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Exporting the margin of appreciation:

Lessons for the Inter-American Court of Human Rights

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What might the Inter-American Court of Human Rights (IACtHR) gain from a 'judicial dialogue' with the European Court of Human Rights (ECtHR) in the form of borrowing the ECtHR's margin of appreciation doctrine? Arguably, a favorable interpretation of the vague margin of appreciation doctrine allows the ECtHR to provide both human rights protection and deference to domestic democratic decision-making. This may guide the IACtHR's attempt to respect both the American Convention on Human Rights and its sovereign creators. In particular, the ECtHR's Doctrine may illustrate how these regional courts can interact with states that violate the respective conventions after less than fully democratic processes—in the eyes of the courts. The same margin of appreciation doctrine may justify more or less sovereignty-invading stances by both the IACtHR and by the ECtHR, depending on to the different levels of entrenchment of a democratic culture and rule of law in the state of concern, and depending on the actual deliberations carried out in the particular case.

1. Introduction

Human rights courts face a continual challenge: How to honour their mandate to protect human rights of individuals within the signatory states, whilst paying due respect to the sovereign state masters of the treaties. The present article defends a version of the European Court of Human Rights' (ECtHR) doctrine of a margin of appreciation ("the Doctrine"), whereby the ECtHR grants a state the authority, within certain limits, to determine whether the European Convention on Human Rights (ECHR)[1] is violated in a particular case. This Doctrine is also suitable for the Inter-American Court of Human Rights (IACtHR), even though it must adjudicate states with fragile democratic and rule of law traditions—skeptics notwithstanding. The Doctrine need not sacrifice human rights on the altar of state sovereignty: the respect for democratic sovereignty expressed by the Doctrine need not reduce the democracy protection and promotion which the regional human rights courts are set up to provide.

This introductory section presents a brief backdrop of these two courts and some of the recent criticism they face. Section 2 lays out a favorable interpretation of the current Doctrine by the ECtHR. Section 3 considers how the IACtHR may apply the Doctrine to states of varying democratic quality.

The ECtHR and the IACtHR were both set up in part to promote and safeguard democratic, human rights respecting governance in their regions. Their main tasks include to monitor, adjudicate and possibly penalize states which violate the human rights standards of the European Convention on Human Rights and of the American Convention on Human Rights (ACHR), respectively.[2] The courts would serve as "fire alarms" to warn and trigger early intervention if tyranny nevertheless threatened.[3]

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[1] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as Amended by Protocols Nos. 11 and 14. Entry into Force 3 September 1953*, 213 UNTS 222 (1950).

[2] *Id*.; European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, in force Nov. 3, 1953, 213 U.N.T.S. 222; American Convention on Human Rights, November 22, 1969, in force July 18, 1978, O.A.S. T.S 36, 1144 U.N.T.S. 123; Darren G. Hawkins, *Protecting Democracy in Europe and the Americas*, 62(3) INT'L ORG. 373 (2008).

[3] For the ECtHR, *see* Matthew McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols and Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984); Kal Raustiala, *Police Patrols and Fire Alarms in the NAAEC*, 3 LOY. L.A. INT'L & COMP. L. REV. 389 (2004); ED BATES, THE EVOLUTION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS. FROM ITS INCEPTION TO THE CREATION OF A PERMANENT COURT OF HUMAN RIGHTS (2010).

A central challenge to both courts—and to the Doctrine—is the combination of two phenomena: the *broad* and *dynamic* range of signatory states. The varying range of "democratic quality" and rule of law commitment among their member states spans from states with long and strong democratic credentials to states recently emerging from dictatorship. This range makes it difficult for the courts to treat similar cases alike and dissimilar cases appropriately different. Second, both courts have witnessed dynamic change in the "democratic quality" and rule of law commitment among the member states over time: the immediate post-authoritarian phase where the alarm bell function was thought crucial. In Europe, the ECtHR later turned more to "cosmetic" fine-tuning of well-functioning democracies—until the post 1989 accession of post-Communist states which required the Court to again seek to consolidate fragile democracies. The IACtHR has likewise witnessed a strengthening of democratic rule in several of its member states since its early years, which some critics claim the IACtHR has yet to accommodate.[4] However, the IACtHR must also function and possibly benefit a region which has witnessed several attempts at overthrowing democratic governments. These include the *coup d'état* in Nicaragua against President Manuel Zelaya (28 June 2009); impeachment of Paraguay's President Fernando Lugo by the National Congress in 2012 and his consequent removal from the Presidency; and the failed attempt to overthrow Rafael Correa's government in Ecuador in 2010.[5]

This combination of broad and dynamic range among the member states' democratic traditions has challenged the two courts. Can the Doctrine be part of the solution for the IACtHR? In later years, both courts have faced heavy criticism from several of their member states that they are insufficiently deferential to the masters of the treaties. Indeed, both courts are criticized for engaging in too dynamic treaty interpretation, far beyond the consent of the signatories. In Europe, the conflict came to a peak at a meeting of the Council of Europe's Committee of Ministers on the future of the European Court of Human Rights in Brighton 2012. The meeting, *inter alia,* agreed to subtle changes to the Convention, to insist that states enjoy a certain scope of discretion—confirming the ECtHR's own doctrine of a margin of appreciation. Critics—including judges of the Court and academics—worry that this Doctrine amounts to an abdication by the ECtHR.[6]

States and academics have criticized the IACtHR along similar lines. States' protests against rulings and their lack of implementation[7] should not surprise. The President of the Chilean Supreme Court has claimed that the judgments of the IACtHR are only suggestions, rather than binding on states.[8] Trinidad and Tobago (in 1998) and Venezuela (in 2013) withdrew from the IACtHR, and the Dominican Republic has warned that it could do the same in 2014, although no further action has been taken by this state. Scholars also lament that the Court has yet to realize that several states under its jurisdiction are no longer at risk of falling back into

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For IACtHR, *see* Ariel Dulitzky, *The Inter-American Human Rights System Fifty Years Later: Time for Changes*, 127 (Special edition) QUEBEC J. INT'L L.,128 (2011); Jonas Tallberg & Anders Uhlin, *Civil Society and Global Democracy: An Assessment*, *in* GLOBAL DEMOCRACY 210 (Daniele Archibugi et al. eds., 2010); Arturo C. Sotomayor, *Militarization in Mexico and Its Implications*, *in* THE STATE AND SECURITY IN MEXICO: TRANSFORMATION AND CRISIS IN REGIONAL PERSPECTIVE 42, 52 (Brian J. Bow and Arturo Santa Cruz eds., 2013).

[4] Dulitzky, *supra* note 3.

[5] I am grateful to Leiry Cornejo Chavez for this reminder.

[6] Z v. Finland (1997) 25 EHRR 371 para. 2 (1997) (De Meyer J. dissenting); Jan Kratochvil, The Inflation of the Margin of Appreciation by the European Court of Human Rights, 29(3) Netherlands Quarterly of Human Rights. 324 (2011) (with further references).

[7] Alexandra Huneeus, *Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights*, 44 CORNELL INT'L L.J. 493 (2011).

[8] Leiry Cornejo Chavez, *The Claude-Reyes Case of the Inter-American Court of Human Rights—Strengthening Chilean Democracy?*, 31(4) NORDIC J. HUM. RTS 513, 528 (2013).

authoritarianism—some recent upheavals and incidents notwithstanding. The IACtHR should therefore be more deferential to domestic democratic decisions.[9] The Court should also constrain its dynamic interpretation so as to reflect states' consent, rather than to cite the ECtHR and other sources in support of more "progressive" interpretations.[10] It might instead rely more on "regional consensus," as the ECtHR does when appealing to a(n) (emerging) European consensus.[11]

Might the IACtHR adopt a margin of appreciation doctrine, to better address the tension between supporting states' human rights obligations and deference to the sovereign state parties? Several objections should be considered. Firstly, this may be yet another unauthorized borrowing from the ECtHR by the IACtHR. However, this would presumably be acceptable by the state parties, insofar as the margin of appreciation grants them more discretion to determine violations of the Convention. Secondly, such deference to states may be even worse by the IACtHR than by the ECtHR. Thus Cançado Trindade, former judge of the IACtHR and now judge at the International Court of Justice (ICJ), claims that:

> How could we apply [the margin of appreciation doctrine] in the context of a regional human rights system where many countries' judges are subject to intimidation and pressure? How could we apply it in a region where the judicial function does not distinguish between military jurisdiction and ordinary jurisdiction? How could we apply it in the context of national legal systems that are heavily questioned for the failure to combat impunity? . . . We have no alternative but to strengthen the international mechanisms for protection … Fortunately, such doctrine has not been developed within the inter-American human rights system.[12]

The present article seeks to soften if not rebut such a rejection of a margin of appreciation. A margin of appreciation doctrine, duly developed and specified, can contribute to alleviating the tension between human rights protection and due deference to sovereignty in a defensible way. The Doctrine is also suitable when a court must adjudicate states with questionable democratic credentials and without sufficient judicial independence. Indeed, this is a task not only for the IACtHR, but also for the ECtHR, and the Doctrine can be applied to a broad range of states.

2. The margin of appreciation doctrine: rationale and features

The ECtHR's Doctrine refers to its practice to grant states some measures of discretion in determining whether there is a violation of the ECHR. This practice is arguably so indeterminate and the standards so vague that to call it a "doctrine" is unduly salutary. The following is thus a favorable reconstruction which draws both on the explicit descriptions of the Doctrine in some of the cases, and on some of the examples of the doctrine draws from the case law of the Court—as well as on some academic analyses of the doctrine. This is of

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[9] Roberto Gargarella, *In Search of Democratic Justice: What Courts Should Not Do: Argentina, 1983–2002*, 10(4) DEMOCRATIZATION 181 (2004); Roberto Gargarella, *La Democracia Frente a Los Crimenes Masivos: Una Reflexión a La Luz Del Caso Gelman*, 2 REVISTA LATINOAMERICANA DE DERECHO INTERNACIONAL 181 (2015); Victor Abromovich, *From Massive Violations to Structural Patterns: New Approaches and Classic Tensions in the Inter-American Human Rights System*, 6(11) SUR INT'L J. HUM. RTS 6 (2009).

[10] Gerald L. Neuman, *Import, Export, and Regional Consent in the Inter-A513merican Court of Human Rights*, 19(1) EUR. J. INT'L L. 107 (2008).

[11] Neuman, *supra* note 10, at 107. For the ECtHR's practice, *see* Eva Brems, *The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights*, 56 HEIDELBERG J. INT'L L. 240 (1996); Luigi Crema, Disappearance and New Sightings of Restrictive Interpretation(s), 21(3) EUR. J. INT'L L. 681 (2010); KANSTANTSIN DZEHTSIAROU, EUROPEAN CONSENSUS AND THE LEGITIMACY OF THE STRASBOURG COURT (2015).

[12] A. A. C. TRINDADE, EL DERECHO INTERNACIONAL DE LOS DERECHOS HUMANOS EN EL SIGLO XXI, at 390 (2008).

course not to deny that other reconstructions and analyses are equally loyal to the somewhat confusing cases and claims by the Court.[13]

The main rationale of the Doctrine on this account is to limit the authority of the ECtHR in those cases where domestic authorities can be trusted to provide sufficient protection of human rights. This role of the Doctrine must be understood in light of the contribution of regional human rights courts generally, and informed by a "person-centered" conception of a principle of subsidiarity.[14] It may seem paradoxical that states agree to bind themselves to human rights conventions which mainly serve to restrict how the state may treat its own citizens. Why would states want to thus bind themselves?[15] A central objective is to increase states' credibility as regards their commitment to human rights—in the eyes of their own citizens and of other states. The role of human rights courts is thus mainly to monitor and promote domestic human rights protection where that is most needed. To allow such regional human rights courts to grant states a certain margin of appreciation facilitates this function. The margin of appreciation helps specify the subsidiary, supportive role of the ECtHR to provide added human rights protection, and bolster the protection provided by independent domestic courts—without limiting democratic self-governance unduly.[16]

Rights of minorities are at risk in majoritarian democracies, thus states should seldom enjoy a margin of appreciation for them; and the rights necessary for well-functioning democratic procedures should also be protected and thus seldom be subject to a margin of appreciation. However, when the governments are sufficiently responsive to the best interests of their and other citizens, and the domestic judiciary is independent, the ECtHR is not likely to be a better judge of whether there is a violation of the Convention. Evidence of such responsiveness may be found in a domestic proportionality test, which should therefore be a necessary condition in the cases where the Court grants a state a margin of appreciation.

The following presentation first gives an account of which rights the state may enjoy a margin of appreciation; then explains the practice of a "narrow" or "wide" margin, and the roles of a proportionality test and a perceived "European consensus."

A margin of appreciation is claimed by the Court to be appropriate for at least three main issue areas: exemptions, applications to specific local circumstances, and balancing among rights:

> (1) "Balancing" the rights against certain exemption conditions—other urgent issues such as emergencies, public safety, the economic well-being of the country etc.—as permitted for several rights to private life, religion, expression etc. (arts. 8, 9, 10 ECHR).
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> (2) How to apply the norms to the specific circumstances of a state, which may depend on peculiar complex political or social assessments, shared values and traditions including "moral issues" such as adoption or in vitro fertilization, or perceived threats.[17]

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[13] For nuanced accounts, *see, e.g.*, YUTAKA ARAI-TAKAHASHI, THE MARGIN OF APPRECIATION DOCTRINE AND THE PRINCIPLE OF PROPORTIONALITY IN THE JURISPRUDENCE OF THE ECHR (2001); George Letsas, *Two Concepts of the Margin of Appreciation*, 26(4) OXFORD J. LEGAL STUD. 705 (2006); Janneke Gerards, *Pluralism, Deference and the Margin of Appreciation Doctrine*, 17 EUR. L.J. 80 (2011).

[14] Andreas Follesdal, *Squaring the Circle at the Battle at Brighton: Is the War between Protecting Human Rights or Respecting Sovereignty over, or Has It Just Begun?, in* SHIFTING CENTRES OF GRAVITY IN HUMAN RIGHTS PROTECTION: RETHINKING RELATIONS BETWEEN THE ECHR, EU, AND NATIONAL LEGAL ORDERS 189 (Oddný Mjoll Arnardottir & Antoine Buyse eds., 2016). For a similar approach, *see* Marisa Iglesias, *Subsidiarity, Margin of Appreciation and International Adjudication from a Cooperative Conception of Human*,15(2) INT'L J. CONST. L. (2017).

[15] Karen Alter, *Delegating to International Courts: Self-Binding vs. Other-Binding Delegation*, LAW AND CONTEMPORARY PROBLEMS 71(2008).

[16] *Cf.* Vila's (*supra* note 14) "rationalized" version of the margin of appreciation doctrine.

[17] *See, e.g.*, Fretté v. France, 38 EHRR 438. (2002).

(3) "Balancing" or "trade-offs" among different private human rights in the Convention, such as between freedom of expression (art. 10 ECHR) and privacy (art. 8 ECHR).

2.1. The domain of Convention rights to which the Doctrine applies

The Doctrine originated in response to emergency situations that allow limitations of certain rights under article 15 of the ECHR.[18] The margin of appreciation has mainly been used for articles that include limitation clauses, namely articles 8–11 (right to private and family life, freedom of thought and religion, of expression, and of assembly, respectively), each of which include proportionality requirements. It is also used concerning prohibitions of unequal treatment or non-discrimination (art. 14 ECHR); and art. 6 ECHR (right to a fair trial)—including access to courts. The Court hardly ever grants a margin to the non-derogable rights to life (art. 2 ECHR), against torture (art. 3 ECHR), slavery or forced labor (art. 4 ECHR).[19] The Court is also very wary of granting a margin of appreciation for rights that secure political participation, freedom of expression, and other conditions required for well-functioning democratic decision-making.[20]

2.2. Wide and narrow margin of appreciation

One important aspect of the Doctrine is that the Court will grant a wider or narrower margin dependent on various conditions.[21] These include the nature of the Convention right, its importance for the individual, the kind of interference, and the social objective pursued which required restriction of the right—typically whether it is "necessary in a democratic society." Thus states will only enjoy a narrow margin for rights necessary for democratic decision-making.

Some scholars maintain that when the Court grants a wider margin the scrutiny mainly amounts to seeing whether the domestic authorities have considered the case carefully.[22] When the ECtHR engages in strict scrutiny of cases of the first and second kinds—concerning exemption clauses or application to local circumstances—it often requires that the accused state has undertaken a 'proportionality test' to check if the rights violation could have been avoided by other policies in pursuit of the same social objectives. Proportionality evaluations are more complex when there are conflicts between two Convention rights.[23]

2.3. Proportionality test

The ECtHR has specified the requisite proportionality test in several cases, unfortunately not always consistent, and not followed in all cases, which would appear to require strict

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[18] Cf similar limited suspension clause in ACHR, *supra* note 2, art. 27.

[19] *But see* Julian Rivers, *Proportionality and Variable Intensity of Review*, 65(1) CAMBRIDGE L.J. 174, 184 (2006), who argues that some balancing occurs for almost all Convention rights. The ECtHR has referred to the margin of appreciation with regard to some aspects of the European Convention on Human Rights art. 2 (Budayeva v. Russia App no 15339/02 ECtHR, March 20, 2008) and art. 3 (M.C. v. Bulgaria 2003 40 EHRR 459, and Beganovic v Croatia App No 46423/06 ECtHR June 25, 2009). Thanks to Oddny Mjoll Arnardottir for these references.

[20] ANDREW LEGG, THE MARGIN OF APPRECIATION IN INTERNATIONAL HUMAN RIGHTS LAW: DEFERENCE AND PROPORTIONALITY 90–92 (2012); Eyal Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards*, 31 INT'L L. & POL. 843, 847 (1999).

[21] S. and Marper v. UK48 EHRR 50, para. 102 (2008). For detailed analysis of these requirements, *see* Gerards, *supra* note 13, at 107.

[22] *See, e.g.*, Gerards, *supra* note 13, at 104.

[23] Olivier De Schutter & Francoise Tulkens, *Rights in Conflict: The European Court of Human Rights as a Pragmatic Institution*, *in* CONFLICTS BETWEEN FUNDAMENTAL RIGHTS 171 (Eva Brems ed., 2008).

[23] Olivier De Schutter & Francoise Tulkens, *Rights in Conflict: The European Court of Human Rights as*

review.[24] A favorable account based on cases and various statements by the ECtHR is that the proportionality test must assess:

(1) the legitimacy of the social objective pursued;
(2) how important the restricted/derogated right is, e.g., as a foundation of a democratic society;[25]
(3) how invasive the proposed interference will be;
(4) whether the restriction of the right is necessary;[26] and
(5) whether the reasons offered by the national authorities are relevant and sufficient.[27]

Furthermore, the ECtHR is prepared to assess whether the state has carried out these steps in a substantively satisfactory way: the Court has maintained that the state sometimes has overlooked less intrusive alternative means to secure its objectives.[28] The ECtHR must be satisfied on these five counts for the Court to defer to the domestic court's decision as to whether there is a violation of the ECHR.

I submit that such a proportionality test may best be regarded as a necessary, but never a sufficient condition. As mentioned above, proportionality arguments are only accepted by the Court as regards some rights. Thus the Court has noted often about itself that

> "[I]it is in no way [its] task to take the place of the competent national courts but rather to review under Article 10 (art. 10) the decisions they delivered in the exercise of their power of appreciation . . ."
>
> This does not mean that the Court's supervision is limited to ascertaining whether a respondent State exercised its discretion reasonably, carefully and in good faith. Even a Contracting State so acting remains subject to the Court's control as regards the compatibility of its conduct with the engagements it has undertaken under the Convention.[29]

The scrutiny is stricter for some rights, in particular for rights crucial for the functioning of democratic elections and deliberation.

Note that the proportionality test concerns *the particular piece of legislation or policy*—it is not a question of whether the state generally has a more deliberative or authoritarian mode of legislation.[30] The Doctrine thus avoids the unnecessary quagmire of determining the "democratic quality" of each state.

The ECtHR does not require that it be the domestic judiciary that undertakes such a proportionality test: it may well be the legislature's task.[31] But the Court will usually require that the domestic judiciary determines whether such a review has taken place: the domestic judiciary should not accept governments' claims in this regard without evidence.[32] The

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[24] Handyside v. United Kingdom, 24 Eur. Ct. H.R. 523 EHRR (1976); James and Others v. United Kingdom, 8 EHRR 123 (1986) v; Hirst v. The United Kingdom (No. 2), 42 EHRR 849 (2005). The court's inconsistency in this regard is widely lamented, *see, e.g.*, Patricia Popelier, *The Court as Regulatory Watchdog. The Procedural Approach in the Case Law of the European Court of Human Rights*, *in* THE ROLE OF CONSTITUTIONAL COURTS IN MULTILEVEL GOVERNANCE 249, 267 (Patricia Popelier, Armen Mazmanyan, and Werner Vandenbruwaene eds., 2013); Gerards, *supra* note 13, at 106; GEORGE LETSAS, A THEORY OF INTERPRETATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 80 (2007). For alternative interpretation of proportionality criteria, e.g. stressing suitability and the least-restrictive-means test, *see* Janneke Gerards, *How to Improve the Necessity Test of the European Court of Human Rights*, 11(2) INT'L J. CONST. L. 466 (2013); or LEGG, *supra* note 20.

[25] Handyside, 24 Eur. Ct. H.R. 523, para. 49 (1976).

[26] *Id.* para. 4.

[27] *Id.* para. 50.

[28] Rasmussen v. Denmark Eur. Ct. H. R. 71 Ser. B, 43 (1988).

[29] The Sunday Times v. United Kingdom, 2 EHRR 245 para. 59 (1979)

[30] *Cf.* Vila *supra* note 14.

[31] Popelier, *supra* note 24, at 255–56, 261.

[32] Thus the Court held in Lindheim and Others v. Norway, Ser. B 13221/08 and 2139/10 (2012), para. 85, that

absence of both is the reason why the Court refused to grant the UK a margin of appreciation in the *Hirst* case and likewise in the case *Lindheim and Others v. Norway*.[33]
Indeed, the Court has often stated that a visible proportionality test it is *necessary* if a state is to enjoy a margin of appreciation: the Court cannot grant a margin of appreciation when there is no evidence of such testing by domestic organs. It has sometimes stated a less stringent requirement, namely that the margin will be *narrower* if domestic authorities have not conducted such a test.[34] There are also cases such as *Schalk and Kopf v. Austria* where the Court did grant the state a margin in the absence of a proportionality test.[35] My reconstruction follows a joint dissenting opinion in that case by judges Rozakis, Spielmann, and Jebens, who stated that:

> [I]n the absence of any cogent reasons offered by the respondent Government to justify the difference of treatment, there should be no room to apply the margin of appreciation. Consequently, the "existence or non-existence of common ground between the laws of the Contracting States" . . . is irrelevant as such considerations are only a subordinate basis for the application of the concept of the margin of appreciation.[36]

2.4. European consensus

A further aspect of the Doctrine is that domestic authorities are subjected to stricter scrutiny if the Court finds that the policies or legislation violates a European "consensus," or violates an emerging trend toward such a consensus. The methods the ECtHR has used to determine such a consensus have been heavily criticized, both by judges and scholars.[37]
Note the role of consensus in the Doctrine. It is not a condition for granting a margin, but rather the reverse: if the infringement of a right is of the kind where the ECtHR may grant a margin, that margin will be narrower if the Court detects a (trend toward) consensus.
Some scholars hold that the proportionality test entails a role of the Court as more or mainly "procedural" rather than material, in that it refrains from considering whether violations have occurred but rather checks whether domestic authorities have carried out the requisite procedures required by the proportionality test.[38] Some describe this as a "semiprocedural" review that mixes both aspects, which may or may not be a new trend, or instead the development of more "evidence based" traditional judicial review.[39] Such discussions must heed the context of the test: the Court may find against the state even when it has conducted such a proportionality test. Some rights may not permit limitations or "balancing," or the

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> [F]rom Hirst v. the United Kingdom (no. 2) ([GC], no. 74025/01, ECHR 2005-IX) it could be deduced that the margin of appreciation would be narrower when Parliament had not analysed and carefully weighed the competing interests or assessed the proportionality of blanket rules. Nor had Parliament assessed section 33 in the light of the European Convention.

See also Animal Defenders International v. United Kingdom, (2013) 57 EHRR 21 (2013)para. 116.
[33] Hirst v. United Kingdom (No. 2) (2005) 42 EHRR 849, para. 79–82 ; Lindheim and Others v. Norway, App Nos. 13221/08 and 2139/19, Eur. Ct. H.R., June 12, 2012, para. 128–130. *See contra* Animal Defenders v. United Kingdom 57 EHRR 21, para. 108–109 (2013). *Cf.* Popelier, *supra* note 24, at 255–256.
[34] *Cf.* Lindheim EHRR 985, para. 85 (2013) (referring to Hirst (No. 2)). One case where the state was granted a margin of appreciation even absent evidence of a proportionality test was Schalk and Kopf v. Austria 53 EHRR 20. (2010).
[35] Schalk and Kopf v. Austria 53 EHRR 20 (2010) (Rozakis, Spielmann and Jebens, dissenting)
[36] *Id*. para. 8 (Rozakis, Spielmann, and Jebens, dissenting).
[37] Hirst (No. 2) 42 EHRR 849; Laurence Helfer, *Consensus, Coherence and the European Convention on Human Rights*, 133 CORNELL INT'L L.J. 154 (1993).
[38] Janneke Gerards, *Procedural Review by the ECtHR–A Typology* in PROCEDURAL REVIEW IN FUNDAMENTAL RIGHTS CASES (to appear) (Janneke Gerards and Eva Brems, eds., 2017).
[39] Ittai Bar-Siman-Tov, *Semiprocedural Judicial Review*, 6(3) LEGISPRUDENCE 271(2012); Alberto Alemanno, *The Emergence of the Evidence-Based Judicial Reflex: A Response to Bar-Siman-Tov's Semiprocedural Review*, 1(2) THEORY & PRACTICE LEGIS. 327 (2013).

domestic testing was found wanting. But for the relevant rights, if the Court is satisfied with the domestic proportionality test, it will be reticent in overturning the domestic review:

> Where the balancing exercise between those two rights has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case law, the Court would require strong reasons to substitute its view for that of the domestic courts[40]

This sketch should not leave the impression that the Doctrine is clear and uncontested, neither in theory nor in applications.[41] Disagreements are rampant, also among the judges of the ECtHR. Thus in several landmark cases large numbers of judges dissent on how to interpret and apply the Doctrine. [42] In *The Sunday Times v. United Kingdom* nine dissenting judges held that the UK should have been granted a margin, stating that:

> The difference of opinion separating us from our colleagues concerns above all the necessity of the interference and the margin of appreciation which, in this connection, is to be allowed to the national authorities.[43]

This presentation should not be taken to defend the Doctrine as it is currently practiced. To the contrary, a defensible Doctrine should be made more precise, *and* more consistently applied, than is presently the case.

Leaving such challenges aside, the Doctrine as presented here does express deference for sovereign democratic self-government, but only within some limits—namely when such democratic governance merits respect the ECtHR is reluctant to grant a margin for some rights of minorities—which majorities are likely to disregard; or the rights necessary for democratic decision-making to be responsive to citizens' interests—including freedom of expression and association, and the right to vote.

3. The Doctrine of a margin of appreciation: is it appropriate for the Inter-American Court of Human Rights?

Can the margin of appreciation doctrine also be appropriate for the IACtHR? Based on the above discussion the most relevant domain of application for a Doctrine of this kind for the IACtHR would largely be restricted to balancing among the rights of the American Convention on Human Rights, or articles with a similar "necessity" clause where balancing may be appropriate—i.e., mainly arts. 12(3) (freedom of conscience and religion); 13(4–5) (freedom of thought and expression); 15 (freedom of assembly); 16(2) (freedom of association); 22(2) (right to property); and 22(3) (freedom of movement)—and never those whose suspension is prohibited under article 27. And the IACtHR should require that the state has performed a "proportionality test."

Consider now Judge Cançado Trindade's concerns: whether this Doctrine is appropriate for a regional human rights court which reviews states with less than fully developed and

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[40] Lillo-Stenberg and Sæther v. Norway Application no. 13258/09, ECtHR para. 88 16 January 2014; Von Hannover v. Germany (No. 2) 55 EHRR 15, para.107 (2012),

[41] *See, e.g.*, HOWARD CHARLES YOUROW, THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE (1996); Brems, *supra* note 11; Benvenisti, *supra* note 20; Kratochvil, *supra* note 6; Jeffrey A. Brauch, *The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law*, 11 COLUM. J. EUR. L. 113 (2005); Carla M. Zouthout, *Margin of Appreciation,Violation and (in)Compatibility: Why the ECtHR Might Consider Using an Alternative Mode of Adjudication*, 20(2) EUR. PUB. L. 309 (2014); Gerards, *supra* note 13, at 106–7.

[42] Observer and Guardian v. United Kingdom 14 EHRR 153 (1991); Wingrove v. United Kingdom 24 EHRR 1 (1996).

[43] The Sunday Times v. United Kingdom 2 EHRR 245 (1979),

consistent democratic processes and with domestic courts suffering from insufficient independence from the executive. There are several concerns which merit response.

The IACtHR must adjudicate cases against states with widely differing democratic credentials. Concerns have been raised about the lack of democratic quality among states under the jurisdiction of the IACtHR. However, while some ECHR states top various democratic quality lists, other member states rate poorly on "democratic quality," variously measured. Thus Uruguay ranks at 18, Chile at 21, and Costa Rica at 22 on the World Audit's democracy ranking, above the majority of the forty-eight states of the Council of Europe which are all subject to the ECHR.[44] How the ECtHR applied the Doctrine to less democratic states and decisions may thus be relevant also for the IACtHR. So how should the Doctrine be brought to bear on less democratic states? Several arguments against the IACtHR applying the Doctrine may be considered: that the states lack democratic credentials, and that there is a lack of consensus among the member states.[45]

Critics may worry that the democratic deliberative credentials of many of the states' legislative process are poor, and so poor that the IACtHR should not grant any of the states a margin of appreciation. This concern should be modified in light of the comparative observation above: the ECtHR must also review states of varying democratic quality. An important factor which this criticism ignores is the criteria for applying the margin of appreciation. The ECtHR does not engage in any explicit—and thus contentious—categorization of *states* as more or less democratic or human rights respecting. Rather, the ECtHR applies the proportionality test to the deliberations leading to the *particular* piece of legislation or administrative act. Thus the ECtHR limits itself to assess the proportionality test conducted by the state in that particular case; and to determine the existence of such deliberation—democratic or otherwise—in that particular case. Have the domestic authorities considered alternative measures, and the human rights impact of each, so as to minimize the violations? The ECtHR does not determine whether to grant a margin of appreciation on the basis of a judgment about whether this decision procedure is typical for that state. A state will not receive a margin of appreciation even if the particular process was flawed, as long as it is an aberration from an otherwise exemplary mode of democratic decision-making. Even well-functioning democracies will sometimes render flawed decisions, ignoring better policies or overlooking human rights violations imposed on some of its members.

The IACtHR applied the same requirement of an actual proportionality test in a case where that Court specifically mentioned the margin of appreciation doctrine. In *Artavia-Murillo v. Costa Rica* on in vitro fertilization (IVF), Costa Rica invoked the application of the doctrine due to lack of consensus on IVF. The IACtHR refused to rule on the state's argument that it has a margin of appreciation on the grounds that Costa Rica had failed to balance arguments for right to life against other competing rights, to privacy and family life.[46]

As regards the significance of a lack of consensus across the states of the American Convention on Human Rights, this is not a reason against the IACtHR using the doctrine of a margin of appreciation. It is important to recall the role of "consensus" in the Doctrine. Consensus is not a condition for granting a margin of appreciation—indeed, closer to the reverse. If the infringement of a right is of the kind where the ECtHR may grant a margin, of appreciation, that margin will be *narrower* if the Court detects a (trend toward) consensus. Thus lack of consensus across the jurisdiction of the IACtHR does not count against granting states a margin of appreciation.

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[44] World Audit's democracy ranking, http://www.worldaudit.org/democracy.htm

[45] I owe this and the following concern to an anonymous reader.

[46] Artavia-Murillo v. Costa Rica, Ser. C N0 257, Nov. 28, 2012, para. 316. I owe this reference to Leiry Cornejo Chavez.

Recall that states which fail to conduct a proportionality test will not be granted a margin of appreciation, at least according to the Doctrine as laid out above. Thus the risks voiced by Judge Cançado Trindade and others are not overwhelming. Application of the human rights treaty is not generally left to the accused state.
To the contrary, arguably this requirement of a proportionality test in order for the state to enjoy a margin of appreciation may help nudge states—democratic and less so - into more careful public deliberation. The ECtHR has often made statements which appear to urge states to do so:

> In the opinion of the Court, both the majority and the minority of the Norwegian Supreme Court carefully balanced the right of freedom of expression with the right to respect for private life, and explicitly took into account the criteria set out in the Court's case-law which existed at the relevant time. In addition, de facto, the Supreme Court assessed all the criteria identified . . . . The Court therefore finds reason to point out that, although opinions may differ on the outcome of a judgment, "where the balancing exercise has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case-law, the Court would require strong reasons to substitute its view for that of the domestic courts".[47]

The Doctrine may thus serve to increase the likelihood that parliaments and legislatures consider and assess alternative legislative and policy proposals, in particular as regards the restrictions on individuals' rights they entail. This requirement also supports attempts by the domestic judiciary to undertake an impartial assessment of the legislature's and executive's policies. The margin of appreciation doctrine may thus arguably serve to bolster the independence of the judiciary, supplementing the IACtHR's doctrine of "conventionality control"—ordering national judges to disregard national legislation when it contravenes the Inter-American Convention.[48] The proportionality test requirement may thus promote better democratic deliberation and the rule of law—in more and less democratic and rule of law abiding states alike.

4. Conclusion

Regional human rights courts must review the states' compliance with human rights conventions, whilst giving due deference to the same states' sovereignty. The European Court of Human Rights' doctrine of a margin of appreciation, favorably interpreted, provides ways to do so, granting states some discretion in determining violations against some rights. States enjoy such a margin only when domestic authorities have been diligent in assessing whether any rights violations have been proportionate and minimal. The ECtHR can apply the Doctrine to states with varying democratic quality and varying independence of the judiciary, without sacrificing human rights protection unduly. A central reason is that such a proportionality test, actually and visibly carried out by the state, is argued to be a necessary condition for the Court to grant a margin. This feature means that a similar doctrine may be suitable also for the Inter-American Court of Human Rights, as a means to accommodate its human rights mandate whilst being duly deferential to the state parties.
Concerns that such a Doctrine is inappropriate for the IACtHR due to the less democratic states in its jurisdiction are misguided in at least two ways: the range of "democratic quality" of the member states is not so different among the two courts as to make a difference, and the Doctrine—favorably interpreted—can be applied to states with a large variation in democratic

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[47] Lillo-Stenberg and Sæther v. Norway Application no. 13258/09 ECHR 16 January 2014. para. 44 (*citing* Von Hannover v. Germany (no. 2), para. 107 and Axel Springer AG v. Germany, 55 EHRR 15, § 88).
[48] Almonacid Arellano v. Chile IACHR Series C No 154 (2006) ; *cf.* LEGG, *supra* note 20, ch. 5; JO M. PASQUALUCCI, THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS 303 (2013). I am grateful to Leiry Cornejo Chavez for these references.

quality. Indeed, the Doctrine may itself serve to promote democratic deliberation and independence of the judiciary, by "nudging" states to perform an independent proportionality test as a necessary condition for enjoying a margin of appreciation.

The IACtHR may thus benefit from developing a practice of granting states a certain scope of discretion, drawing judiciously from the ECtHR's Doctrine. This may guide the IACtHR's attempt to respect both the American Convention on Human Rights and its sovereign creators. In particular, the ECtHR's Doctrine may illustrate how these regional courts can interact with states which violate the respective conventions after less than fully democratic processes—in the eyes of the courts. The same margin of appreciation doctrine may justify more or less sovereignty-invading stances by both the IACtHR and by the ECtHR, depending on to the different levels of entrenchment of a democratic culture and rule of law in the state of concern, and depending on the actual deliberations carried out in the particular case.