

SAME-SEX MARRIAGE AND GAY RIGHTS: THE NEED TO AFFORD AFRICA A MARGIN OF APPRECIATION

EMEJE ARUWA

Faculty of Law, Salem University,
Lokoja

Abstract

The doctrine of margin of appreciation was evolved in Europe as an instrument for the interpretation of the European Convention on Human Rights. The doctrine affords member nations the right to derogate from some of their obligations under the Convention. It has become the tool which allows member nations to define certain rights based on their own socio-cultural orientation and to differ on some human rights issues. This paper considers the doctrine as one which if adopted globally in the interpretation of human rights provisions bordering on marriage; it would afford Africa the opportunity to differ from the liberal west on the contentious issue of gay rights. This paper eulogizes the wisdom of the doctrine and finds in it the solution to the constant bickering over the refusal of African nations to flow with the tide of the same sex revolution.

Introduction

Marriage traditionally is recognized as the union of a man and a woman for life until death or divorce separates them. It is a universal institution which is recognized and respected all over the world¹. While monogamy represents the marriage of one man and one woman for life to the exclusion of all others, polygamy admits of more than one woman in a marriage. The concept of polyandry which is the marriage of one woman to two or more husbands enjoys very little acceptance globally. For centuries, this traditional concept of marriage which recognizes two opposite sexes coming together for purpose of companionship and procreation held sway until recently the gradual evolution of same-sex marriage in the western world. Since then, the definition of marriage has been re-defined in various countries. Constitutions of nations have been amended to create a new generation of human rights called gay rights. What was condemned as sodomy in time past is fast becoming an acceptable norm in the “developed” world and the concept of Lesbians, Gays, Bisexuals and Transgender (LGBT) is one which has come to stay and is being exported from the west to other parts of the globe.

The Same-Sex Marriage Revolution:

The LGBT movement which erstwhile was a minority concern is fast taking the center stage in globally as it is now regarded by civil society and human rights groups as a litmus test of the overall relationship between government and its citizens.² It has become the bane of politics in some advanced climes as politicians seeking to be elected into office often cannot afford to be in the bad book of promoters of the LGBT movement. According to Wrong, “Governments whose executive grip has been weakened by the devolution of powers and

¹ E I Nwogugu, *Family Law in Nigeria* (3rd edn, HEBN Publishers Plc, 2014) 4.

² Michela Wrong, “Conservatism in Africa increases as civil liberties are stifled” *Financial Times* (October 5, 2014) available at <<https://www.ft.com/content/e6e8a39e-1e53-11e4-ab52-00144feabdc0>> accessed 12th March, 2021.

multi-party democracy find the LGBT agenda provides them with one area in where they can demonstrate strong, popular leadership. They are grabbing that opportunity with relish.”³

As a result of this ongoing revolution, the legal status of marriage is fast changing in numerous jurisdictions around the world.⁴ For instance, on the 26th of June 2015 the United States Supreme Court legalised same-sex marriage, authorising the licensing legal recognition of gay and lesbian marriages. The decision was premised on marriage equality rights under the due process clause and the equal protection clause under the fourteenth amendment to the American constitution.⁵ In Canada, between 2003 and 2005, court rulings in several states ruled the prohibition of same-sex marriage to be contrary to the Charter of Rights. Consequently, in those jurisdictions which hold about 90 percent of the Canadian population, same sex marriages have been legalized.⁶ On 20 July 2005, the Canadian Parliament passed the Civil Marriage Act which now defines marriage nationwide as “the lawful union of two persons to the exclusion of all others.”

Reticence of African Countries on Issues of Same-Sex Marriage and Gay Rights

Marriage as a social institution is founded on and governed by social and religious norms of societies.⁷ Its validity in any society will therefore depend largely on what is considered as acceptable standard or norm. This will differ from society to society depending on cultural and moral orientation. The culture in sub-Saharan countries of Africa is conservative in nature and communities uphold traditional values where a union between a man and woman is emphasized as the only acceptable relationship status, any deviation from this norm is not often tolerated. The unwillingness to accept same-sex conduct or homosexuality stems from profound prejudice: it is considered to be un-African.⁸ This conservativeness has been expressed in the inability of most African countries to accept the LGBT revolution as, for them, it portends a high level of immorality.

Gay or lesbian sex is considered unnatural and a product of a debased and morally corrupt mind. It is seen as deviation from acceptable cultural norms. Some governments have been vicious in the approach to stemming the tide of the revolution. In Nigeria for instance, under the Goodluck Jonathan administration, legislation⁹ was passed placing a garb of criminality over same-sex relationships. Yoweri Museveni of Uganda equally signed an anti-gay bill into law toughening penalties for gay relationships though the Act was later ruled invalid by the Constitutional Court on the 1st of August 2014 on procedural grounds.¹⁰ This annulment of

³ ibid

⁴ https://en.wikipedia.org/wiki/Legal_status_of_same-sex_marriage

⁵ A Ojilere, “The Diplomacy Of Homocapitalism Against Africa: SAME-SEX MARRIAGE AND THE WEST’S PROMOTION OF HOMOSEXUALITY.” *World Affairs: The Journal of International Issues*, vol. 22, no. 1, 2018, pp. 152–163. JSTOR, www.jstor.org/stable/48520054. Accessed 12 Mar. 2021.

⁶ https://en.wikipedia.org/wiki/Legal_status_of_same-sex_marriage#Canada

⁷ E I Nwogugu (n1)

⁸ Zanele Nyoni, “The Struggle for Equality: LGBT Rights Activism in Sub-Saharan Africa” *Human Rights Law Review*, Volume 20, Issue 3, September 2020, p 582

⁹ Same Sex Marriage (Prohibition) Act 2013.

¹⁰ The Ugandan Anti-Homosexuality Act, 2014 was passed by the Parliament of Uganda, on the 20th of December 2013 and signed into law by the President Yoweri Museveni on the 24th of February, 2014. The original bill provided for death sentence and so was christened “Kill the Gays bill” by the western mainstream media. However, the law passed substituted life in prison for the death penalty.

the Anti-Homosexuality Act offers a hollow relief to the LGBT community in Uganda as same-sex relationships remain criminal and punishable under other extant legislations in Uganda.

Only a few countries like South Africa seem to differ when it comes to the recognition of same sex marriages. The status of same sex marriages in South Africa took a new turn in 2005 when the Constitutional Court in the case of *Minister of Home Affairs v Fourie*¹¹, ruled in a unanimous decision that bans on same-sex marriage were unconstitutional. The Court gave Parliament one year to change the laws, or same-sex marriage would be legalized by default. While ruling in the case, Sachs, J held that “The horizon of rights is as limitless as the hopes and expectations of humanity.” The South African Parliament in November 2006 passed the Civil Union Act¹², which now permits same-sex couples to contract a union which they may choose to call a marriage or civil partnership but having legal effects identical to that of a traditional marriage under the Marriage Act.

Overview of the Concepts of Margin of Appreciation under in the European Court of Human Rights

The phrase “Margin of appreciation” which is a word for word translation of the French phrase “*marge d’appréciation*” is a concept developed by the European Courts, particularly the European Court of Human Rights¹³ as a doctrine for the interpretation of the European Convention on Human Rights.¹⁴ The European Convention on Human Rights is an agreement designed to secure international recognition and observance of those human rights considered necessary in a democratic society. It is the first international agreement to integrate a concern for the protection of human rights with an enforcement procedure to ensure that Member States comply with their obligation to uphold those rights. The Convention's enforcement apparatus consists of two organs: the European Commission of Human Rights and the European Court of Human Rights.¹⁵

The doctrine comes in handy when considering whether or not a member country has breached any of the provisions of the convention. The ECtHR recognizes the fact that state parties to the ECHR will from time to time have divergent views on some aspects of human rights. The margin of appreciation which is also referred to as “Margin of State discretion” was therefore developed to accommodate these differences and to accord to member states a margin of opportunity to interpret or construe provisions in the ECHR in a manner that is agreeable to them. The ECtHR utilizes the doctrine to judge whether a state party to the ECHR should be sanctioned for limiting the enjoyment of rights.¹⁶ The doctrine allows the Court to reconcile practical differences in implementing the articles of the Convention. Such differences

¹¹ 2006 (1) SA 524 (CC) at 564

¹² Civil Union Act 17 of 2006.

¹³ The European Court of Human Rights (ECtHR) is an international court based in Strasbourg which was set up in 1959. The Court entertains and rules on individual or State applications alleging violations of the civil and political rights set out in the European Convention on Human Rights.

¹⁴ The European Convention on Human Rights (ECHR) was based on the United Nations' Universal Declaration of Human Rights. It was signed in Rome in 1950 and came into force in 1953. See <<https://www.equalityhumanrights.com/en/what-european-convention-human-rights>> accessed on the 11th of March, 2021.

¹⁵ C S Feingold, “Doctrine of Margin of Appreciation and the European Convention on Human Rights” 53 Notre Dame L. Rev. 90 (1977) 90. Available at: <http://scholarship.law.nd.edu/ndlr/vol53/iss1/6>

¹⁶ <https://en.wikipedia.org/wiki/Margin_of_appreciation> accessed on the 11th of March, 2021

create a limited right, for Contracting Parties; "to derogate from the obligations laid down in the Convention"¹⁷ The application of the doctrine was explained in detail in the case of *Handyside v United Kingdom*¹⁸

It has been said that the doctrine of margin of appreciation originally evolved in the course of the European Commission on Human Rights entertaining some applications bordering on the interpretation of Article 15 of the ECHR.¹⁹ The said Article provides that:

1. 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.
2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 '(paragraph 1) and 7 shall be made under this provision.
3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary-General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary-General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.²⁰

This provision of the convention was interpreted in *The Cyprus case*²¹, *Lawless v Ireland*²², and *The Greek case*²³. In all these cases except the Greek Case, the Commission applied the provisions of Article 15 and permitted derogation from certain obligations under the ECHR. With time however, the doctrine of margin of appreciation took a new turn as the Commission and the ECtHR extended its application to non-emergency situations outside the purview of Article 15²⁴ particularly in the interpretation of provisions contained in Articles 8 through 11 of the ECHR which border on the right to respect for private and family life, the right to freedom of thought, conscience, and religion, the right to freedom of expression, and the right to freedom of peaceful assembly and association with others.²⁵

A cursory look at the provisions under Articles 8 through 11 discloses that the rights created thereunder are not absolute rights as they provide for exceptions, that is, instances when a member state is permitted to impose restrictions on the enjoyment of the right. The ECHR however requires that these restrictions must be "necessary in a democratic society" in the interests of national security, public order, health, morals, or the rights and freedoms of others.²⁶ The extension of the application of the doctrine of margin of appreciation to these Articles was to allow each member state wide discretion to select policies that would regulate

¹⁷ Application No. 176/56 (Greece v United Kingdom, "Cyprus"), 2 Yearbook of the European Convention 1958-1959, 174-199 at 176.

¹⁸ Application No 5493/72 [1976] ECHR 5 (7 December 1976)

¹⁹ C S Feingold (n3) 91.

²⁰ Article 15, ECHR

²¹ The Cyprus Case, [1958-59] 2 Y.B. EUR. CONV. ON HUMAN RIGHTS 174.

²² Lawless v Ireland, [1958-59] 2 Y.B. EUR. CONV. ON HUIAN R IGHTS.

²³ The Greek Case, [1969] 12 Y.B. EUR. CONV. ON HUMAN RIGHTS.

²⁴ C S Feingold (n3) 94.

²⁵ *ibid*

²⁶ See Articles 8 to 11, ECHR.

potentially harmful activities, such as incitement of violence, racist speech, etc, by means befitting each State's unique circumstance and societal constraints.²⁷

There is a consensus of legal opinion that the margin of appreciation is a tool of jurisprudential origin through which the ECtHR leaves the national authorities a certain autonomy in applying the Convention. It confers what appears to be a mild form of immunity, entailing a level of European review that is less intense than the review that the Court is entitled to perform on the basis of "full jurisdiction"²⁸ of the Convention. Instead of being fully 'reviewable', so to speak, those acts will be scrutinized only if their effects 'overstep' the scope of the margin of appreciation left to national authorities.²⁹

Adopting the Concept of Margin of Appreciation over Same Sex Marriage and Gay Rights in Africa

African countries are not members of either the European Union or the Council of Europe. However, at the global level, countries in Africa are member states of the United Nations³⁰. In fact, African member states comprise nearly 28 percent of the UN's overall membership.³¹ The United Nations is primarily a peacekeeping organization. But it also helps nations deal with economic and social problems. It promotes respect for human rights. It works to advance justice and international law. And it helps victims of wars, famines, and other disasters.³² Just like in Europe a body of human rights laws have been formulated and encapsulated in the ECHR, the United Nations equally developed a body of human rights laws known as the Universal Declaration of Human Rights.³³ Article 16 of the UDHR seeks to protect the institution of marriage.

Consequently, the right to marry has been made a human right globally. Countries of the West and Europe have been at the forefront of the fight for the protection of human rights. In their bid to promote what they consider the ideals of human rights, they have often sought to impose on Africa and Africans what is now known as gay rights, which make for the legality of same-sex marriages. In a bid to add some force to the demand for the recognition of these rights, Countries like America have often sought to drive the culture of respect and recognition for gay rights through their foreign policy. President Joe Biden, the 46th President of America signed a Presidential memorandum on Advancing the Human Rights of Lesbian, Gay, Bisexual, Transgender, Queer, and Intersex Persons around the world.³⁴ The said Memorandum directed American agencies operating abroad "to ensure that United States diplomacy and foreign

²⁷ Eyal Benvenisti, "Margin of Appreciation, Consensus and Universal Standards" 31 *New York University Journal of International Law and Politics* 843 (1999) note 2.

²⁸ Under Article 32 of the ECHR.

²⁹ J Callewaert, "Quel avenir pour la marge d'appréciation?" in P Mahoney, F Matscher, H Petzold and L Wildhaber (eds), *Protecting Human Rights: The European Perspective, Studies in memory of Rolv Ryssdal*, Cologne-Berlin-Bonn-Munich, Carl Heymanns Verlag K. G., 2000, pp 147 – 166, p 149.

³⁰ The UN is an international organization founded in 1945. It is currently made up of 193 Member States.

³¹ 54 of the 193 member nations of the UN are from Africa.

³² Goodrich, Leland. "United Nations." *The New Book of Knowledge*. Grolier Online, 2016. Web. 5 May. 2016. <<http://nbk.grolier.com/ncpage?tn=/encyc/article.html&id=a2030330-h&type=0ta>> accessed 13th March 2021.

³³ UDHR; The UDHR was adopted by the United Nations on 10 December 1948, in response to the barbarous acts which outraged the conscience of mankind during the Second World War. Its adoption recognized human rights to be the foundation for freedom, justice and peace.

³⁴ The memorandum was signed on the 4th of February, 2021.

assistance promote and protect the human rights of LGBTQI+ persons.” Countries like Nigeria where the practice of gay or lesbian relationships and same-sex marriages are considered criminal have been condemned by the liberal west.

The kernel of this paper has to do with the right of Africans to determine for themselves their own standards of human rights, particularly as it concerns the issue of same sex marriage. I compliment to the wisdom of the European Commission on Human Rights as well as the ECtHR in evolving the doctrine of margin of appreciation with regards to the interpretation of human rights provisions in the ECHR. It is indicative of the recognition of sovereignty of states as well as differences in socio-cultural norms and values. Hence, I find the intent of the doctrine as one which should be adopted globally in addressing the current negative view of the liberal west with regards to Africa’s treatment of the contentious gay rights and same sex marriages. Although the concept of margin of appreciation is essentially European in origin, the world ought to borrow its wisdom in the interpretation of the UDHR and other international human rights instruments that make for the protection of the institution of marriage. The doctrine should be considered as a solution to the socio-cultural quagmire. The world ought to “cut Africans some slack” and permit them to define the standards of marriage within the parameters of acceptable socio-cultural norms.

This is necessary because most African cultures are unreceptive of the gay and lesbian relationships. They are considered a taboo under most African cultures. Most governments in Africa can never face their citizens to promote gay or lesbian ideologies as such a government will be vilified and become the subject of attack on grounds of morality. Africa has come of age to determine for herself what is acceptable to her culturally and morally. The fact that the gay revolution is picking up in America, Europe and some other parts of the globe does not mean that African must embrace the practice and radically transform her cultures and become conformists.

The doctrine of margin of appreciation will require that the world should afford Africa a wide margin of discretion to determine for herself what is acceptable standard of morality based on her cherished culture. Doing otherwise, will be tantamount to claiming superiority over the sovereign nations of Africa, which would be antithetical to the core values of international relations.

According to the Open Society Justice Initiative, a member state’s margin of appreciation is generally wide in the following cases:

1. Cases of public emergency;
2. Cases involving national security;
3. Cases involving the “protection of morals”
4. Cases involving legislative implementation of social and economic policies;
5. Cases where there is no consensus within the member states;
6. Cases where the state is required to strike a balance between competing interests or Convention rights.³⁵

There is no doubt that for Africa, contending against the gay revolution is a fight for the protection of morals. It is also obvious that the international community cannot reach a

³⁵ Open Society Justice Initiative (2012) Margin of Appreciation, p 2.

consensus on the issue of gay rights. It is one of the issues that create a very wide divergence of opinions between the conservative Africa and the liberal west. It is therefore clearly a matter which would ordinarily enjoy a wide margin of appreciation if considered in the light of the ECtHR approach to the interpretation of the ECHR.

Conclusion:

The doctrine of margin of appreciation, no doubt has been a veritable tool for international cohesion in Europe. It has afforded countries the opportunity to reject what is antithetical to their social norms and cultural beliefs. There is no doubt also that the adoption of the doctrine in the interpretation of the various human rights instruments to which African nations have pledged allegiance will create for Africa the opportunity to differ from the radical west on issues of gay rights and same sex marriage which cannot be accommodated within the conservative African culture. This is in view of fact that Africa's opposition of the gay movement is considered a fight for the protection of morals. Moral standards are not universal; hence there is the need to permit countries to differ on them and to condemn actions considered immoral within their own social space. To impose on Africa a western standard of morality will be unjust and a deviation from basic principles of international relations based on the sovereignty of state.

It is rather unjust that the countries in the west which have been on the forefront of the fight for gay rights have constantly portrayed Africa as opposed to human rights due to her reticence towards homosexual relationships. Engrained within the consciousness of most Africans is repulsion for homosexuality. It is therefore within their rights to differ and to be permitted to seek to protect the minds and consciousness of their citizens from what they consider as a depraved moral standard of behavior.