THE DOCTRINE OF THE MARGIN OF APPRECIATION IN REGIONAL HUMAN RIGHTS COURTS

NOOR ZAFAR

Noor Zafar is a lawyer currently practicing at the High Court Bench, Multan. She graduated with an LL.M in International Human Rights Law from the University of Notre Dame, USA, and a BA-LL.B (Hons.) from the Lahore University of Management Sciences (LUMS).

ABSTRACT

This paper explores the doctrine of the margin of appreciation, its scope and applicability under three regional human rights courts, namely the European court of Human Rights, the Inter-American Court of Human Rights and the African Court on Human and People's Rights. The paper begins by defining the doctrine of the margin of appreciation and how it applies to the regional human rights courts. It proceeds with a detailed analysis of the margin of appreciation's invocation in the European and Inter-American systems. While the African Court on Human and People's Rights makes no special reference to the doctrine, this paper argues in favour of the adoption of a margin of appreciation by this Court. The discussion concludes with the view that both the Inter-American and African courts should follow the model of the European court when adopting the margin of appreciation in their jurisprudence to some extent, notwithstanding the suspicions regarding the grant of the margin to States in all three regional systems.

KEYWORDS**:** margin of appreciation, human rights, regional human rights systems, European Court of Human Rights, Inter-American Court of Human Rights, African Court on Human and People's Rights

1. THE MARGIN OF APPRECIATION: AN INTRODUCTION

The doctrine of the margin of appreciation is often viewed as 'breathing space' or 'elbow room' afforded 'by international authorities to national authorities.'[1] The doctrine refers to the freedom granted to domestic authorities to interpret a State's obligations arising out of different international conventions in a way that aligns with the State's own national interests, or is not in conflict with the norms, values or customs of its jurisdiction.

[1] Bert B. Lockwood Jr., Janet Finn & Grace Jubinsky 'Working Paper for the Committee of Experts on Limitation Provisions' (1984) 7(1) Human Rights Quarterly 35, 67.

In the European system, the European Court of Human Rights (ECtHR) provides deference to the national governments of States Parties to the European Convention on Human Rights (ECHR) and their institutions in the fulfillment of their obligations.[2] The doctrine emerged because of the need felt by some European States to restrict the scope of certain rights enshrined in the ECHR. Under the limitation clauses in Articles 8-11 of the ECHR and Article 2 of the Fourth Protocol to the ECHR, there are three standard requirements for legitimate restrictions on these rights. Firstly, 'the State's interference in the rights of individuals must be 'in accordance with the law' or 'prescribed by the law'.[3] Secondly, 'the restriction must pursue a legitimate aim."[4] Finally, the limits imposed on individual rights by the State must be 'necessary in a democratic society.'[5]

Understanding the doctrine's development in European human rights law requires an examination of the 'theory of European consensus.' European consensus refers to 'the level of uniformity present in the legal frameworks of the Member States of the Council of Europe on a particular topic.'[6] Where there is a disagreement between Member States on specific issues, the Court allows 'a wide margin of appreciation to Member States.'[7] Consensus is also used to justify the progressive interpretation of the ECHR whenever there is an inclination towards that interpretation found in domestic legislation and judgments of domestic courts in different Member States.[8] Domestic courts' interpretations in different States differ greatly as those are mostly influenced by each State's local legal, moral and cultural systems.

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[2] ibid.
[3] Humphrey Waldock 'The effectiveness of the system set up by the European Convention on Human Rights' (1980) 1 Human Rights Law Journal 9.
[4] ibid.
[5] ibid.
[6] Council of Europe 'Interpretative mechanisms of ECHR case-law: the concept of European consensus' <https://www.coe.int/en/web/help/article-echr-case-law#:~:targetText=The%20concept%20of%20%22European%20consensus,Europe%20on%20a%20particular%20topic.&targetText='The%20concept%20is%20usually%20analysed,this%20approach%20is%20not%20exhaustive.> accessed 1 November 2019.
[7] ibid.
[8] ibid.

Moreover, the margin of appreciation can be seen as a legal manifestation of 'cultural relativism' within the context of human rights jurisprudence. Cultural relativists believe that the margin of appreciation doctrine is important because the idea of human rights as a Western liberal concept is almost alien to States outside the Western context.[9] It acknowledges that human rights standards may vary based on cultural, historical, or social factors. Simply put, the margin of appreciation recognises the diversity of cultural perspectives and allows States some flexibility to determine how to fulfill their human rights obligations. Values promoted by a certain system are only relevant to that system and they cannot be held as universal or applicable in the same manner to every other system.[10] It would be highly unjust to impose the norms of one society on another without giving due regard to the norms and values of that society.[11]

The margin of appreciation has been crucial for international and regional human rights systems to gain the confidence of domestic authorities and indigenous groups across different societies. According to some scholars, the totalitarian nature of human rights documents risks turning the international human rights law regime into a tool for cultural genocide.[12] Therefore, the focus should be on consensus-building and providing States with a certain amount of leeway necessary to implement their international or regional human rights obligations.

2. THE MARGIN OF APPRECIATION AND ITS INVOCATION IN REGIONAL HUMAN RIGHTS SYSTEMS

According to George Letsas, States have the authority to limit individuals' rights under certain circumstances in order to achieve legitimate aims, that are of public interest, i.e., matters involving a breach of national security or

[9] James A Sweeney 'Margins of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War Era' (2005) 54(2) The International and Comparative Law Quarterly 459, 460.
[10] ibid.
[11] ibid.
[12] David M. Smolin 'Will International Human Rights Be Used as a Tool of Cultural Genocide? The Interaction of Human Rights Norms, Religion, Culture and Gender (1995) 12(1) Journal of Law and Religion 143.

disruption of public order.[13] He further argues that the said doctrine itself does not determine whether the State's intervention is legitimate or if said intervention violates a given right. This determination is made by reference to other concepts, such as 'fair balance' and 'proportionality'[14]

Proportionality demands a three-pronged analysis of the legitimacy of the objective of the restricting measure, the necessity of the restricting measure, and a balancing test.[15] The restriction must 'pursue a legitimate aim,' such as public safety, public health, or the protection of others' rights.[16] The restriction has to be proven to be necessary to achieve the aim, i.e., no less intrusive alternative means exist to achieve said aim.[17] The restriction's benefits must outweigh its detriments to individual rights. The more severe the restriction, the more compelling the justification must be.[18] Crucially, the margin of appreciation does not act as a blank check to Member States. The ECtHR retains the ability to review national measures through the lens of proportionality, ensuring that States do not abuse their discretion and that restrictions remain genuinely necessary and proportionate.[19] In essence, proportionality is the yardstick, while the margin of appreciation acknowledges the ruler's flexibility depending on the context. Together, they guarantee that individual rights are not unduly encroached upon in the pursuit of legitimate societal goals.

According to Letsas, there are two distinct conceptions of the margin of appreciation as implemented in the ECtHR, namely the 'structural' and 'substantive' margins.[20] The 'structural' version of the margin of appreciation is the dominant one in the ECtHR's jurisprudence. It attempts to 'balance the sovereignty of the contracting States with the need to secure protection of the rights embodied in the ECHR.'[21] Although States have been granted

[13] ibid.
[14] ibid.
[15] Jan Burda 'The Principle of Proportionality in EU law' (2019) Law and Legal Science. <https://is.muni.cz/th/inasg/The_Principle_of_Proportionality_in_EU_Law.pdf>
[16] *Handyside v United Kingdom*, 1976 Eur. Ct. H.R. (ser. A) 5.
[17] *Sunday Times v United Kingdom*, 1979 Eur. Ct. H.R. (ser. A) 30.
[18] *R.R. v France*, 2014 Eur. Ct. H.R. (ser. A) 824.
[19] *Levits v Latvia*, 2012 Eur. Ct. H.R. (ser. A) 645.
[20] George Letsas 'Two Concepts of the Margin of Appreciation' (2006) 26(4) Oxford Journal of Legal Studies 705.
[21] ibid.

leeway in interpreting the provisions of the ECHR, the Court has the power to limit the discretion given to States in this regard.[22] The practice of granting a margin to States signifies that specific human rights provisions can be defined and applied in different ways by Member States' authorities while staying within the acceptable extents of legitimacy, i.e., in conformity with the ECHR.[23]

The ECtHR is the 'oldest regional court' across all human rights systems.[24] with the most well-developed jurisprudence on the rights enshrined under the ECHR. Because the margin of appreciation first emerged in the European system, the ECtHR has used the doctrine in the largest number of cases compared to the other regional systems. Although concerns may arise over the use of the doctrine by the ECtHR, especially in cases involving freedom of religion and violations of *jus cogens n*orms, the ECtHR has given State authorities considerable flexibility in interpreting and implementing the provisions of the ECHR in several cases.

The Inter-American Court on Human Rights (IACtHR) has invoked the margin of appreciation on extremely rare occasions. Nevertheless, there is an ongoing debate in the Inter-American system regarding adopting and applying this doctrine in their system. The IACtHR has taken an interventionist approach in the past, because of which there is a danger of resistance or backlash from States.

In the African human rights system, which also happens to be the youngest, there has been no mention of the margin of appreciation, or any similar doctrine of deference, in its case law or in writings of scholars working in the African system thus far. However, a need for this doctrine could be inferred from how the African Court on Human and People's Rights (ACtHPR) decides its cases.

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[22] ibid.
[23] ibid.
[24] Maria A. Sanchez 'Deference and Divergence in Regional Human Rights Courts' (DPhil Thesis, University of Minnesota 2022) 9 https://conservancy.umn.edu/handle/11299/241313

3. THE MARGIN OF APPRECIATION AT THE EUROPEAN COURT OF HUMAN RIGHTS

The European margin of appreciation has its roots in the ECtHR, and draws upon the 'jurisprudence of the French Conseil d'Etat,' the classical martial law doctrine and the administrative law reviews of institutions from other continents.[25] The term 'margin of appreciation' is derived from the French term '*merge d'appreciation*', and is thus commonly translated into English as 'margin of assessment/appraisal/estimation.'[26]

The margin of appreciation is an essential element of the 'principle of subsidiarity,' which is a fundamental principle in European regional law:

> The general aim of the principle of subsidiarity is to guarantee a degree of independence for a lower authority in relation to a higher body or for a local authority in relation to central government. It therefore involves the sharing of powers between several levels of authority, a principle which forms the institutional basis for federal states.[27]

Subsidiarity dictates that issues should be addressed at the most appropriate level, prioritising local decision-making unless compelling reasons necessitate intervention by regional authorities. This principle finds expression in various legal frameworks, including EU law and international human rights law. Under Article 5(3) of the Maastricht Treaty on the European Union, 1992, the European Union is only required to act if Member States are unable to meet their intended objectives through certain measures.[28]

Furthermore, subsidiarity informs the scope of the margin. Issues delegated to lower levels receive a wider margin, as national particularities are more relevant.[29] Subsidiarity also limits the margin; when international authorities

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[25] H.C. Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (The Hague/Boston/London: Kluwer, 1996) 14.
[26] Steven Greer, *The Margin of Appreciation: Interpretation and Discretion Under the European Convention on Human Rights,* Human Rights Files No. 17 (Council of Europe Publishing) 5.
[27] European Parliament 'Fact sheets on the European Union, The principle of subsidiarity' *European Parliament* <https://www.europarl.europa.eu/factsheets/en/sheet/7/the-principle-of-subsidiarity>
[28] See, e.g., Case C-332/13, EMIR Trading, [37]-[38].
[29] *South Bank Mutual Investments Ltd v Bulgaria*, 2018 Eur. Ct. H.R. (ser. A) 1262 [59].

intervene due to insufficient protection at the domestic level, the margin of appreciation narrows to ensure uniform adherence to fundamental rights.[30]

Moreover, both principles are not absolute. The margin can be exceeded, i.e., serious violations of human rights or persistent failures to uphold obligations can lead to interventions despite the margin.[31] Ultimately, the goal is to achieve a delicate balance between preserving national sovereignty and allowing for flexible interpretations while holding States accountable for falling short of their obligations to their citizens under human rights law. This ongoing dialogue between subsidiarity and the margin of appreciation ensures that both the universal nature of human rights and the specificities of national contexts are considered in the pursuit of a just and equitable global order.

The ECtHR has the authority to review whether measures imposed by a Member State fall under the ambit of the margin. The ECtHR can also determine a change in variable limits of the margin, i.e., how much leeway a State can be afforded when implementing a certain right. These two factors prove that this doctrine does not imply a complete renunciation of the Court's power of judicial review.[32] Rather, while States are granted some leeway in interpreting and applying the ECHR, this must be done in a legitimate manner.

Furthermore, while the doctrine is estimated to have been used in over 700 judgments of the ECtHR,[33] the *travaux preparatoires* (documents describing the discussions and negotiations of a treaty before it is finalised) of the ECHR make no clear reference to the margin of appreciation doctrine.[34] This shows that the doctrine developed over time through the practice of the Court under the circumstances where internal conflicts in some member States led to a demand for deviation from some of the obligations under the ECHR.

In cases on the freedom of religion, the ECtHR has allowed a considerable margin of appreciation to States on several occasions, particularly because

[30] See, e.g., *Handyside v United Kingdom*, 1976 Eur. Ct. H.R. (ser. A) 5, [66].
[31] See, e.g., *Hirsi Jamaa v Italy*, 2012 Eur. Ct. H.R. (ser. A) 644, [155].
[32] ibid.
[33] Letsas (n 20) 705.
[34] Yourow (n 25) 14.

European States adopt a secular constitutional structure.[35] The ECtHR's application of the margin of appreciation gives more space to States in cases involving restrictions on the freedom of religion than any other right.[36] The ECtHR has supported States' approaches in religious freedom cases conflicting with the ideology of secularism.

An example of this can be seen in *Leyla Sahin v Turkey*.[37] Leyla Sahin was a medical student at the University of Istanbul in 1997, which is a public university.[38] In 1998, the Vice Chancellor of the University banned the wearing of a headscarf on campus.[39] Sahin was denied access to classrooms because she wore a headscarf.[40] She protested the imposition of the ban and filed petitions in the Turkish courts against the circular issued, but did not receive a decision in her favour.[41] She filed a case at the ECtHR claiming a violation of her freedom of religion under Article 9 of the ECHR.[42] The State responded to her claim with the argument that Article 2 of the Turkish Constitution promotes 'secularism and gender equality':[43]

> The Republic of Turkey is a democratic, secular [*laik*] and social State based on the rule of law that is respectful of human rights in a spirit of social peace, national solidarity and justice, adheres to the nationalism of Atatürk and is underpinned by the fundamental principles set out in the Preamble.[44]

The State further claimed that headscarf was a symbol of religious belief and might have symbolised the Turkish State's support for a specific religion.[45] They also argued that it was against the 'principle of gender equality.'[46] The

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[35] Benjamin Elisha Sawe 'What is a Secular State?' *WorldAtlas* (8 March 2018) <https://worldatlas.com/articles/what-is-a-secular-state.html>
[36] Tom Lewis 'What Not to Wear: Religious Rights, the European Court, and the Margin of Appreciation' (2007) 56(2) The International and Comparative Law Quarterly 395, 396. <www.jstor.org/stable/4498074>
[37] *Leyla Sahin v Turkey*, App no 44774/98 (ECtHR, 10 November 2005), [29] available at: <https://www.refworld.org/cases,ECHR,48abd56ed.html>
[38] Lewis (n 36) 406.
[39] ibid.
[40] ibid.
[41] ibid.
[42] ibid.
[43] ibid.
[44] *Leyla Sahin v Turkey* (n 37) [29].
[45] ibid [35].
[46] ibid [111].

Court gave deference to the position of State authorities in this case and stated that the State was permitted a margin of appreciation in religious matters:

> Consequently, the Contracting States enjoy a certain margin of appreciation in this sphere, although the final decision as to the observance of the Convention's requirements rests with the Court. In order to ensure that the restrictions that are imposed do not curtail the right in question to such an extent as to impair its very essence and deprive it of its effectiveness, the Court must satisfy itself that they are foreseeable for those concerned and pursue a legitimate aim. However, unlike the position with respect to Articles 8 to 11 of the Convention, it is not bound by an exhaustive list of "legitimate aims" under Article 2 of Protocol No. 1 (see, *mutatis mutandis*, *Podkolzina v Latvia*, no. 46726/99, § 36, ECHR 2002-II). Furthermore, a limitation will only be compatible with Article 2 of Protocol No. 1 if there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.[47]

Ultimately, the ECtHR held that the university's ban on the headscarf was 'a proportionate interference with Leyla Sahin's Article 9 rights.'[48]

There are several similar cases in which the ECtHR used the margin of appreciation. In *Karaduman v Turkey*, a girl was denied graduation even after she had completed the degree requirements because she refused 'to submit a photograph without a headscarf' for her graduation ceremony.[49] Her claim that this was a violation of Article 9 of the ECHR was rejected.[50] Similarly, *Dahlab v Switzerland* was a case where Dahlab, a school teacher, was dismissed for insisting that she wanted to wear a headscarf.[51] The Court determined that this was not a 'disproportionate interference' in her freedom of religion as States have a margin of appreciation in religious matters.[52] The Court also stated that because of the 'tender age' of her students, her decision to wear a

[47] ibid [154].
[48] Lewis (n 36) 409.
[49] *Karaduman v Turkey*, App No 16278/90 (ECtHR 3 May 1993).
For comment and comparison with *Sahin v Turkey*, see H Gilbert 'Redefining Manifestation of Belief in *Leyla Sahin v Turkey*' (2006) 3 European Human Rights Law Review 308.
[50] ibid.
[51] *Dahlab v Switzerland*, App No 42393/98 (ECtHR, 15 February 2001).
[52] ibid.

headscarf while teaching might have an impact on the notion of neutrality that the Swiss education system promotes.[53]

In 2014, the ECtHR decided a case filed against the law banning wearing of veil by Muslim women in France in favor of French government.[54] The same law was challenged by different applicants at the UN Human Rights Committee, which decided the complaint in favor of the applicants.[55] The dissenting opinion on the Committee's decision, written by Yadh Ben Achour, rightly pointed out that the concept of veiling is contested in Islam.[56] He stated:

> The truth is that the wearing of the niqab or the burka is a custom followed in certain countries called "Muslim countries" that, under the influence of political Islamism and a growing puritanism, has been artificially linked to certain verses from the Qur'an, in particular to verse 31 of the Surah of Light and verse 59 of the Surah of the Confederates. However, the most knowledgeable authorities on Islam do not recognize concealing the face as a religious obligation.[57]

Because of the highly contested nature of concept of veil in different Islamic schools of thought, this decision cannot be compared with the decisions in *Leyla Sahin* or *Dahlab* as the hijab (or the headscarf) is a more unambiguous concept. The Committee took a victim-centered approach in this case; it could be said that as the ECtHR is a regional court and more familiar with the practices in the region, it decided to allow States to restrict the applicants' right to freedom of religious expression in 2014.

Similar reasoning was extended to other cases as well. *Refah Partisi* case was a case in which the ECtHR stated that limiting the religious expression such as wearing of headscarf is sometimes justified 'to protect the public order' and

[53] ibid.
[54] See *S.A.S. v France*, App no 43835/11 (ECtHR, 1 July 2014).
[55] See *Yaker v France*, Communication no 2747/2016, (UN Human Rights Committee, 17 July 2018) CCPR/C/123/D/2747/2016.
[56] ibid.
[57] ibid.

freedom of others.[58] This case was not related to headscarf, but rather was against the activities of Islamic political parties.

Another important case is *Lautsi v Italy*.[59] In this case, Soile Lautsi filed a case to the ECtHR on behalf of her two sons claiming a violation of her freedom of religion.[60] The classrooms of the public school her sons used to attend had a crucifix on display.[61] According to Lautsi, this was a violation of her and her 'children's right to freedom of religion' as she did not want to raise them as Christians.[62] On the other hand, the Italian government argued that the display of crucifix was meant to symbolise their importance in history of Italy and not to highlight them as a symbol of Christianity.[63]

The ECtHR initially mandated a ban on the display of the crucifix in all public schools.[64] This initial decision reflects the ECtHR's inclination towards values of secularism.[65] In cases on the headscarf mentioned above, the Court readily granted the margin of appreciation to States identifying themselves as secular.[66] However, when it came to the issue of the State trying to conform to a certain religious tradition, the Court came up with a decision in favor of the petitioner demanding neutrality from the State in *Lautsi*.[67] The Grand Chamber hence denied the margin of appreciation to Italy.

Later on, due to pressure from other European countries and an appeal from Italy for a rehearing, the case was reheard.[68] It came to be known as *Lautsi II*, with the highest number of *amicus curae* briefs filed in the history of the Court

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[58] *Refah Partisi (The Welfare Party) and others v Turkey*, Apps nos 41340/98, 41342/98, 41343/98 and 41344/98, (ECtHR, 31 July 2001)
[59] *Lautsi v Italy*, App no 30814/06 (ECtHR, 18 March 2011).
[60] ibid.
[61] ibid.
[62] ibid.
[63] ibid.
[64] ibid.
[65] ibid.
[66] ibid.
[67] ibid.
[68] William L Saunders 'Does Neutrality Equal Secularism? The European Court of Human Rights Decides *Lautsi v Italy*' (2011) 12(3) The Federalist Society Review. <https://fedsoc.org/commentary/publications/does-neutrality-equal-secularism-the-european-court-of-human-rights-decides-lautsi-v-italy>

at that time.[69] Several States criticised the Court's decision for not granting deference to the Italian government. As a result, the Grand Chamber overturned the decision.[70]

Thus, the ECtHR developed the margin of appreciation doctrine to grant national discretion to States in matters where they felt it more appropriate to interpret the rights enshrined in the ECHR in a different, usually more restrictive, manner. Although cases like *Leyla Sahin* and *Lautsi* attracted criticism from Muslim and Christian communities respectively, this does not mean that the ECtHR should not grant this margin to national authorities in implementing the provisions of the ECHR at the domestic level. The Court retains the right to review State practice in implementing its ECHR obligations even after granting the margin. The overall jurisprudence at the ECtHR shows that the margin of appreciation is important to garner support and confidence of Member States in the credibility of the European human rights system.

4. THE MARGIN OF APPRECIATION AT THE INTER-AMERICAN COURT OF HUMAN RIGHTS

The Inter-American human rights system was founded by the Organisation of American States (OAS) adopting the American Declaration on Rights and Duties of the Man (ADRDM) in 1948.[71] Later, the OAS adopted the American Convention of Human Rights (ACHR) in 1969,[72] and it entered into force in 1978.[73]

The two main bodies established to safeguard the protection of rights guaranteed under the ACHR are the Inter-American Commission on Human rights (IACmHR) which became operational in 1960[74] and the Inter-American Court of Human Rights (IACtHR) which became operational in

[69] ibid.
[70] ibid.
[71] ibid.
[72] ibid.
[73] ibid.
[74] ibid.

1979 and delivered its first contentious decision in 1988.[75] These two bodies have the discretion to 'decide individual complaints' regarding 'alleged human rights violations' and 'issue emergency protective measures when an individual or the subject of a complaint is in immediate risk of irreparable harm.'[76] The IACtHR's mandate is more restricted than that of the IACmHR because the former 'may only decide cases brought against the OAS Member States' that have 'specifically accepted the Court's contentious jurisdiction' and have been processed by the latter first.[77]

Three different positions are generally taken towards the margin of appreciation doctrine in the Inter-American human rights system.[78] The first position argues that there is no place for this doctrine in the Inter-American system.[79] The second position - a completely opposing viewpoint – is that the IACtHR should seriously consider the adoption of this doctrine as there is an emerging need for the incorporation of a doctrine of deference in this system.[80] The third position takes a middle ground approach, claiming that the IACtHR should be extremely careful when determining the margin of appreciation to OAS Member States.[81]

During the 1970s and 1980s, Central and Latin American countries were experiencing the worst period in their history in terms of large-scale human rights violations.[82] Most of these States were either under dictatorship or experiencing civil wars.[83] Nino Tsereteli observes that when the Inter-American system was established, the IACtHR mostly dealt with cases

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[75] *Velásquez-Rodríguez v Honduras*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988).
[76] International Justice Resource Center 'Inter American Human Rights System' *International Justice Resource Center* (n.d) <https://ijrcenter.org/regional/inter-american-system/#:~:text=The%20Court%27s%20mandate%20is%20more,be%20processed%20by%20the%20Commission.>
[77] ibid.
[78] Pablo Contreras 'National Discretion and International Deference in the Restriction of Human Rights: A Comparison Between the Jurisprudence of the European and the Inter-American Court of Human Rights' (2012) 11(1) Northwestern Journal of Human Rights 61.
[79] ibid.
[80] ibid.
[81] ibid.
[82] David J. Harris and Stephen Livingstone, *The Inter-American System of Human Rights* (Clarenbon Press, Oxford 2004) preface.
[83] ibid.

concerning 'acts of state violence'.[84] Because of the lack of will on part of the State authorities to conform to provisions of the ACHR, there was no reason for the Court to give deference to national authorities.[85]

It is because of this history and the kind of cases the IACtHR dealt with in its early years that people like former ICJ Judge Antonio Cancado Trindade (also ex-president of the IACtHR) believed that there is no place in the Inter-American system of human rights for the margin of appreciation.[86] He further stated, that because most cases brought to the IACtHR involve violations of non-derogable rights, States should not be given the discretion to interpret the ACHR in different ways.[87] Thus, the 'relative application of international human rights law' that the margin allows for was not acceptable to Judge Trindade.[88] His viewpoint is an illustration of the 'universal' tendency of this court in interpreting the regional treaty.[89] This view is also reflective of the tendency in the Inter-American system for being more interventionist and anti-deference in its approach.

Thus, the IACtHR has tried to take stronger measures in order to make OAS Member States endorse and comply with international human rights standards. Firstly, the ACHR has contains more non-derogable rights than the ECHR.[90] Secondly, the IACtHR applies the 'doctrine of conventionality control' extensively, requiring States' domestic courts to follow the decisions

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[84] Nino Tsereteli 'Emerging doctrine of deference of the Inter-American Court of Human Rights?' (2016) 20(8) The International Journal of Human Rights 1097. <http://dx.doi.org/10.1080/13642987.2016.1254875>

[85] ibid.

[86] Antonio Cançado Trindade 'Reflexiones sobre el Futuro del Sistema Interamericano de Protección de los Derechos Humanos' in El Futuro del Sistema Interamericano de Protección a Los Derechos Humanos (Juan E. Méndez & Francisco Cox eds., 1998) 582

[87] ibid.

[88] ibid 593

[89] María Angélica Benavides Cassals 'El Consenso y el Margen de Apreciación en la Protección de los Derechos Humanos' (2009) 15 Ius Et Praxis 295, 308

[90] Article 15.2 of the European Convention states that it is not allowed to derogate from the right to life ("except in respect of deaths resulting from lawful acts of war"), the prohibition of torture, the prohibition of slavery or servitude and the prohibition of punishment without law. In contrast to that, Article 27.2 of the American Convention prohibits "any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from Ex Post Facto Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights."

and interpretation of the ACHR by the IACtHR.[91] Conventionality control is viewed as the 'direct opposite of the margin of appreciation by some scholars:'[92] Dulitzky advised the IACtHR to become 'less absolutist' and accept the domestic courts as the enforcers and interpreters of the ACHR.[93] Other scholars believe that deference to national courts under the margin of appreciation could be termed as an application of the principle of subsidiarity,[94] in a manner similar to the approach of the ECtHR.

Consequently, the doctrine has not found a proper place in the jurisprudence of the Inter-American human rights system, unlike in the ECHR. The majority of Member States that in the Inter-American system did not adhere to strong democratic principles as did the States that ratified the ECHR.[95] Some argue that it is not feasible to allow a margin of appreciation to States under this system because of the poor democratic quality of OAS Member States and problems in their legislative mechanisms. However, some Inter-American States are ranked higher on the Democratic Quality Index than many of the forty-eight countries that have ratified the ECHR. For example, Uruguay ranks 15,[96] Costa Rica ranks 20[97] and Chile ranks 23.[98] Nevertheless, the ECtHR does discuss any classification of countries on the basis of their democratic credentials.[99] While granting a margin of appreciation, the ECtHR

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[91] Álvaro Paul 'The Emergence of a More Conventional Reading of the Conventionality Control Doctrine' (2019) 49 Revue Générale de Droit (N° hors série: Canada's Role in Protecting Human Rights in the Americas) 275, 292-3.

[92] Lucas E. Barreiros 'Emerging Voices: Freedom or Restraint? On the Comparison Between the European and Inter-American Human Rights Courts' *Opinio Juris* (11 August 2014) <http://opiniojuris.org/2014/08/11/emerging-voices-freedom-restraint-comparison-european-inter-american-human-rights-courts/>

[93] Ariel E. Dulitzky 'An Inter-American Constitutional Court? The Invention of the Conventionality Control by the Inter-American Court of Human Rights' (2015) Texas International Law Journal 45, 76.

[94] Álvaro Paúl 'Decision-Making Process of the Interamerican Court: An Analysis Prompted By The "In Vitro Fertilization" Case' (2014) 21 ILSA Journal of International & Comparative Law 87, 125. <https://nsuworks.nova.edu/ilsajournal/vol21/iss1/4>

[95] Andreas Follesdal 'Exporting the margin of appreciation: Lessons for the Inter-American Court of Human Rights" (2017) 9 International Journal of Constitutional Law 359.

[96] See The Economist Intelligence 'Democracy Index 2018' *The Economist* (2018) <http://www.eiu.com/public/thankyou_download.aspx?activity=download&campaignid=Democracy2018>

[97] ibid.

[98] ibid.

[99] ibid.

mainly relies on a proportionality test[100] because it acknowledges that democracies can develop laws that do not conform to international human rights standards.[101]

Furthermore, the lack of consensus amongst OAS Member States is seen as another hurdle in granting States a margin of appreciation. However, the requirement of grant of margin of appreciation depends more on the 'nature and formulation' of the right, rather than consensus.[102] 'Consensus is not a condition for granting margin of appreciation'; rather, it is the other way around.[103] For instance, in the European system, if a violation by a State falls under the category of rights for which the ECtHR usually grants a margin of appreciation, the consensus between the States would only make the scope of the margin 'narrower'.[104] Another view on regional consensus suggests that, at times, regional consensus may demand a different interpretation of 'broad rules' stated in the ACHR.[105] This shows the difference of perspectives between the European system and the Inter-American system.

The IACtHR first mentioned the margin of appreciation in 1984 in a case related to the grant of nationality by a State.[106] This led some scholars to conclude that the doctrine is not completely alien to the inter-American system.[107] Indeed, a closer look at the Court's stance reveals that it grants a margin of appreciation to States to interpret norms where the ACHR is silent.[108] Similarly, in 2004, the IACtHR analysed the restrictions on freedom of speech in *Herrera Ulloa v Costa Rica*, a case where a journalist was found guilty for offensive publications that constituted defamation.[109]

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[100] ibid.
[101] ibid.
[102] Paúl 'Decision-Making' (n 94) 125.
[103] Follesdal (n 95).
[104] ibid.
[105] ibid.
[106] Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4/84, 19 January 1984, Inter-Am. Ct. H.R. (Ser. A) No. 4 (1984), [59], [62]–[63].
[107] Jorge Contesse,'Contestation and Deference in the Inter-American Human Rights System' (2016) 79 Law and Contemporary Problems 141.
[108] Tsereteli (n 84) 1098.
[109] *Herrera-Ulloa v Costa Rica*, Preliminary Objections, Merits, Reparations and Costs, Judgment, InterAm. Ct. H.R. (ser. C) No. 107 (July 2, 2004).

The Court stated that

> democratic control exercised by society through public opinion encourages the transparency of State activities and promotes the accountability of public officials in public administration, for which there should be a reduced margin for any restriction on political debates or on debates on matters of public interest.[110]

The Court observed that statements related to public officials or any private individuals performing public functions should be looked at with a certain 'latitude'.[111] This shows an inclination in the Inter-American system towards reducing the national discretion to a great extent in matters related to freedom of speech.

In the same case, the Court discussed how States have discretion to regulate judicial remedies.[112] However, if the 'essence' of the right to judicial remedy is affected by the State's interference, the international courts have the power to review these cases.[113] This case is another example of a narrowing of the margin of appreciation by the IACtHR.

The margin of appreciation was invoked by the State of Costa Rica in *Artavia Murillo et al. v Costa Rica,*[114] a case against the Costa Rican Constitutional Court's decision banning in-vitro fertilisation (IVF) in 2012. The Costa Rican Court banned IVF because it led to the loss of embryos, which it argued was a violation of the right to life, which it attached to the embryos under Article 4 of the ACHR.[115] Costa Rica demanded a broad margin of appreciation in this regard because they believed that there was an lack of scientific consensus on whether an embryo constitutes the 'beginning of life.'[116] The IACtHR supported the argument that because 'embryos have no chance of survival without implantation,' embryos cannot be said to have a right to life as

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110 ibid [127]
111 ibid.
112 ibid [161].
113 ibid.
114 *Artavia Murillo et al. v Costa Rica*, Judgment of 28 November 2012 (Preliminary Objections, Merits, Reparations and Costs), [162].
115 ibid
116 ibid [170]

embryos themselves do not represent beginning of life.[117] None of the countries in the region had imposed any restrictions on IVF as none of them attached the right to life to embryos before implantation.[118] Thus, the claim of a margin of appreciation raised by Costa Rica was rejected by the IACtHR in this case based on the argument of state practice, stating that

> The Court considers that, even though there are few specific legal regulations on IVF, most of the States of the region allow IVF to be practiced within their territory. This means that, in the context of the practice of most States Parties to the Convention, it has been interpreted that the Convention allows IVF to be performed. The Court considers that this practice by the States is related to the way in which they interpret the scope of Article 4 of the Convention, because none of the said States has considered that the protection of the embryo should be so great that it does not permit assisted reproduction techniques and, in particular, IVF. Thus, this generalized practice is associated with the principle of gradual and incremental – rather than absolute – protection of prenatal life and with the conclusion that the embryo cannot be understand as a person.[119]

To summarise, the origin, history, practice and case-law of the Inter-American system along with the critiques on the system's universalist approach[120] make it clear that the doctrine of margin of appreciation has not found a resolute place in the decision making by the IACtHR. The general trend in this Court seems to be towards putting some limitations on the discretion of States in interpreting the ACHR. Nevertheless, there is an ongoing debate and demand from certain circles for the adoption of the doctrine in the Inter-American system in order to make this system less absolutist in its practices.

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117 ibid [177], [186], [187].
118 ibid [252]-[254].
119 *Artavia Murillo and Others ("In Vitro Fertilization") v Costa Rica.* (2016). International Law Reports, 165, 1-187, [256].
120 "Universality means that human beings are endowed with equal human rights simply by virtue of being human, wherever they live and whoever they are, regardless of their status or any particular characteristics."
UN Office of the High Commissioner of Human Rights 'Universality and Diversity' *UNOHCHR* <https://www.ohchr.org/en/special-procedures/sr-cultural-rights/universality-and-diversity>

5. THE MARGIN OF APPRECIATION IN AFRICAN COURT ON HUMAN AND PEOPLE'S RIGHTS

The Organisation for African Unity (OAU) was established in 1963. Its 'principal human rights issues' include the 'decolonisation for all African peoples, in the context of self-determination, and ending apartheid in South Africa.[121] The principles of 'freedom, equality dignity and justice',[122] the 'unity and solidarity of the African States' and a 'better life for the peoples of Africa'[123] were deeply embedded in the Charter of the OAU, which was the first step towards the establishment of human rights institutions in Africa. While some called the Charter of the OAU a 'charter of liberation,'[124] there was sheer disregard for the violations of human rights of citizens from independent states of Africa.[125]

The main human rights body of the OAU, the African Commission on Human and Peoples' Rights (AfComm), was established by the African Charter on Human and Peoples' Rights, 1981 (ACHPR) and became operational in 1987.[126] Later, the African Court on Human and People's rights (ACtHPR) was created under Article 1 of the Protocol to the African Charter on the Establishment of the African Court on Human and People's Rights.[127] The said Protocol was adopted by the OAU in 1998 and entered into force in 2004.

Adopted in 1981, the ACHPR has now been ratified by all African Union (AU) Member States. Out of the thirty States that have ratified the Protocol, eight have made declarations that allow individuals and non-governmental

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121 Rachel Murray, *The African Charter on Human and Peoples' Rights: A Commentary* (Oxford 2019) Oxford Commentaries on International Law.

122 Charter of the Organization of African Unity, Done at Addis Ababa on 25 May 1963 <https://au.int/sites/default/files/treaties/7759-file-oau_charter_1963.pdf> preamble

123 ibid art 2.

124 J Dugard 'The Organisation of African Unity and Colonialism: An inquiry into the plea of self-defence as a justification for the use of force in the eradication of colonialism' (1967) 16 International and Comparative Law Quarterly 157

125 Gina Bekker 'The African Human Rights System: An Uphill Struggle' (2009) 52 German Yearbook of International Law 45, 47

126 ibid.

127 Kate Stone 'African Court of Human and People's Rights' *Advocates for international development* (27 February 2012) 3.

organisations (NGOs) to bring their cases to the Court[128] after the withdrawal of Rwanda's declaration in 2016[129] and Tanzania's declaration in 2019.[130] The Court is situated in Arusha, Tanzania.[131] Interestingly, 40 percent of the cases decided by the Court up to September 2019, i.e., 28 out of a total of 70 cases, were from Tanzania.[132] While the Tanzanian government has not provided a specific reason for the withdrawal of its declaration so far, it is assumed that it is due to the volume of cases against the State of Tanzania caused the government to withdraw the declaration to the Protocol. This shows how the majority of African states have shown some resistance towards allowing different groups to bring their cases to the African Court. It is because of absence of a doctrine similar to the doctrine of margin of appreciation, that would have allowed states some form of leeway to interpret the charter in a way that is a bit more aligned with their specific domestic situation.

Rwanda withdrew the declaration allowing access to court to individuals and NGOs when a person who was found guilty and sentenced to life imprisonment for the crime of genocide was granted access to the ACtHPR.[133] He had been declared a fugitive by Rwandan authorities.[134] The Foreign Ministry issued a statement indicating that when the State submitted the declaration in 2013, 'it never envisaged that such a person (Genocide convict/fugitive) would ever seek or be granted a platform.'[135] This shows how the African human rights system has been unable to gain the trust of OAU Member States because of its consistent disregard of States' internal

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128 ibid.

129 International Justice Resource Centre, 'Rwanda Withdraws Access to African Court for Individuals and NGOs' *IJRC* (14 March 2016) <https://ijrcenter.org/2016/03/14/rwanda-withdraws-access-to-african-court-for-individuals-and-ngos/>

130 Amnesty International 'Tanzania: Withdrawal of individual rights to African Court will deepen repression' *Amnesty International* (2 December 2019). <https://www.amnesty.org/en/latest/news/2019/12/tanzania-withdrawal-of-individual-rights-to-african-court-will-deepen-repression/>

131 Kate Hairsine 'Africa's rights court suffers setback as Tanzania blocks cases' *DW* (12 June 2019) <https://www.dw.com/en/africas-rights-court-suffers-setback-as-tanzania-blocks-cases/a-51548555>

132 Anuradha Mittal 'Tanzania's Withdrawal from the African Court on Human and People's Rights' *Oakland Institute* (9 December 2019) https://www.oaklandinstitute.org/tanzanias-withdrawal-african-court-human-peoples-rights-wrong-move

133 The New Times 'Rwanda withdraws from African Court Declaration' *The New Times* (5 March 2016) <https://www.newtimes.co.rw/section/read/197697>

134 ibid.

135 ibid.

circumstances. A similar attitude is found in the Court's jurisdiction, calling into question whether it would ever be considerate enough to develop a doctrine similar to the margin of appreciation.

The ACtHPR's success would be dependent on the will of States to adopt the core Afrcan human rights values that the Court was intended to serve.[136] At that point in time, the principle of State sovereignty was seen to be at odds with a supra-national legal order created 'to regulate their municipal laws under the instruction of that legal system.'[137] Hopkins believed that States had a two-dimensional obligation: first, to incorporate provisions of the ACHPR into their own domestic law and to guarantee the compliance by their own municipal courts, and second, to accept and obey the judgments of the ACtHPR regardless of any dispute that may have existed between their own legislation and provisions of statutes applied in the Court.[138]

The ACHPR lays great emphasis on the duties that an individual owes to his or her community. It is believed that the ACHPR goes even further in establishing individual duties than 'the Universal Declaration of Human Rights, the American Declaration of Rights and Duties of Man and the American Convention on Human Rights.'[139] The Preamble of the ACHPR makes two important ideological claims: 'that the reality and respect of people's rights should necessarily guarantee human rights;' and that 'the enjoyment of rights and freedoms . . . implies the performance of duties on the part of everyone'.[140] The two claims can be linked with each other as espousing an idea of a strong sense of the community in African affairs.[141] Umozurike states that 'the notion of individual responsibility to the community is firmly engrained in the African tradition . . . It is an open question, however, as to whether "community" equals "State".'[142] If

136 Kevin Hopkins 'The Effect of an African Court on the Domestic Legal Orders of African States' (2002) 2 African Human Rights Law Journal 234, 236.
137 ibid.
138 ibid.
139 Bekker (n 125) 50.
140 Patrick Thornberry 'The African Charter on Human and Peoples' Rights; African Perspectives on Indigenous Peoples' in *Indigenous Peoples and Human Rights*, 244-64. (Manchester University Press, 2002) 7 <www.jstor.org/stable/j.ctt155jg1p.15>
141 ibid.
142 U. O. Umozurike, 'The African Charter on Human and Peoples' Rights: Suggestions for More Effectiveness' (1983) 77(4) American Journal of International Law 902, 911.

community does equal State, then the African system of human rights would be considered a highly restrictive system that directs the individuals to fulfil the duties owed to the State more than any other international human rights instrument. Rather, the ACtHPR should come up with a more progressive charter that allows for more individual freedom. The Member States' confidence should be gained by reassuring them that the ACtHPR would allow states some flexibility in their imposing their obligations under the ACHPR.

Furthermore, 'claw back' clauses reveal the restrictive nature of the ACHPR.[143] At the time the Charter was framed, there was increasing international pressure as well as pressure from other human rights regimes. Hence, the system is said to be borne out of geo-political realities rather than sincere commitment to the cause of human rights.[144] The allegedly restrictive nature of the ÅCHPR could be assumed as corresponding directly to the fact that States were not comfortable with the idea of having a supranational regional system trying to meddle with their domestic affairs, as mentioned earlier. In order to get African States on board, framers of the ACHPR came up with the provisions that would make it seem like a pro-State document. The term 'pro-state' would essentially entail that the Charter would prioritise the interests of State authorities or laws in place within a State over the freedoms and rights of individuals.

Although the aforementioned facts make the African system seem relatively restrictive, the ACHPR allows the AfComm to 'draw inspiration' from other human rights treaties and documents.[145] This has created space for a wide array of interpretations and the broadest possible meanings that could be attached with individual rights enshrined in the ACHPR. In some cases, the AfComm implied certain rights from other rights that are enshrined in the ACHPR. One major example of this practice is the *Ogoniland* case, wherein the Court held that the rights to life, health, and economic, social and cultural development give rise to an implicit right to food.[146] This exemplifies how the

[143] Bekker (n 125) 51.
[144] ibid 48.
[145] African Charter on Human and Peoples' Rights, 1981, art 60.
[146] *Decision Regarding Communication 155/96 (Social and Economic Rights Action Center/Center for Economic and Social Rights v Nigeria)* Case no ACHPR/COMM/A044 (27 May 2002) [64].

ACtHPR can sometimes take great amount of leeway in terms of implying certain human rights.

The African Charter on the Rights and Welfare of Children, 1990 (ACRWC) and the Protocol to the African Charter on the Rights of Women, 2003 (Maputo Protocol) could also be seen as signifying a broad interpretation of rights in the African system. The ACRWC prohibits child marriages,[147] recruiting children as soldiers during armed conflicts,[148] and children's sexual exploitation,[149] and also introduces special measures for the promotion of girls' education.[150] The Maputo Protocol provides for a ban on female genital mutilation,[151] for 'monogamy as the preferred form of marriage,'[152] equal rights when it comes to 'separation, divorce or annulment of marriage,'[153] the right for women to control their own fertility,[154] property rights[155] and the rights of widows.[156]

In light of the abovementioned instruments, and also the way the ACtHPR is implying additional rights from the existing provisions in the ACHPR, one could assume that the African system is not as restrictive as the African charter's basic reading would have us believe. Thus, scholars who argue that African system was created just to protect the interests of African States would not be able to stand their grounds.[157]

Moreover, the ACtHPR is the youngest and least experienced regional human rights court. Consequently, it is difficult to find literature highlighting the number of cases in which the Court has given some deference to national

[147] African Charter on the Rights and Welfare of the Child, 1990, adopted by 26th Ordinary Session of the Assembly of Heads of State and Government of the OAU (adopted in Addis Ababa, July 1990, entered into force 29 November 1999) art 21 (2).
[148] ibid art 22.
[149] ibid art 27.
[150] ibid art 11.
[151] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003 (adopted 1 July 2003, entered into force 25 November 2003) art 5(b).
[152] ibid art 6(c).
[153] ibid art 7.
[154] ibid art 14.
[155] ibid art 21.
[156] ibid art 20.
[157] Bekker (n 125) 151.

authorities to interpret the provisions of the ACHPR or its Protocols in a way that that is deemed appropriate for their domestic legal systems.

The ACtHPR issued its first judgment on women's rights in *APDF and IHRDA v The Republic of Mali.* In 1998, the Republic of Mali decided to modernise its legislation relating to family law to bring it in line with its international obligations.[158] After the promulgation of the Family Code in 2009, several groups, including Islamic organisations, organised protests and demanded an amendment of the law in line with Muslim family law. In 2011, Mali adopted a revised Family Code.[159]

The petitioners alleged violations of provisions regarding the 'minimum age of marriage,' consent of parties at the time of marriage, violations of inheritance rights of women, and violations of obligations to end harmful traditional practices that are harmful to women's well-being.[160] Although Mali claimed that they had amended the law under *force majeure* conditions, they were still responsible for violating their obligations under the ACRWC, the Maputo Protocol, and the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).[161] The Court ordered the State to amend the Family Code to align it with their international obligations under the instruments they had ratified.[162]

This case indicates how the African Court can be extremely inflexible in certain cases, imposing its will on the State without giving due regard to the State's interests. Mali is a Muslim majority country where almost 92% of the population is Muslim.[163] In the above case, the State contended that, under Islamic law, women receive half of the share in property as that of men. The State also contended that women are considered to be eligible for marriage after reaching puberty, with an appropriate age for women to get married in

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158 *Association Pour le Progres et la Defense des Droits des Femmes Maliennes (APDF) and the Institute for Human Rights and Development in Africa (IHRDA) v Republic of Mali,* App no 046/2016 (ACtHPR, 11 May 2018)
159 ibid.
160 ibid.
161 ibid.
162 ibid.
163 Kenneth Kimutai too 'Religious Beliefs in Mali' *WorldAtlas* (25 April 2017) <https://worldatlas.com/articles/religious-beliefs-in-mali.html>

the Muslim community of Mali determined to be as low as 15 years of age.[164] The ACtHPR did not give any deference to the argument of the State; the fact that religious groups had forced the government to amend the Family Code was not a suitable argument in view of the Court.

Moreover, the argument against the Family Code in Mali was that the State had ratified the Maputo Protocol, which contained provisions on the State's obligations regarding women's consent in marriage, the right age for women to get married and equitable share in inheritance for women. The State had contended that they were trying to improve the law slowly; however, the Court did not give any credence to this argument. The ACHPR also ignored the fact that the State had shown a strong will and inclination towards bringing its laws in conformity with international human rights treaties by incrementally modernising their legislation starting in 1998. The State of Mali promulgated the Family Code against all odds in 2009. It was only after the backlash that the government had to face from different groups, including Islamic organizations that the Family Code was amended that led to violations of the State's international obligations.

Depending on how the situation unveils in the future, Mali could be the third country after Rwanda and Tanzania to withdraw the declaration that allows NGOs and individuals to take their cases to African Court. In a country where the majority of the population is Muslim, it is never easy to go against religious and customary norms and practices. It could be said that by not allowing Mali to introduce laws that are not in conformity with the State's international obligations to gain control over a situation of internal conflict, the ACtHPR may have given rise to resistance against the international human rights regime at the domestic policymaking level in Mali.

In *Dexter Eddie Johnson v Republic of Ghana,*[165] the ACtHPR affirmed and justified the State's decision in imposing the death penalty. the applicant had alleged that the Ghanaian State had violated his right to life and right to protection from inhumane punishment under the International Covenant on

[164] *Association Pour le Progres et la Defense des Droits des Femmes Maliennes (APDF) and the Institute for Human Rights and Development in Africa (IHRDA) v Republic of Mali* (n 158).
[165] *Dexter Eddie Johnson v Republic of Ghana* (Ruling), App. No 016/2017 (ACtHPR, 28 March 2019).

Civil and Political Rights (ICCPR).[166] The Court noted that he was awarded the death penalty after a proper investigation and after proper establishment of charge against him.[167] The Constitution of Ghana allowed the death penalty; therefore, his sentence was legal. The Court dismissed the relief sought.[168] The Court did not derive a rule against the death penalty from the rights mentioned in the application in the case of Ghana.

Considering the above-mentioned facts, the doctrine of margin of appreciation has not found any place in practice of the ACtHPR. The African system is clearly not an entirely pro-State system as it draws inspiration from other human rights instruments, implies new and more progressive rights from existing provisions, and requires States to conform to their treaty obligations in a straightforward manner. Even the sub-regional courts in Africa, namely the 'ECOWAS Community Court of Justice, the East African Court of Justice, and the Tribunal of the Southern African Development Community' have no application of the doctrine of margin of appreciation in their systems.[169] It is believed that these Courts are more focused on the rights of citizens and are not willing to give States much leeway.[170]

There have been mixed approaches towards the nature of this ACtHPR until now. Some view it as a restrictive system that favours States while some cases such as the *Ogoniland* and *Republic of Mali* cases indicate otherwise. Like the other two systems, the application of the doctrine of margin of appreciation in the African system would depend on the circumstances of each individual case. However, the ACtHPR needs to establish a system of deference to domestic governments, as otherwise, Member States will be reluctant in ratifying further international human rights treaties at the African level. There is also a danger of some States ultimately leaving the system. After Tanzania's withdrawal, there are only eight states that have made declarations to allow

166 ibid.
167 ibid.
168 ibid.
169 Andreas von Staden 'Subsidiarity, exhaustion of domestic remedies, and the margin of appreciation in the human rights jurisprudence of African sub-regional courts' (2016) 20(8) International Journal of Human Rights 1113.
170 ibid 1126.

the ACtHPR to receive cases from individuals and NGOs. The Mali judgment could further discourage other States to adopt this declaration.

6. CONCLUSION

The notion of the margin of appreciation, though originating in Europe, is finding greater relevance when considered within the framework of various regional human rights regimes. The European system is well-versed in the doctrine, which has been applied by the ECtHR in a number of judgments. In cases where national authorities do not entirely agree with the provisions of the American Convention, Member States of the Inter-American system—who at first did not object to the IACtHR 'universalist' approach—are now requesting a margin of appreciation. The ACtHPR is the newest and has less developed and established norms and tendencies; yet, in certain instances, the ACtHPR has adopted a stance that is comparable to the Inter-American court—or even more restricted in certain instances. The reaction that the ACtHPR has gotten from the OAU is the strongest as indicated by the withdrawal of States from its jurisdiction.

In conclusion, the margin of appreciation is needed in all regional human rights systems. The way every State perceives their human rights obligations would almost always correspond with the domestic socio-cultural realities of those States. Cultural relativism posits that the cultural context should shape the evaluation of ethical standards; the margin of appreciation acknowledges this by allowing States some leeway in interpreting human rights norms based on their unique cultural and historical backgrounds. The varying adoption of the margin of appreciation stems from the tension between preserving cultural diversity and the desire for universal human rights standards; legal traditions, political philosophies, and historical contexts shape how different systems approach this balance. The margin of appreciation allows States to move in the direction of conformity with international human rights treaties and obligations, while also adopting such measures that are acceptable to those groups within a State who have a different conception of rights and duties than those enshrined in international human rights instruments.