide religious purposes failing to distinguish between Rastafari and drug abusers thereby grouping genuine religious observation with criminality. He alleges that the Respondent State thus violated his right to dignity [Article 5], his right to freedom of religion [Article 8], his right to occupational choice [Article 15], and his right to a cultural life [Article 17(2)].

31. The complainant, in requesting for an exemption for sacramental use of cannabis, further explains that he does not ask for the overall decriminalisation of cannabis, rather for a reasonable accommodation to manifest his beliefs in accordance with his Rastafari religion. Such reasonable accommodation ensures a religiously pluralistic society that is an important principle of any democratic society. He adds that Rastafari is a minority and vulnerable group, a political minority not able to use political power to secure favourable legislations for themselves.
32. In its initial response of 5th September 2003, the Respondent State argues that attorneys are obliged to uphold the law and wilful defiance of the law suggests that such a person is not fit and proper to be admitted as an attorney. This is so even if the person applying for admission believes that a law or a provision thereof contravenes his or her fundamental rights. Until such time that a law or a provision thereof has been declared unconstitutional or has been changed by legislative or other means, everyone has duty to obey the law or provision in question.
33. The Respondent State further argues that any religious practices must be conducted within the framework of the law and must, if necessary, be adapted to comply with the law as failure to do so will result in anarchy. Rastafari is a genuine religion protected by the South African Constitution. The recognition of and the right to practice a religion and engage in associated activities may not be exercised in a manner which is inconsistent with the Bill of Rights and the Rule of Law under which no one would be punished except for a distinct breach of law to which everyone is subject. Religious practices and the freedom to practice a religion must be conducted strictly in accordance with the law, which must be obeyed.
34. Contrary to the complainant's allegation, the Respondent State avers that the fact that reasonable limitations are placed on the practice of a religion in the interests of society does not negate the essential right to freedom of religion. The Constitution permits limitation of rights without which the rights of others may be infringed with unintended consequences. The prohibition on the use of cannabis is a reasonable and permissible limitation on the freedom of religion. The legal restrictions placed on the use of cannabis do not erode the necessity to ensure religious pluralism, are rational and legitimate and do not invade the right any further than it needs.
35. The Respondent State further avers that lawyers have a duty, at all times, to uphold the Constitutions and the rule of law, which includes adhering to the law, adapting ones religious practices to confirm with the law and generally setting an example to others. The complainant's professional difficulties are due to his refusal to accept and adhere to the

relevant laws and that the worship of the Creator is possible without cannabis. The impugned provisions of the law do not compel Rastafari to desist from taking part in an aspect of the cultural life of their community.

36. In conclusion, the Respondent State admits that the impugned provisions do prohibit the use or possession of cannabis for bona fide religious purposes but they are not overbroad and that the Constitutional Court has upheld the restrictions placed on the use of cannabis.

37. In its further written submissions on the merits, the Respondent State raised the following points:

- That the matter has been carefully considered by the South African Courts which found that while the legislations in question did limit Mr. Prince's constitutional rights, specifically the right to freedom of religion, such limitations were justifiable under the South African Constitution which allows limitations only in terms of law of general application to the extent that such limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom. Limitations may also take place taking into account all relevant factors, including:
 - The nature of the right;
 - The importance of the purpose of the limitation;
 - The nature and extent of the limitation;
 - The relation between the limitation and its purpose; and
 - The less restrictive means to achieve the purpose.
- That in considering the matter, the South African Constitutional Court made a careful analysis of the Bill of Rights and struck a careful balance between competing interests in society, while remaining acutely aware of the historical context and unique feature of the South African society of which it is the highest judicial body.
- That the African Commission should apply extreme care in considering this matter as a determination that will in effect contradict the decision of an esteemed judicial body will inevitably carry seeds of possible conflict between domestic and international legal systems, and will upset the careful balances struck within the young and developing human rights system of member states of the AU.

- That the South African Courts, in denying Mr. Prince's application, and in striking a balance between his rights and the interests of the wider society, did not only do so with South African domestic law in mind, but in the process also took into account the widest possible scope of international law, both customary international law and treaty law, including the African Charter. By using the same international law sources as the South African Courts, the African Commission should come to the same conclusions as that of the South African domestic courts.

- That, in order to allow the domestic legal system of South Africa co-exist with the African Charter without undue tension, the African Commission should apply the following two methods of interpretation:
 - ***The Principle of Subsidiarity*** which delimits or distributes powers, functions and responsibilities between the state on the one hand, and individuals and groups within the jurisdiction of the state, on the other. Equally, this can be applied to distribute powers between national authorities of State Parties to the African Charter and the African Charter itself. The national authorities should have the initial responsibility to guarantee rights and freedoms within the domestic legal orders of the respective states, and in discharging this duty, should be able to decide on appropriate means of implementation. The African Commission should therefore construct its role as subsidiary, as a narrower and supervisory competence in subsequently reviewing a state's choice of action against the standards set by the provisions of the African Charter. In terms of this construction, the African Commission should not substitute for domestic institutions in the interpretation and application of national law.

 - ***The margin of appreciation doctrine***, which is the logical result of the application of the principle of subsidiary. It's a discretion that a state's authority is allowed in the implementation and application of domestic human rights norms and standards. This discretion that the state is allowed, rests on its direct and continuous knowledge of its society, its needs, resources, economic and political situation, legal practices, and the fine balance that need to be struck between the competing and sometimes conflicting forces that shape a society. Accordingly, the African Commission, in considering the matter, has to take into account the legal and factual situation in South Africa. It should not view this communication ***in abstracto***, but in the light of the specific circumstances pertaining in the Respondent State. The South African Constitutional Court did take into account

such specific circumstances: the *ratio* for the decision to limit the right to freedom of religion in terms of the Constitution was that the use of cannabis by Rastafari could not be sanctioned without impairing the State's ability to enforce its drug legislation in the interest of the public at large.

38. The Respondent State finally avers that the African Charter does not prescribe how States Parties should achieve the protection of the rights enshrined within the domestic jurisdiction, but leaves the way in which such protection is to be achieved to the discretion of States Parties.

39. The African Commission has examined the complaint and the various documents thereto and decides as follows.

Violation of the right to freedom of religion: Article 8 of the African Charter

40. The complainant alleges violation of this Article due to the Respondent State's alleged proscription of the sacramental use of cannabis and for failure to provide a religious exemption for Rastafari. The crux of his argument is that manifestation of Rastafari religious belief, which involves the sacramental use of cannabis, places the Rastafari in conflict with the law and puts them at risk of arrest, prosecution and conviction for the offence of possession or use of cannabis. While admitting the prohibition serves a rational and legitimate purpose, he nonetheless holds that this prohibition is disproportionate as it included within its scope the sacramental use of cannabis by Rastafari.

41. Although the freedom to manifest one's religion or belief cannot be realized if there are legal restrictions preventing a person from performing actions dictated by his or her convictions, it should be noted that such a freedom does not in itself include a general right of the individual to act in accordance with his or her belief. While the right to hold religious beliefs should be absolute, the right to act on those beliefs should not. As such, the right to practice one's religion must yield to the interests of society in some circumstances. A parent's right to refuse medical treatment for a sick child, for instance, may be subordinate to the state's interest in protecting the health, safety, and welfare of its minor children.

42. In the present case, thus, the Commission upholds the Respondent State's restriction, which is general and happens to affect Rastafari incidentally (*de facto*), along the lines of the UN Human Rights Committee, which, in the case *K. Singh Bhinder v. Canada*, (*Communication No. 208/1986*) upheld restrictions against the manner of manifestation of one's religious

practice. That case concerned the dismissal of the complainant from his post as maintenance electrician of the government-owned Canadian National Railway Company. He had insisted on wearing a turban (as per the edicts of his Sikh religion) instead of safety headgear at his work, which led to the termination of his labour contract. The UN Human Rights Committee held:

If the requirement that a hard hat be worn is seen as a discrimination de facto against persons of the Sikh religion under Article 26 (of the ICCPR), then, applying the criteria now well established in the jurisprudence of the Committee, the legislation requiring that workers in federal employment be protected from injury and electric shock by wearing of hard hats is to be regarded as reasonable and directed towards objective purpose that are compatible with the ICCPR.

43. The African Commission considers that the restrictions in the two South African legislations on the use and possession of Cannabis are similarly reasonable as they serve a general purpose and that the Charter's protection of freedom of religion is not absolute. The only legitimate limitations to the rights and freedoms contained in the African Charter are found Article 27(2); i.e. that the rights in the African Charter "shall be exercised with due regard to the rights of others, collective security, morality, and common interest." The limitation is inspired by well-established principle that all human and peoples' rights are subject to the general rule that no one has the right to 'engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms' recognised elsewhere. And the reasons for possible limitations must be founded in a legitimate state interest and the evils of limitations of rights must be strictly proportionate with and absolutely necessary for the advantages, which are to be obtained. It is noted that the Respondent State's interest to do away with the use of cannabis and its abuse/trafficking stems from the fact that, and this is also admitted by the complainant, cannabis is an undesirable dependence-producing substance. For all intents and purposes, this constitutes a legitimate limitation on the exercise of the right to freedom of religion within the spirit of Article 27(2) cum Article 8.
44. Besides, the limitations so visited upon the complainant and his fellow Rastafari fall squarely under Article 2 of the African Charter which requires States to ensure equal protection of the law. As the limitations are of general application, without singling out the complainant and his fellow Rastafari but applying to all across the board, they cannot be said discriminatory so as to curtail the complainant's free exercise of his religious rights.

Violation of the right to occupational choice: Article 15 of the African Charter

45. The complainant has alleged that because of his religious beliefs, the Law Society refused to register his contract of community service, thereby violating his right to occupational choice. He argued that the effect of the legal restrictions on cannabis in effect denied the Rastafari access to a profession.
46. One purpose of this Charter provision is to ensure that States respect and protect the right of everyone to have access to the labour market without discrimination. The protection should be construed to allow certain restrictions depending on the type of employment and the requirements thereof. Given the legitimate interest the State has in restricting the use and possession of cannabis as shown above, it is held that the Complainant's occupational challenge can be done away with should he chose to accommodate these restrictions. Although he has the right to choose his occupational call, the Commission should not give him or any one a leeway to bypass restrictions legitimately laid down for the interest of the whole society. There is no violation, thus, of his right to choose his occupation as he himself chose instead to disqualify himself from inclusion by choosing to confront the legitimate restrictions.

Violation of the right to dignity and cultural life: Articles 5 and 17(2) of the Charter

47. The complainant lists down the main characteristics for identifying the Rastafari way of life (culture): hairstyle, dress code, dietary code, usage of cannabis, the worship of Jah Rastafari, the Living God and others. He further states that the critical form of social interaction amongst the followers of this religion is the worship of the Creator, which is not possible without cannabis, and to which the Respondent State argues to the contrary.
48. The Commission notes that the participation in one's culture should not be at the expense of the overall good of the society. Minorities like the Rastafari may freely choose to exercise their culture, yet, that should not grant them unfettered power to violate the norms that keep the whole nation together. Otherwise, as the Respondent State alleged, the result would be anarchy, which may defeat everything altogether. Given the outweighing balance in favour of the whole society as opposed to a restricted practice of Rastafari culture, the Commission should hold that the Respondent State violated no cultural rights of the complainant.
49. With respect to the alleged violation of the right to human dignity, the Commission holds that the complainant's treatment by the Respondent State does not constitute unfair treatment so

as to result in his loss of self-worth and integrity. As he or his fellow Rastafari are not the only one's being proscribed from the use or possession of cannabis, the complainant has no grounds to feel devalued, marginalized, and ignored. Thus, the Commission should find no violation of the right to dignity.

With Respect to the arguments of the Respondent State invoking the inter-related ***Principle of Subsidiarity*** and the ***margin of appreciation doctrine***:

50. The African Commission notes the meaning attached to these doctrines by the Respondent State as outlined in its submissions to the former. The principle of subsidiarity indeed informs the African Charter, like any other international and/or regional human rights instrument does to its respective supervisory body established under it, in that the African Commission could not substitute itself for internal/domestic procedures found in the Respondent State that strive to give effect to the promotion and protection of human and peoples' rights enshrined under the African Charter.
51. Similarly, the margin of appreciation doctrine informs the African Charter in that it recognises the Respondent State in being better disposed in adopting national rules, policies and guidelines in promoting and protecting human and peoples' rights as it indeed has direct and continuous knowledge of its society, its needs, resources, economic and political situation, legal practices, and the fine balance that need to be struck between the competing and sometimes conflicting forces that shape its society.
52. Both doctrines establish the primary competence and duty of the Respondent State to promote and protect human and peoples' rights within its domestic order. That is why, for instance, the African Charter, among others, requires complainants to exhaust local remedies under its Article 56. It also gives Member States the required latitude under specific Articles in allowing them to introduce limitations. The African Commission is aware of the fact that it is a regional body and cannot, in all fairness, claim to be better situated than local courts in advancing human and peoples' rights in Member States.
53. That underscored, however, the African Commission does not agree with the Respondent State's implied restrictive construction of these two doctrines relating to the role of the African Commission, which, if not set straight, would be tantamount to ousting the African Commission's mandate to monitor and oversee the implementation of the African Charter. Whatever discretion these two doctrines may allow Member States in promoting and protecting human and peoples' rights domestically, they do not deny the African Commission's

mandate to guide, assist, supervise and insist upon Member States on better promotion and protection standards should it find domestic practices wanting. They do allow Member States to primarily take charge of the implementation of the African Charter in their respective countries. In doing so, they are informed by the trust the African Charter has on Member States to fully recognise and give effect to the rights enshrined therein. What the African Commission would not allow, however, is a restrictive reading of these doctrines, like that of the Respondent State, which advocates for the hands-off approach by the African Commission on the mere assertion that its domestic procedures meet more than the minimum requirements of the African Charter.

For these reasons, the African Commission finds no violation of the complainant's rights as alleged.

Adopted at the 36th Ordinary Session of the African Commission on Human and Peoples' Rights, 23rd November 7th December 2004, Dakar, Senegal.