

The effect of an African Court on the domestic legal orders of African states

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1 Introduction

Africa's dismal human rights record is well documented. The African Commission on Human and Peoples' Rights (African Commission) has also proved to be largely inadequate and ineffective in ensuring the protection of human rights on the African continent.¹ This is mostly because the African Commission can only report on human rights violations and make recommendations to the Assembly of Heads of State and Government of the Organisation of African Unity (OAU)/African Union (AU). Most critics believe that if the African Commission is complemented by an African Court on Human and Peoples' Rights (African Court), then the latter may be just what is needed to 'give teeth' to the African human rights system.

After much debate, spanning four decades and a multitude of different fora, a Protocol on the Establishment of an African Court on Human and Peoples' Rights (Protocol on the African Court or Protocol) was

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¹ The African Commission was established by the African Charter on Human and Peoples' Rights (African Charter) and it was established under the auspices of the Organisation of African Unity (OAU). Its mandate is to promote and protect human rights, as stated in art 45 of the African Charter. It does this by receiving and acting upon written communications of human rights violations from state parties to the African Charter. Written communications are made in accordance with art 47 of the African Charter.

eventually adopted by the OAU Assembly.² The Protocol is now open for ratification. It will only enter into force once there are 15 ratifications.³ There is need for an African Court and this African Court will strengthen the overall system of human rights promotion and protection on the continent.

However, the creation of a supra-national legal system does not come without its own set of peculiar problems — the most obvious of which is created by the international law principle of state sovereignty. It is the principle of state sovereignty which entitles states to exercise their legislative, executive, and judicial functions, largely unfettered, in their own municipal territories. This principle is at odds with the idea that states can in fact be obliged to regulate their municipal laws under the instruction of a supra-national legal order. It is essentially this tension that is the focus of this paper.

The success of an African Court is mostly dependent on the willingness of states to embrace, with a real sense of obligation, the core values of the African human rights system that it is intended to serve. This is a two-dimensional obligation: First, it necessitates that states incorporate the provisions of the African Charter on Human and Peoples' Rights (African Charter) into their own municipal law and ensure (through their own municipal courts) compliance with it. Second, it necessitates that states accept and obey the judgments of the African Court notwithstanding apparent ideological conflict that may exist between their own jurisprudence and that of the African Court.⁴

² The idea of an African Court was first debated at the 1961 Law of Lagos Conference. However, it was not until 1994 that the OAU Assembly actually adopted a formal resolution at its 30th session, requesting that the Secretary-General of the OAU convene a meeting for this exact purpose. There were various subsequent discussions which culminated in the adoption of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (Protocol on the African Court) in Burkina Faso in June 1998.

³ As at 31 July 2002 there were six ratifications — Sénégal, Burkina Faso, The Gambia, Mali, Uganda and South Africa.

⁴ The difficult question here is: Exactly how interventionist should the African Court be? From a political perspective, the African Court probably needs to be fairly circumspect, but much of its effectiveness will be lost if it does not make brave and bold decisions. On the other hand, if the African Court is too interventionist, then many African states may be reluctant to ratify the Protocol on the African Court for fear that their own domestic legal orders may be turned upside-down. Suggestions on this rather important question will be made during the course of this paper.

2 Incorporating the African Charter and the Protocol into the domestic law of states

The relationship between international law and municipal law is a controversial (and difficult) issue. It has long troubled both theorists and courts, mainly because international lawyers have for some time been divided on which of two main approaches to adopt — monism or dualism.⁵

The monists see all law as a unified body of rules. Because of this single conception of law, and since international law is law, monists regard international law as automatically forming part of the same legal structure that includes municipal law. For them, international law is incorporated directly into municipal law without any specific act of adoption. State judges, argue monists, are consequently obliged to apply the rules of international law in their municipal courts.

Dualists, in contradistinction, see international law and municipal law as completely different legal systems. For a dualist, the question of which legal system ought to govern a dispute is relative and dependent on both the nature of the dispute and the forum in which the matter arises (ie whether the adjudicating body is a municipal court or an international tribunal). Dualists accord international law primacy over municipal law in the international arena, for example, where the dispute is one between states; and similarly municipal law enjoys primacy in domestic disputes. The two legal orders are thus, for a dualist, quite distinct and separate — both in their application and purpose. For this reason, a dualist will never see international law as being applicable in a municipal court unless there has first been a specific act of adoption.

Maluwa writes that 'most scholars agree that the monist and dualist theories are relevant only in the specific context of customary international law'.⁶ It thus seems as though, in his opinion, since the African Charter and the Protocol are both treaties, it makes little difference in the final analysis as to which of the two theories one ought to apply. He clearly feels that this debate is not as relevant as the question of how municipal courts ought to apply international law in solving a legal

⁵ Most standard international law textbooks contain some literature on this long-standing debate. See eg J Dugard *International law: A South African perspective* (2000) 43–44; D Harris *Cases and materials on international law* (1998) 68–71; R Wallace *International law* (1997) 36–37; M Shaw *International law* (1997) 100–102. For a more detailed analysis of the debate, see A Aust *Modern treaty law and practice* (2000) 146–161.

⁶ T Maluwa 'The incorporation of international law and its interpretational role in municipal legal systems in Africa: An exploratory survey' (1998) 23 *South African Yearbook of International Law* 50.

problem.⁷ Perhaps one should be a little less convinced as to the irrelevance of the debate. Ratification of the African Charter and the Protocol (as treaties) means that states party to these instruments agree to uphold certain fundamental human rights. In essence the undertaking is given at the level of 'states'. But the undertaking of a state to abide by the provisions of a human rights instrument does not necessarily help a judge in that state's municipal court to solve a legal problem. The judge still needs to know when to apply the relevant international law and how to apply it in the context of the dispute. This would most certainly require a measure of incorporation. It is unclear as to how states should incorporate these human rights provisions into their law. Neither the African Charter nor the Protocol instructs state parties on how they ought to do this. There is certainly no formal act of incorporation required by the African system, given that issues of incorporation are largely determined by the domestic legal orders of states, rather than by international law itself.

Article 1 of the African Charter provides that state parties to the Charter 'shall recognise the rights, duties and freedoms' enshrined therein and that they 'shall undertake to adopt legislation or any other measures to give them effect'. There is nothing at all in the Protocol on the African Court that instructs states to incorporate it. It seems that, as a consequence of ratifying the Charter, states must do no more than give effect to the rights catalogued in it. They are free to decide for themselves on how they wish to go about doing this.

It also seems that, in the specific context of this paper, issues of incorporation raise two separate considerations: first, the state's obligation to other African state parties to the African human rights system; and second, the obligation of judges to apply the minimum standards prescribed under this system in the municipal courts of the state parties. These considerations are often merged into one but clearly they are distinct — the former deals with the state's duty to the African community whilst the latter deals with the state's duty to those subject to its municipal jurisdiction. The former obligation (owed to the African community) extends no further than the state affording recognition to the rights contained in the provisions of the instrument; whilst the latter obligation (owed to subjects in its municipal jurisdiction) requires that the states actually give content to the right. It is clear from this that the content given to the right can not be done in a vacuum and as such the ambit of its protection will be heavily influenced by the domestic context

⁷ This problem does not arise in South Africa because the South African Constitution Act 108 of 1996 specifically provides for the incorporation of both treaties and customary international law into the South African municipal legal order. But the incorporating provisions found in the South African Constitution are virtually unparalleled in Africa and for this reason the monist/dualist debate is by no means irrelevant.

in which that right operates. It is crucial that the African Court give serious contextual consideration to the domestic situation when evaluating a particular state's level of compliance.

3 The domestic effects of the African Court's jurisprudence on African states

The first point to make here is that by ratifying the Protocol, states accept the general jurisdiction of the African Court in respect of inter-state disputes, matters referred to the African Court by the African Commission, and also with respect to advisory opinions. The advisory jurisdiction, in particular, could make a very useful contribution to the development of a human rights culture in Africa. A state could foreseeably, by way of example, request an opinion from the African Court on the compatibility of its own municipal law with African human rights law. This is an obvious (and positive) effect that the African Court's jurisprudence can potentially have on the development of human rights in Africa.⁸

The second point to make is that article 30 of the Protocol provides that state parties 'undertake to comply with the judgment in any case to which they are parties within the time stipulated by the African Court and to guarantee its execution'. The ability of the system to bring about change depends on how binding the judgments of the African Court are. Apart from article 30, there does not seem to be any specific recourse provided for in the Protocol where a delinquent state deliberately refuses to comply with the African Court's judgment. Consequently, the effectiveness of the system seems to be largely dependent on the willingness of states to comply with its decisions. The execution of the judgment is founded on the undertaking of the states party to the Protocol.⁹

The statement, to the effect that Africa is a continent with a largely dismal human rights record, is a generalisation and for this reason it is horribly incomplete without the qualification that there are in fact a number of states in Africa that are demonstrating a firm commitment to

⁸ Art 4(1) of the Protocol empowers the African Court to 'provide an opinion on any legal matter relating to the Charter or any African human rights instrument'. Most permanent international courts (although, strangely, not the International Criminal Court) possess this advisory jurisdiction. One hopes that art 4(1) will be used in much the same way as advisory opinions have been used in the International Court of Justice, where their use has greatly contributed to the development of international law.

⁹ Although it is not strictly speaking an enforcement mechanism, art 31 of the Protocol states that the Court is to list (by specifically naming) those states that have not complied with its judgments. This list will be published as part of its annual report to the OAU. This is a kind of 'shaming' tactic aimed at embarrassing states that do not comply with the court order. This may help in some cases to ensure compliance, although there are arguably some tyrannical and despotic African leaders that have such little regard for the approval of the international community that embarrassment seems extremely unlikely.

upholding human rights in their own domestic legal orders.¹⁰ There are still a number of African states that continue to show little or no concern at all for human rights. It is this exact dichotomy that seems to be the source of an unfounded paranoia. The paranoia suggests that there is a very real danger that the African Court will not be able to match the high standard of human rights protection offered in some municipal jurisdictions (such as Benin or South Africa). The fear is that the African Court will settle for a standard in line with the African Charter, but nevertheless somewhat lower than the standard set in the more sophisticated constitutions of some of the more 'human rights friendly' states. The paranoia feeds off the logic that we can all anticipate disastrous consequences if the African Court is allowed to second-guess the decisions of municipal courts that have adequate domestic human rights systems in place.

This paper will deal with the unnecessary concern and indicate why perhaps this fear is misdirected. But first it is important to understand that the anticipated problem is mostly prevalent where there are conflicting ideologies.

4 The possibility of conflicting ideologies

This difficult question arises when a state party to both the African Charter and the Protocol develops an ideological conflict opposed to the jurisprudence of the African Court. A common example that is frequently used in the literature is that of Islamic law which apparently stands in contrast (and clear opposition to) the Universal Declaration of Human Rights (Universal Declaration) specifically, and the larger emerging body of human rights doctrine generally.¹¹ The question then becomes one of which of the two competing ideologies ought to prevail. Thus, the conflict of ideologies manifests between the municipal law of the state on the one hand, and the state's international human rights obligations on the other. The first point that needs to be made is that this conflict is in fact a paradox. While it is seen as problematic and therefore undesirable that states should have a conflict between their own municipal law and their obligations to the African community at large, it is equally true that without this conflict there would be no cause to revisit and reform their (non-compliant) municipal law.

¹⁰ South Africa, with her relatively new, yet extremely progressive Bill of Rights, is probably the best example of this. It is widely recognised that the protection of human rights in South Africa is mostly unprecedented and stands as a proud example to the rest of the world of a municipal law system that can work.

¹¹ The Universal Declaration of Human Rights specifically guarantees in art 18 the freedom to choose one's religion, and in art 16 the freedom to choose one's spouse. Both of these rights are severely curtailed by a strict interpretation of Islam.

The problem inherent in the conflict of ideologies can occur in two different ways — one is simple, the other one is rather more complex. The 'simple' conflict occurs where the state party has a municipal legal order that simply does not comply with the minimum standards prescribed under the African human rights system. The 'complex' conflict occurs where the state believes that it is in fact complying with these standards, even though the interpretation of a particular right in the African Charter given by its own municipal court is at odds with the jurisprudence of the African Court. By way of example: the African Court may pronounce on the meaning of gender equality, but what then of the cultural context and consequent meaning assigned to this concept in different African societies. For example, gender equality means one thing in traditional African customary societies, but it means quite another in states that follow a Western tradition.

The duty to comply may at first blush point to a single universal standard of human rights. The problem is thus a complex one because it may require that in the case of an ideological conflict arising, some states will be required to compromise aspects of their culture, tradition and sometimes even their religion if they are to conform to this single universal standard. It is difficult to see how this can realistically happen in Africa, and for this reason the ideal is probably to find a solution that is slightly more tolerant of diversity and less prescriptive of a single 'imposed' norm. This is the Herculean challenge that the African Court will need to confront. A sensible African Court may wish to learn from the European system and save itself the unnecessary growing pains of reinventing the wheel.

5 Lessons from the European system and possible solutions for the African Court

Initially, there were very few meaningful lessons that could be learned from the European system on solving the problem of conflicting African ideologies. This is mainly because of the perception that Africa is a far more diverse continent than Europe, suffering from a dire lack of consensus on what ought to constitute the single uniform human rights norm acceptable to all people, cultures, and states. But, as André Stemmet points out, the European system is also extremely diverse:¹²

[T]he Council of Europe comprises states with Catholic, Protestant, Orthodox and Muslim traditions. Since the end of the Cold War in Europe in 1990, a number of Eastern European states with no tradition of democracy and human rights have joined the system. Turkey has experienced three *coups*

¹² A Stemmet 'A future African Court for Human and Peoples' Rights and domestic human rights norms' (1998) 23 *South African Yearbook of International Law* 233.

d'état in as many decades, and as a very nationalistic state, places a strong emphasis on sovereignty. Turkey and neighbouring Greece, which has also not been spared the fate of a military takeover, have been on the brink of war over border disputes a number of times in the past decades. Russia is, political instability aside, currently experiencing an economic crisis of unprecedented proportions. The success of the European Court and the European Commission in developing mechanisms to apply the Convention in such diverse states and find the delicate balances that can sustain progress towards the development of uniform standards of human rights protection, will serve as inspiration for a human rights court in Africa to rise to the challenge.

In the European system the possible conflict of ideology has been minimised at the interpretation stage of the rights analysis. Judges in the European Court of Human Rights (European Court) frequently make use of the general principles of law applicable in the relevant municipal state when interpreting the scope and ambit of provisions in the European Convention. Two closely related doctrines have emerged for interpretative purposes — the twin principles of subsidiarity and the margin of appreciation. It seems wholly feasible that an African Court could similarly make use of the same two doctrines, with some variation, given that the African Charter does make reference, in article 61, to the 'general principles of law recognised by African states' as being a subsidiary means of establishing what law to consider when resolving disputes. Thus the article refers directly to consideration that the African Court may give to the municipal laws of individual African states.¹³

The principle of subsidiarity, in the European context, is concerned with the distribution of power between the national authority of member states and the supra-national authority of the European Convention on Human Rights (European Convention). Under this principle, the initial responsibility of enforcing human rights falls upon member states before the responsibility is shifted to the European Court. In other words, the European Court has a subsidiary role, limited in practice to little more than a review of the enforcement methods employed by the state in its own domestic legal order. From this it is clear that states and their municipal courts have an obligation, as the first point of reference, to do all that is necessary to ensure and guarantee the protection of human rights within their territories. This will obviously be done by applying their own municipal law in their own municipal courts. Only when a state's domestic legal order fails the human rights system, can the supra-national European Court step in with its review process — which entails a review of the offending conduct against the standard expected by the European human rights system.

¹³ The African Court shall, in terms of art 7 of the Protocol, apply the provisions of the African Charter (and any other human rights instrument ratified by the states concerned). Art 61 of the Charter, as described in the text, is thus of relevance.

It is interesting to note that, because the initial responsibility rests on member states, such states are given a fair amount of freedom to decide on how it is that they wish to discharge their duty. This makes complete sense since it is clearly the municipal courts that are best placed to decide on the contextual and historical interpretation of rights — therein lies the connection between the doctrine of subsidiarity on the one hand and the debate on a culturally relative theory of rights interpretation on the other. States must therefore be given a fairly broad margin of appreciation when it comes to implementing and applying these human rights standards in their own municipal courts. For this reason it seems fair to say that the margin of appreciation, which is a logical consequence of the doctrine of subsidiarity, is an interpretative tool used to reconcile the diverse understanding of human rights held by a diverse group of people. As one commentator has said:¹⁴

In the European system, comprising states with widely divergent legal traditions and factual situations, the discretion that a state is allowed rests on its direct and continuous knowledge of its society, its needs, resources, economic and political situation, local practices, and fine balances that need to be struck between competing and sometimes conflicting forces that shape a society. It follows that when the European Court sits in judgment on a state's actions, it has to take into account the legal and factual situations in the state, with the result that the standards of protection may vary in time and place.

It is nevertheless evident from the European system that although a fairly wide margin of appreciation is given to states, it is by no means a boundless margin. Two of the cases from the European Court that possibly best illustrate the workings and limits of the doctrine are *Handyside*¹⁵ and *Dudgeon*.¹⁶ These two cases seem to work well alongside each other for two reasons: First, because they both deal with the issue of public morals,¹⁷ and second, because the former is an illustration of where the margin of appreciation was applied so as to permit what was in effect a fairly restrictive state practice, whilst in the latter case the restrictive state practice was deemed to be impermissible on the basis that the margin of appreciation was not a boundless discretion.

In *Handyside* the European Court clearly expressed the flexibility of the 'moral' concept. The case dealt with the freedom of expression — which is protected by article 10 of the European Convention. In dispute was a publication called *The Little Red Schoolbook* which had been written

¹⁴ Stemmet (n 12 above) 242.

¹⁵ *Handyside v UK* ECHR (7 December 1976) Ser A 24.

¹⁶ *Dudgeon v UK* ECHR (22 October 1981) Ser A 45.

¹⁷ According to R Koering-Jouline 'Public morals' in M Delmas-Marty (ed) *The European Convention for the Protection of Human Rights: International protection versus national restrictions* (1992) 84, the European Court allows the widest margin of appreciation in relation to disputes involving the concept of morals. She attributes this to the fact that moral standards vary according to time and space.

by two Danish authors. The book was intended for school children and it contained a variety of material including a substantial (and controversial) chapter on sex. The book was subsequently banned in England and the publisher claimed that the banning order violated his rights to the freedom of expression contained in article 10 of the European Convention. The case is a good illustration on how the margin of appreciation was made available to the English authorities. The European Court explained its application of the doctrine as follows:¹⁸

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, especially in our era which is characterised by a rapid and far reaching evolution of opinions on the subject. 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 these requirements as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them.

The European Court decided, on the facts, that it was satisfied that the national authorities were entitled to regard the book as morally pernicious. Merrills is of the view that the judgment is a good one and that the European Court was correct in applying a wide margin of appreciation quite simply because there was no clear pre-existing standard of uniformity on the subject.¹⁹ One of the compelling reasons for applying a significant margin of appreciation seems to be if there are clear differences of opinion amongst states on what ought to be acceptable. From this it is evident that the European Court has the ability to vary the margin of appreciation that states have, depending on the degree of uniformity of opinion or lack thereof.

The *Dudgeon* case illustrates how the European Court can conversely restrict the margin of appreciation in an effort to disallow boundless or unlimited margins — after all the purpose of a regional human rights system is the attainment of an effective and uniform respect for human rights law. The *Dudgeon* case concerned the rights of the Northern Irish authorities to enforce legislation that criminalised homosexuality. The applicant claimed that (i) the criminal law in Northern Ireland constituted an unjustified interference with his right to respect for private life as contained in article 8 of the European Convention and (ii) he had been the victim of discrimination within the meaning of article 14 of the European Convention because in Northern Ireland he was subject to greater restrictions than other male homosexuals in other parts of the United Kingdom. The European Court found that there were 'profound differences of attitude and public opinion between Northern Ireland and

¹⁸ *Handyside* (n 15 above) para 48.

¹⁹ JG Merrills *The development of international law by the European Court of Human Rights* (1988) 146–147.

Great Britain as regards questions of morality' and that 'Irish society was more conservative and placed greater emphasis on religious factors, as was illustrated by more restrictive laws even in the field of heterosexual conduct'. Yet, despite these findings, the European Court nevertheless held that the restrictions in the Irish criminal law were disproportionate to the aims that the legislation sought to achieve. In the words of the European Court:²⁰

[I]n consequence of 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 member states.

In another case to come before the European Court, it was similarly held that:²¹

The Court cannot agree that the state's discretion in the field of the protection of morals is unfettered and unreviewable. It acknowledges that the national authorities enjoy a wide margin of appreciation in matters of morals however, this power of appreciation is not unlimited. It is for the Court, in this field also, to supervise whether a restriction is compatible with the Convention.

According to Delmas-Marty, there is a link between the legitimate aim of the national state's domestic law (as invoked by the government of the defendant-member state) on the one hand; and the presence of a common denominator between the domestic legal orders of the member states on the other.²² From this it is evident that the width of the margin of appreciation can conceivably vary a great deal. This is because different states may enact infringing legislation for different reasons, and the extent of uniformity of opinion may also differ — depending on the right, the claim, the state and the context (political and social) in which the infringement occurs. These factors combine to influence the court on whether or not it should afford the national government a wide or narrow margin of appreciation.

The doctrine of subsidiarity and its corollary, the margin of appreciation, seem to be geared towards cultivating a tolerant human rights system in a diverse community of nations. It should, for these reasons, be able to comprehend (and take into account) cultural relativity on the one hand whilst nevertheless being committed to reaching a 'uniform' minimum standard of human rights protection on the other. This should

²⁰ *Dudgeon* (n 16 above) para 60.

²¹ *Open Door Counselling and Dublin Well Woman v Ireland* ECHR (29 October 1992) Ser A 246 para 68; also reported in (1992) 15 European Human Rights Reports 244.

²² M Delmas-Marty 'The richness of underlying legal reasoning' in M Delmas-Marty (ed) *The European Convention for the Protection of Human Rights: International protection versus national restrictions* (1992) 337.

mean that all conduct should meet a minimum standard of behaviour acceptable to all of humanity and not that all people must behave in the same way.²³

But some paranoia remains. Phrased as a question, one might ask: What guarantee does a state have that the African Court, in the review process, will not do more damage than good by applying a lower level of protection, or else a type of protection that is simply inappropriate given the historical and social domestic context of the state? This paranoia might be misdirected. This is predominantly because the problem can be overcome by properly (and carefully) applying the lessons taken from the European system. In the final analysis it is states with a higher standard of human rights protection which will be largely unaffected by the jurisprudence of the African Court. There are at least two reasons for this: First, the African Court is not intended to function as an appeal court from the municipal courts of states; and second, the African Court should be aimed not at achieving uniformity on the continent, but rather at ensuring that states govern their territories with adherence to a basic minimum standard acceptable to the African system — notwithstanding the problem of conflicting ideologies.²⁴ In any event, very few cases are likely to be submitted to and will therefore eventually reach the African Court.

The point on the unfounded paranoia is best made by using two examples from the South African context.

6 Applying the lessons to defeat the paranoia

The two examples from the South African constitutional context have been selected, primarily because South Africa provides us with a very useful case study of a state that is generally considered to have all of its proverbial human rights 'ducks in a row'. South Africa ratified the Protocol on the African Court on 3 July 2002. The first example, involving the constitutional protection of property, is relatively easy to reconcile, even though South Africa's level of protection afforded to her citizens in her own Constitution is arguably at odds with that offered to African people in terms of the African Charter. Yet, despite the varied levels of protection, there is nothing to suggest that the African Court would find

²³ Merrills (n 19 above) 146 states that 'the [supra-national] court's function is not to decree uniformity wherever there are national differences, but to ensure that fundamental values are respected'.

²⁴ Obviously states that offer protection at a lower level than the African Charter will be significantly affected by the jurisprudence of the African Court. These states will need to rework their domestic legal orders so as to ensure their compliance with the regional African human rights regime. This is consistent with the very purpose of creating an African Court.

reason to meddle. This is especially so if the African Court applies the doctrine of subsidiarity and the margin of appreciation. The second example, involving issues of gender equality, is somewhat more difficult. An explanation will be given as to why it is unlikely that an African Court would want to intervene. The point of these two examples is to demonstrate that if the African Court does follow a similar path to the European Court then states like South Africa have little to fear — even when it comes to deciding difficult cases.

6.1 The easy case: Protecting property

A number of democracies, like Canada and New Zealand, have no express provisions in their constitutions safe-guarding the protection of private property from interference from the state. South Africa does. Section 25 of the South African Constitution provides, *inter alia*, that:

- (1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
- (2) Property may be expropriated only in terms of law of general application —
 - (a) for a public purpose or in the public interest; and
 - (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.
- (3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including —
 - (a) the current use of the property;
 - (b) the history of the acquisition and use of the property;
 - (c) the market value of the property;
 - (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
 - (e) the purpose of the expropriation.

The property clause in the South African Constitution is a political compromise. According to De Waal, Currie and Erasmus, section 25 represents the mid-way between two contending ideologies. The clause was clearly intended to protect existing property rights on the one hand while, on the other, permitting legislative programmes aimed at correcting apartheid's imbalances in the distribution of land and wealth.²⁵

Given the provisions of section 25(3), it is obvious that the extent of compensation for expropriated property was intended to be justifiably lower than market value where the acquisition was historically linked to the injustice of apartheid. For example, where a white farmer, during the apartheid years, acquired his land through the forced removals of black people, outrageously high state subsidy, and the soft loans of the

²⁵ J de Waal, I Currie & G Erasmus *The Bill of Rights handbook* (2001) 410–411.

apartheid government, then very little compensation is easily explained under the provisions of South African municipal law. It is very difficult to see anyone arguing that this compensation formula is unfair or else unreasonable — certainly not anyone that has a sound understanding of the oppressive domestic context from which the South African Constitution emerged. This is true notwithstanding the fact that this context is unique to South Africa. By implication, it is necessary (when assessing legislative restrictions by the South African government) to interpret the property right in the African Charter not universally, but contextually — therein lies the value of the doctrine of subsidiarity and the margin of appreciation.²⁶

6.2 The hard case: Gender equality

Most systems that seek to promote and protect fundamental rights regard the right not to be discriminated against as one of the core rights — so much so that other rights are often organised around it. The idea that all people are equal seems to animate the very essence of the human rights process. Discrimination is one of the first evils to manifest itself in a society controlled by a regime that violates human rights. And so regional human rights systems generally hold the right to equality or equal treatment as central to their object and purport. Notwithstanding this, equality jurisprudence is predictably a controversial topic in the literature. The African Charter is in itself fairly short in its description of the right to equality. Article 3 states that '[e]very individual shall be equal before the law. Every individual shall be entitled to equal protection of the law.'

As already pointed out, in terms of article 3 of the Protocol on the African Court, the African Court is competent to apply not only the African Charter but also any other human rights treaty or convention ratified by the state parties. Since the African Charter is to be applied by the African Court, and since articles 60 and 61 of the African Charter provide for the resolution of disputes by having regard to international human rights law, the African Court will be able to draw from a wealth of international human rights law governing the prohibition of discrimination.

On the issue of gender discrimination, the African Charter endorses the provisions of the leading human rights instrument on the right that women have to equal treatment — the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). It has as its purpose the elimination of all discriminatory behaviour against

²⁶ The property right in the African Charter is in any event not very clear. Art 14 states that 'the right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.'

women.²⁷ CEDAW was opened for signature in 1979 and came into force in 1981. Now, a little over two decades later, more than 150 states have ratified it. CEDAW obliges states to ensure that their municipal legal systems guarantee equal rights to women in all spheres of life. Article 1 of the CEDAW defines 'discrimination against women' as:

[A]ny distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

South Africa ratified CEDAW in 1995. Thus South Africa has agreed to the provisions of article 2 which enjoins states to 'abolish or modify existing laws, regulations, practices and customs which constitute discrimination against women'. This obligation is reiterated in article 24 where states undertake to 'adopt all the necessary measures' at a municipal level to achieve the realisation of these rights.

Writing as far back as 1995, Fayzee Kathree expressed her optimism that the (then) new South African Constitution was to be welcomed because it would defeat the clear gender inequality that has come to be institutionalised in African customary law.²⁸ She must have been very disappointed when she read the judgment of the Transvaal Province, some two years later, in the case that tested the constitutionality of the African customary law practice of primogeniture.²⁹ The crisp question in that case was whether the custom of primogeniture (which effectively prevents women from being able to inherit property in traditional patriarchal societies) was unconstitutional on the grounds that it unfairly discriminated against women by virtue of their gender. In terms of the Black Administration Act, the estates of black people were administered under the traditional rules of customary succession³⁰ (as opposed to civil marriages, which were governed by the Intestate Succession Act.³¹ The question in the *Mthembu* case was whether this rule amounts to unfair discrimination. Section 8 of the South African interim Constitution provided that '[t]he state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex . . .'.³²

²⁷ Art 18(3) of the Charter instructs that states 'shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions'.

²⁸ F Kathree 'Convention on the Elimination of All Forms of Discrimination Against Women' (1995) 11 *South African Journal on Human Rights* 436-437.

²⁹ *Mthembu v Letsela* (1997) 2 SA 936 (T).

³⁰ The Black Administration Act 38 of 1927.

³¹ The Intestate Succession Act 81 of 1987.

³² The equality clause is now contained in sec 9 of the final Constitution (Act 108 of 1996).

The South African municipal court accepted that the custom of primogeniture was discriminatory in that it did differentiate between men and women. But the court said that in interpreting the equality right, discrimination *per se* was not enough to constitute an infringement — the discrimination had to be unfair. The court was not prepared to find that the customary rule unfairly discriminates against women. The court said that the unfairness of the discrimination rested upon whether it was likely to impair the dignity of African women within the relevant social context. This is consistent with the equality jurisprudence of the South African Constitutional Court. In dealing with this issue, Le Roux J said that:

If one accepts the duty to provide sustenance, maintenance and shelter as a necessary corollary of the system of primogeniture I find it difficult to equate this form of differentiation between men and women with the concept of 'unfair discrimination' as used in s 8 of the [interim] Constitution. In view of the manifest acknowledgment of customary law as a system existing parallel to common law by the Constitution and the freedom granted to persons to choose this system as governing their relationships, I cannot accept the submission that the succession rule is necessarily in conflict with s 8. There are other instances where a rule differentiates between men and women, but which no right-minded person considers to be unfairly discriminatory . . . It follows that even if this rule is *prima facie* discriminatory on grounds of sex or gender, this presumption has been refuted by the concomitant duty of support.

The Court thus found that the custom was not unfair in the way that it discriminated against women because traditional African customary law had other ways to safeguard women from losing their dignity in the absence of being able to inherit.³³

Those who believe in the universality of human rights will no doubt be appalled by this decision. Universalists would predictably argue that before South Africa can claim to adhere to international human rights standards, it must first refrain from its continued acceptance of African customary law practices that stand in contrast thereto.³⁴ But applying the lessons from the European system — using the principles of subsidiarity and the margin of appreciation — an African Court may in fact be able to produce a more culturally tolerant approach to human rights interpretation which is to be preferred to the more rigid universalist approach.

These twin principles of interpretation would most certainly encourage an African Court to give careful consideration to the reasons

³³ This is effectively because even though she may not inherit property herself, she will never be left destitute because the male heir under African customary law has a duty to support the widow.

³⁴ This position seems remarkably similar to the one taken by universalists on aspects of Islam that apparently stand in stark contrast to the Universal Declaration, as referred to earlier in this paper (n 11 above).

employed by the South African court in arriving at its decision. These tools of interpretation effectively accept that municipal courts, like the South African courts, have the initial obligation to protect human rights. South African courts do not necessarily have a free hand in doing this because they must, in so doing, give effect to the rights in the African Charter. But the right to equality in the African Charter is somewhat thin on substance, and for this reason the margin of appreciation doctrine entrusts municipal courts to give substance to the right. Substance is given by having regard to the domestic state's³⁵

direct and continuous knowledge of its society, its needs, resources, economic and political situation, local practices, and fine balances that need to be struck between competing and sometimes conflicting forces that shape [its] society.

As in the European system, an African Court is entitled to review this process. If this was to be done, in the context of the hard case under discussion, it would become clear from the equality jurisprudence propounded in the South African Constitutional Court, that South Africa is certainly grappling with this very complex issue. Given the historical context of the country's difficult past, and the fact that apartheid systematically discriminated against black people in all aspects of social life, the municipal courts in South Africa are sensitive in the way that they approach such matters. It would simply be inappropriate and damaging to racial reconciliation if our courts were to, at this delicate stage of our new democracy, display a typically Eurocentric intolerance to black customs and traditions.

The big lesson from the European system is that, without doubt, municipal courts are best placed to make these kinds of difficult decisions. A supra-national court should not intervene unless it is patently clear that the state concerned is repudiating its obligations to the African community by displaying a willful intent not to uphold the basic provisions in the African Charter. In other words, the real consideration ought to be whether South Africa derogated from the core content of the right that all people have to be treated equally? It does not seem to have done so in the *Mthembu* case despite the unique interpretation given to the right. The municipal court was careful to consider (and engage with) the indigenous custom, the ambit of equality jurisprudence and the historical considerations relevant to some of the tough racially sensitive criteria confronting judicial reform in South Africa. For these reasons, perhaps the South African process would not fall foul of a future African Court's review.³⁶

³⁵ See Stemmet (n 12 above) 242. See also the quoted extract from the *Handyside* case (n 15 above).

³⁶ It should nevertheless be pointed out in further confirmation of South Africa's commitment to human rights (and to rebut any thoughts that she is repudiating her human rights obligations), that shortly after the *Mthembu* case, in May 1998, the South African Law Commission launched a special project to look into this issue. But,

7 Conclusion

The African Court cannot function on its own. It will make little or no meaningful difference to the promotion and protection of human rights on the continent unless it works closely with, and complements the work of the African Commission. State parties should incorporate the provisions of the African Charter into their own municipal laws and ensure compliance through their own municipal courts. State parties should also be willing to accept and comply with the decisions of the African Court. The future African Court should be reluctant to introduce a universalist style of rights interpretation, and should seriously ponder the extent to which it should play an interventionist role.

before the normal consultation process could run its course, the Department of Justice submitted a Bill to the National Assembly proposing, in essence, the abolition of the African customary law of succession. The Bill provided that all deceased estates should be wound up in the same way — it terms of the Intestate Succession Act. But, when traditional leaders became aware that customary law was about to be radically changed, they protested and the Bill was withdrawn. The topic has now been returned to the Law Commission, and the Project Committee is to publish a discussion paper. Things will once again proceed as they ought to have before the Department of Justice jumped the gun.