

SUBSIDIARITY AND INTERNATIONAL HUMAN-RIGHTS COURTS: RESPECTING SELF-GOVERNANCE AND PROTECTING HUMAN RIGHTS—OR NEITHER?

ANDREAS FØLLESDAL*

I

INTRODUCTION

Several regional and international courts (ICs) and treaty bodies are empowered to review whether a state's legislation and policies are consistent with the human-rights conventions it has signed. Such human-rights review presents both theoretical and practical puzzles concerning the tensions between protecting human rights and respecting democratic sovereignty. These dilemmas are central to discussions about how both the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACtHR) interpret and apply their respective conventions: the European and the American Conventions on Human Rights (ECHR and ACHR).¹ Academics and politicians have criticized both ICs for their alleged illegitimate intervention into well-functioning democracies, most famously by the United Kingdom in its 2012 proposal that states in the Council of Europe should severely prune the authority of the ECtHR.²

Scholars, politicians, and judges often use conceptions of subsidiarity as a normative framework for assessing how to allocate and exercise authority within a multilevel political and legal order. Principles of subsidiarity

Copyright © 2016 by Andreas Føllesdal.

This article is also available at <http://lcp.law.duke.edu/>.

* Professor, Co-Director, PluriCourts, University of Oslo.

This article was written under the auspices of ERC Advanced Grant 269841 MultiRights—on the Legitimacy of Multi-Level Human Rights Judiciary, and was partly supported by the Research Council of Norway through its Centres of Excellence Funding Scheme, project number 223274—PluriCourts The Legitimacy of the International Judiciary. A draft of this article benefited greatly from comments at a Workshop on Subsidiarity in Global Governance, Hertie School of Governance, Berlin in 2014. I am grateful for that opportunity and, further, for extremely helpful comments from the editors.

1. Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, Sept. 4, 1950, 213 U.N.T.S. 221 (as amended by Protocols Nos. 11 and 14) [hereinafter European Convention on Human Rights]; Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36.

2. Council of Europe, *High Level Conference on the Future of the European Court of Human Rights—Draft Brighton Declaration*, ¶ 23(c)(i), Feb. 23, 2012; see Jorge Contesse, *Contestation and Deference in the Inter-American Human Rights System*, 79 LAW & CONTEMP. PROBS., no. 2, 2016, at 123, 125 (discussing debates as to the proper scope of ECtHR authority); Roberto Gargarella, *La democracia frente a los crímenes masivos: una reflexión a la luz del caso Gelman*, 2 REV. LATINOAMERICANA DE DER. INT'L 1, 8–10, May 29, 2015.

unanimously espouse a presumption of authority at more local levels, but they differ on important details. This article considers how subsidiarity may be brought to bear on the challenges the ECtHR and the IACtHR face. The article focuses on two politically salient, normative questions. First, should states—even well-functioning democracies—subject themselves to ICs with the authority to interpret and adjudicate alleged violations of relevant human-rights treaties? Second, is it consistent with their mission of protecting human rights that ICs grant the states some discretion, that is, a “margin of appreciation,”³ or does such discretion nullify the human-rights protection the ICs were established to provide?

This article suggests that states have subsidiarity-based rationales for binding themselves to ICs and that the ICs should grant states a conditional margin of appreciation with respect to certain human rights. A historical and empirical backdrop explains how these ICs can protect human rights while being duly deferential to state sovereignty, even for states with minimal democratic credentials. Subsidiarity considerations identify the authority a human-rights court or treaty body should enjoy as well as limits it should face. In particular, subsidiarity arguments help delineate the margin of appreciation that the ECtHR grants states in determining whether certain human-rights violations have occurred.

The discussion of these ICs lends support to several of the assumptions concerning subsidiarity outlined in this issue’s introduction.⁴ Part II provides an overview of some of the discussions concerning the concept of subsidiarity. Part III lays out some explanatory subsidiarity arguments—reasons why states have agreed to self-binding by human-rights ICs—and discusses why these arguments have become more contested. Part IV presents some relevant features of the ECtHR and its history, including its margin-of-appreciation doctrine, and part V explains how the ECtHR addresses the dilemma of protecting democratic sovereignty while protecting human rights by considering when and why democratic decisions merit deference. Part VI concludes, discussing some of the implications for how subsidiarity arguments apply to human rights and considering in more detail the six conjectures from this issue’s introduction.

II

SUBSIDIARITY

Principles of subsidiarity, theorems in normative political theory, urge a rebuttable presumption for the local. Local authorities should enjoy as much authority as possible, so long as it is consistent with achieving the particular,

3. 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) [hereinafter Brems, *The Margin of Appreciation Doctrine*].

4. See Markus Jachtenfuchs & Nico Krisch, *Subsidiarity in Global Governance*, 79 LAW & CONTEMP. PROBS., no. 2, 2016, at 1.

normatively permitted or required objectives of the relevant IC.⁵ The burden of argument, due to this presumption for the local, thus rests with proponents of centralized authority. Beyond these broad statements, different conceptions of subsidiarity vary drastically in how they formulate this presumption. Generally, central bodies must offer comparable effectiveness or efficiency when they exercise authority over the constituent bodies, but conceptions diverge as to who decides on the objectives; whether central authority is required; and, if such authority is required, what kind. Consider, for instance, the scope of issues of concern: the relations between the head of family and the individual members, the powers of the central unit in relation to federation members, or the power of an international human-rights court over the states that have submitted to the court's governing human-rights treaty. The normative conception of subsidiarity used here is person centered rather than state centered. Authority should be placed with states or international bodies only insofar as such centralization better promotes and protects the interests of individual persons rather than states.⁶ Thus, constraints imposed by human-rights ICs on state sovereignty are justified only insofar as they promote and protect individuals' interests better than would a state system without ICs.⁷

A separate yet related role of subsidiarity is as an explanatory hypothesis to explain why certain actors subject themselves to international bodies. Empirically, it is usually only when actors are convinced that their interests are served by placing some authority with a regional or international body that delegate authority to it.⁸ Thus, explanatory subsidiarity, which views states and the interests of their governments as the fundamental explanatory units within a soft rationalist framework, accounts for several features of international law—not only in the area of human rights, but also arguably more generally.⁹ These features include a prevalent understanding of the centrality of state consent in creating such legal obligations¹⁰—the requirement that national remedies must be exhausted before turning to international courts and treaty bodies¹¹—and the often-weak treaty sanctions.¹²

5. Andreas Føllesdal, *Survey Article: Subsidiarity*, 6 J. POL. PHIL. 190, 191 (1998).

6. Andreas Føllesdal, *The Principle of Subsidiarity as a Constitutional Principle in International Law*, 2 GLOBAL CONST. 37, 61–62 (2013).

7. *See id.*

8. BETH A. SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* 12–13 (2009).

9. Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 AM. J. INT'L L. 38, 40 (2003); Føllesdal, *supra* note 6, at 61.

10. IAN BROWNIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 4 (6th ed. 2003); Luigi Crema, *Disappearance and New Sightings of Restrictive Interpretation(s)*, 21 EUR. J. INT'L L. 681, 699 (2010); Mattias Kumm, *The Legitimacy of International Law: A Constitutionalist Framework of Analysis*, 15 EUR. J. INT'L L. 907, 912 (2004); Andreas von Staden, *The Democratic Legitimacy of Judicial Review Beyond the State: Normative Subsidiarity and Judicial Standards of Review*, 10 INT'L J. CONST. L. 1023, 1025 (2012).

11. *Cf.* Contesse, *supra* note 2, at 129–30, 133 (discussing general requirement to exhaust domestic remedies before bringing case to international system).

12. *See* Carozza, *supra* note 9, at 62–63 (discussing lack of definitive international interpreters or

Another expression of explanatory subsidiarity may be the ECtHR practice of granting states a margin of appreciation when assessing whether they are in compliance with their obligations. But this gives rise to two central questions: First, is this court-established doctrine consistent with the states' transfer of authority to the ECtHR? And, second, if not, is it nonetheless justifiable as a way for the court to defer to democratic rule?

This article addresses explanatory subsidiarity mainly from a normative perspective, recognizing that states may have an interest both in maintaining a broad scope of autonomy and in restraining the power of the ECtHR and the IACtHR. The practice of granting states a margin of appreciation may be justified by normative subsidiarity arguments ultimately based on protecting and promoting individuals' interests. This argument first requires considering the rationale for why states should submit to human-rights ICs, if at all, and then calls for exploring the reasons why these courts should grant states some such margin of discretion.

III

WHY STATES BIND THEMSELVES TO HUMAN-RIGHTS ICs AND WHY THESE RATIONALES BECOME LESS SALIENT

The normative issues concerning international human-rights review and the margin of appreciation may best be approached by considering why states subject themselves to regional human-rights conventions and their treaty bodies, such as the ECtHR and the IACtHR, and why states have recently become more critical to such subjection.

States have established many treaties with ICs to help alleviate collective-action problems among and within states.¹³ For example, ICs promote trade within the European Union (EU) or the World Trade Organization.¹⁴ An independent and impartial authoritative body can help resolve prisoners' dilemmas and free-rider fears between states in the commercial context by monitoring compliance, reviewing domestic legislation and administrative decisions, and interpreting and adjudicating agreements that mutually bind the disputing states.¹⁵ Thus, states agree to be bound by ICs to ensure that other states do likewise and to secure otherwise unattainable mutually beneficial results.

However, human-rights ICs do not fit this model. Rather, the ECtHR and the IACtHR adjudicate disputes between individuals and their own states

enforcers of international rights); Føllesdal, *supra* note 6, at 56.

13. Laurence R. Helfer, *Why States Create International Tribunals: A Theory of Constrained Independence*, in CONFERENCES ON NEW POLITICAL ECONOMY 253, 260 (Mohr Siebeck ed., 2006).

14. Giandomenico Majone, *State, Market and Regulatory Competition in the European Union: Lessons for the Integrating World Economy*, in CENTRALIZATION OR FRAGMENTATION?: EUROPE FACING THE CHALLENGES OF DEEPENING, DIVERSITY, AND DEMOCRACY 94, 120–21 (Andrew Moravcsik ed., 1998).

15. Karen J. Alter, *Delegating to International Courts: Self-Binding vs. Other-Binding Delegation*, 71 LAW & CONTEMP. PROBS., no. 1, 2008, at 49.

regarding whether the states have complied with relevant conventions, and review the compatibility between conventions and national laws and practices. These ICs do not address collective-action problems among states. Instead, states submit to these courts in order to enhance their own credibility as human-rights–committed legal and political orders. Thus regional human-rights courts help the states bind themselves, rather than other private or public actors. When a state constrains its sovereignty in this way, it is “both a self-binding pre-commitment on the part of the legislature, and an other-binding choice made to bind future legislative actors and units within the political system to the constitutional bargain.”¹⁶

A state may want to use an IC to provide such assurance to many relevant public audiences. First, a state may bind itself to an IC to enhance trust in its domestic population that the particular government is committed to human rights and that future generations of its government will remain committed. A second important audience is comprised of opposing political parties that might otherwise pursue human-rights–violating platforms. Indeed, several states originally wanted to give the ECtHR more significant powers than those with which it was originally equipped precisely for that reason: to “lock in” human rights as a constraint on future governments.¹⁷ Furthermore, a state may ratify human-rights conventions to gain “legitimacy in the eyes of other states.”¹⁸ The fear of illegitimacy may be especially acute when almost all other states have signed a convention, resulting in a stigma attaching to nonsignatory states.¹⁹ In the case of the European Convention on Human Rights, reputational concerns were supplemented with material benefits because the ECtHR gradually became a gatekeeper to the Council of Europe.²⁰ In order to provide such an assurance of liberalized democracy, the IC must be sufficiently independent of the states it reviews.²¹ In particular, the states should not be the final interpreter of a convention, or the attempt to provide assurance to other audiences will fail.

If a state no longer needs an IC to maintain credibility with the various audiences, the state will naturally seek to limit the relevant court’s ability to constrain state sovereignty. For example, in the Americas in the 1990s the political opposition shifted from an authoritarian regime-in-waiting, to other parties equally committed to human rights.²² Thus, the governments committed

16. *Id.*

17. Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 INT’L ORG. 217, 220 (2000).

18. Emilie M. Hafner-Burton & Kiyoteru Tsutsui, *Human Rights in a Globalizing World: The Paradox of Empty Promises*, 110 AM. J. SOC. 1373, 1384 (2005).

19. See SIMMONS, *supra* note 8, at 13 (discussing the “social and political pressures of remaining aloof from a multilateral agreement to which most of [a state’s] peers have already committed”).

20. Alter, *supra* note 15, at 66.

21. See Helfer, *supra* note 13, at 257 (“[I]ndependent tribunals provide a mechanism to enhance the credibility of the otherwise less than fully credible promises that governments make to one another.”).

22. See Contesse, *supra* note 2, at 130 (explaining the transition from authoritarianism to democracy).

to democratic rule no longer needed the IACtHR as a last resort to remedy future massive human-rights violations.

These historical changes help explain the surge in criticism of both the IACtHR and the ECtHR. Critics assert that these ICs intervene too forcefully into issues that should not be subject to international judicial review.²³ Instead, critics argue that the respective courts should grant the states a broader margin of appreciation.

For example, scholars have noted two historical changes in the violations brought to the ECtHR.²⁴ The Court was originally established as

an “early warning system” to prevent states from lapsing into totalitarianism. It set out the fundamental rights and freedoms that states should secure to everyone in their jurisdiction, and provided a judicial enforcement system—the European Court of Human Rights—by which states which violated human rights could be called to account.²⁵

As the states developed into strong, generally well-functioning democracies, though, the ECtHR’s role changed to helping correct their minor flaws as regards human-rights violations. With the crop of new states that joined the Council of Europe, the Court was required to refocus its efforts to “consolidate democracy and the rule of law in new and relatively fragile democracies.”²⁶ Once the new member states joined the EU, some joined the ranks of critics, complaining about the sovereignty constraints imposed by the ECtHR as politicized attacks.²⁷

These changes help explain growing number of calls to reduce the competences of the human-rights ICs in both jurisdictions. Critics have argued, for example, that the IACtHR should be more deferential to decisions emerging from high-quality democratic processes²⁸ and should defer to the states’ interpretations or applications of the Convention,²⁹ in effect granting states a margin of appreciation in such cases.

Similarly, in preparation for a 2012 Council of Europe meeting, the United Kingdom proposed that the ECtHR should grant states a broad margin of appreciation and that the Court should no longer have the ultimate authority to interpret the ECHR.³⁰ Rather, the United Kingdom urged that the Court should

23. See generally Roberto Gargarella, *In Search of Democratic Justice: What Courts Should Not Do: Argentina, 1983–2002*, in DEMOCRATIZATION AND THE JUDICIARY: THE ACCOUNTABILITY FUNCTION OF COURTS IN NEW DEMOCRACIES 181 (Siri Gloppen, Roberto Gargarella & Elin Skaar eds., 2004).

24. See generally LORD WOOLF, REVIEW OF THE WORKING METHODS OF THE EUROPEAN COURT OF HUMAN RIGHTS (2005).

25. *Id.* at 7.

26. *Id.* at 9.

27. Julia Lapitskaya, *ECHR, Russia, and Chechnya: Two Is Not Company and Three Is Definitely a Crowd*, 43 N.Y.U. J. INT’L L. & POL. 479, 499 (2011).

28. Gargarella, *supra* note 2, at 9–11.

29. Contesse, *supra* note 2, at 133 (indicating that the Inter-American Court has asserted its own authority as the final interpreter of the American Convention).

30. Council of Europe, *Draft Brighton Declaration*, *supra* note 2.

override a state's interpretation only if the "national court clearly erred in its interpretation or application of the Convention rights."³¹

The United Kingdom's suggestions have received mixed responses. Former President of the IACtHR and current International Court of Justice judge Cançado Trindade has objected to the IACtHR's use of the margin-of-appreciation doctrine.³² Likewise, several authors regard this doctrine as an abdication by the ECtHR. They argue,

[W]here national procedures are notoriously prone to failure, most evident when minority rights and interests are involved, no margin and no consensus should be tolerated. Anything less than the assumption of full responsibility would amount to a breach of duty by the international human rights organs.³³

The United Kingdom's initiative did not constrain the ECtHR as much as the draft recommended: The states agreed to Protocol No. 15, not yet in force, which refers to an ECtHR-established margin-of-appreciation doctrine and to subsidiarity in the Preamble of the Convention.³⁴ But no changes were made concerning the ultimate authority on interpreting the ECHR—that remains the ECtHR—contrary to the United Kingdom's proposal.³⁵

How can a normative principle of subsidiarity help assess these proposals? The answer requires more relevant details about the ECtHR and the margin-of-appreciation doctrine.

IV

THE EUROPEAN COURT OF HUMAN RIGHTS: TOWARD MORE INDEPENDENCE YET MORE DEFERENCE TO STATES VIA THE MARGIN OF APPRECIATION

The ECtHR is the most powerful of the human-rights ICs because it issues legally binding judgments. The express role of the Court is subsidiary vis-à-vis the states. The Court shall "ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols."³⁶ This complex role has required a combination of independence from and subservience to the states.³⁷

The ECtHR has gradually increased its autonomy, which no doubt has

31. *Id.*

32. ANTONIO A. CANCADO TRINDADE, *EL DERECHO INTERNACIONAL DE LOS DERECHOS HUMANOS EN EL SIGLO XXI* 390 (2009).

33. Eyal Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards*, 31 N.Y.U. J. INT'L L. & POL. 843, 853–54 (1998–99).

34. Council of Europe, Protocol No. 15 Amending the Convention on the Protection of Human Rights and Fundamental Freedoms, pmb., June 24, 2013.

35. Council of Europe, *Draft Brighton Declaration*, *supra* note 2; *cf.* European Convention on Human Rights, *supra* note 1, art. 19.

36. European Convention on Human Rights, *supra* note 1.

37. *Id.* art. 21, ¶¶ 2–3; Helfer, *supra* note 13 at 263; Erik Voeten, *International Judicial Independence*, in *INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART* 421, 438 (Jeffrey L. Dunoff & Mark Pollack eds., 2013).

fuelled the protests from some states. Originally, individuals could make complaints to the European Commission on Human Rights, which would forward to the ECtHR those complaints it found admissible.³⁸ In 1990, Protocol No. 9 allowed individuals to bring cases directly,³⁹ and in 1998, Protocol No. 11 both rendered the Court a full-time institution to allow it to handle more cases and abolished the Commission.⁴⁰

The Court has also engaged in dynamic interpretation of the ECHR, reading far more rights into it than the states would have envisioned in the 1950s.⁴¹ The ECtHR has held, for example, that the Convention prohibits corporal punishment,⁴² human trafficking,⁴³ and certain forms of religious teaching in public schools,⁴⁴ and that it protects the right not to join a trade union.⁴⁵

Notwithstanding trends of increasing independence from states, the ECtHR has not always sought to maximize its autonomy and powers of judicial human-rights review. In particular, the Court has developed the margin-of-appreciation doctrine, which urges the Court to defer to the domestic judiciary's assessment of whether there is a breach of the Convention.⁴⁶

Many trace the doctrine back to the 1958 *Cyprus* case,⁴⁷ in which the Commission asserted that under the derogation clause in Article 15, U.K.

38. ED BATES, *THE EVOLUTION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS: FROM ITS INCEPTION TO THE CREATION OF A PERMANENT COURT OF HUMAN RIGHTS* 69 n.109 (2010).

39. *Id.* at 167.

40. *Id.* at 460–62.

41. See Janneke Gerards, *Judicial Deliberations in the European Court of Human Rights*, in *THE LEGITIMACY OF HIGHEST COURTS' RULINGS: JUDICIAL DELIBERATIONS AND BEYOND* 407, 429 (Nick Huls, Maurice Adams & Jaco Bomhoff eds., 2009) (“the Convention is a living instrument which . . . must be interpreted in the light of present-day conditions.” (quoting *Tyrer vs. United Kingdom*, App. No. 5856/72, 2 Eur. H.R. Rep. (ser. A/26) 1, 12 (1978))).

42. *Tyrer*, 2 Eur. H.R. Rep. at 31.

43. *Rantsev v. Cyprus & Russia*, 2010-I Eur. Ct. H.R. 65, 124.

44. *Folgero v. Norway*, App. 2007-III Eur. Ct. H.R. Rep. 94.

45. *Young, James & Webster v. United Kingdom*, App. No. 7601/76; 7806/77, 4 Eur. H.R. Rep. 38, 55 (1981).

46. For more in-depth accounts and criticisms, see YUTAKA ARAI-TAKAHASHI, *THE MARGIN OF APPRECIATION DOCTRINE AND THE PRINCIPLE OF PROPORTIONALITY IN THE JURISPRUDENCE OF THE ECHR* (2001); STEVEN GREER, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS: ACHIEVEMENTS, PROBLEMS AND PROSPECTS* (2006); GEORGE LETSAS, *A THEORY OF INTERPRETATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (2007); Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine: A Theoretical Analysis of Strasbourg's Variable Geometry*, in *CONSTITUTING EUROPE: THE EUROPEAN COURT OF HUMAN RIGHTS IN A NATIONAL, EUROPEAN AND GLOBAL CONTEXT* 62 (Andreas Føllesdal et al. eds., 2013); Brems, *The Margin of Appreciation Doctrine*, *supra* note 3, at 240; Eva Brems, *Transitional Justice in the Case Law of the European Court of Human Rights*, 5 INT'L J. TRANSITIONAL JUST. 282 (2011); Eva Brems & Laurens Lavrysen, *Procedural Justice in Human Rights Adjudication: The European Court of Human Rights*, 35 HUM. RTS. Q. 176 (2013); George Letsas, *The ECHR as a Living Instrument: Its Meaning and Legitimacy*, in *CONSTITUTING EUROPE: THE EUROPEAN COURT OF HUMAN RIGHTS IN A NATIONAL, EUROPEAN AND GLOBAL CONTEXT* 106 (Andreas Føllesdal et al. eds., 2013).

47. *Greece v. United Kingdom*, App. No. 176/56, 326 (1958), <http://hudoc.echr.coe.int/eng?i=001-73858>.

authorities enjoyed a certain measure of discretion to assess the extent of rights violations justified by the public-emergency situation. The Court developed the doctrine and its rationale more fully in cases heard in the 1960s.⁴⁸

The ECtHR reviews whether state legislation or policy that appears to violate the Convention has acceptable objectives and whether the legislation is proportionate to the objectives pursued.⁴⁹ Generally, only when the Court is convinced that the state has performed a satisfactory proportionality test, will the ECtHR defer to the domestic judiciary's decision.⁵⁰

Several central aspects of the margin-of-appreciation doctrine are important in assessing it. The ECtHR rarely offers a margin of appreciation for violations of the nonderogable rights to life or the rights against torture, slavery, or forced labor.⁵¹ The ECtHR is also very restrictive in granting a margin of appreciation for rights concerning political participation, freedom of expression, and other rights required for well-functioning democratic decisionmaking.⁵²

Several ECHR rights explicitly provide for exceptions.⁵³ More specifically, the ECtHR claims that the margin-of-appreciation doctrine is particularly appropriate in three main scenarios in which domestic authorities are better suited to judge given that they have conducted a proportionality assessment:⁵⁴

1. When 'balancing' against other urgent issues such as emergencies, public safety, the economic well-being of the country, as permitted by Articles 8, 9, and 10;
2. When balancing different rights against each other;⁵⁵
3. When applying the human-rights norms to specific circumstances of a state.

48. See generally *Ireland v. United Kingdom*, App. No. 5310/71 (1978), <http://hudoc.echr.coe.int/eng?i=001-57506>; *Handyside v. United Kingdom*, App. No. 5493/72, 1 Eur. H.R. Rep. (ser. A) 737 (1979–80); see also *Lawless v. Ireland*, App. No. 332/57, 1 Eur. H.R. Rep. (ser. A) 15, 58 (1979–80) (examining contours of discretion under derogation clause).

49. ARAI-TAKAHASHI, *supra* note 46, at 200; see ANDREW LEGG, *THE MARGIN OF APPRECIATION IN INTERNATIONAL HUMAN RIGHTS LAW: DEFERENCE AND PROPORTIONALITY* 142 (2012).

50. See *Dickson v. United Kingdom*, 2007-V Eur. Ct. H.R. 99, 130 (holding that where Parliament had not made a proportionality assessment, “[the policy was] seen as falling outside any acceptable margin of appreciation”).

51. European Convention on Human Rights, *supra* note 1, arts. 2–4.

52. *Observer & Guardian v. United Kingdom*, App. No. 13585/88, 53 (1991) (Pekkanen, J., partly dissenting), <http://hudoc.echr.coe.int/eng?i=001-57705> (“[T]aking into account the vital importance in a democratic society of freedom of expression and freedom of the press, the State’s margin of appreciation in these cases is very narrow indeed.”); see also *Handyside*, 1 Eur. H.R. Rep. (ser. A) at 754–55 (“The Court’s supervisory functions oblige it to pay the utmost attention to the principles characterizing a ‘democratic society.’”).

53. European Convention on Human Rights, *supra* note 1, arts. 8–10.

54. For thorough and systematic overviews, see Brems, *The Margin of Appreciation Doctrine*, *supra* note 3 and Dean Spielmann, *Allowing the Right Margin: The European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?*, 14 CAMBRIDGE Y.B. EUR. LEGAL STUD. 381 (2011–12).

55. *Lillo-Stenberg & Saether v. Norway*, App. No. 13258/09, 88 (2014), <http://hudoc.echr.coe.int/eng?i=001-140015>.

States may be justified in violating some individuals' rights but only if the restrictions on rights are proportionate to certain acceptable social objectives or other rights.⁵⁶ When the ECtHR seeks to decide this, it must determine whether the state's policy minimizes the violation of rights required to achieve the objectives.⁵⁷

The ECtHR has specified an additional important requirement for granting states a margin of appreciation: that the state must give evidence of this proportionality test.⁵⁸ The state must have assessed whether there is proportionality or a "fair balance" between the means and the end sought.⁵⁹ Case law has developed five elements of this proportionality test:

1. The legitimacy of the social objective pursued;
2. How important the restricted or derogated right is, for example, as a foundation of a democratic society;
3. How invasive the proposed interference will be;
4. Whether the restriction of the right is necessary;
5. Whether the reasons offered by the national authorities are relevant and sufficient.⁶⁰

The ECtHR also assesses whether the state has carried out these steps in a substantively satisfactory way.⁶¹ Indeed, the Court sometimes holds that a state's test is unacceptable.⁶²

But the Court may decide against granting a margin of appreciation if the legislation or policy at hand runs counter to an observed emerging consensus in Europe, sometimes expressed as "the existence or non-existence of common ground between the laws of the Contracting States."⁶³ When it perceives such a consensus, the Court may require the accused state to provide an even more convincing argument for its policies,⁶⁴ but the Court has also ruled against accused states on this ground.⁶⁵ The Court's attention to emerging consensus

56. See *Dickson v. United Kingdom*, 2007-V Eur. Ct. H.R. 99, 122 (explaining that some public legitimate aims "necessarily involve[] some limitation on an individual's rights").

57. *Animal Defs. Int'l v. United Kingdom*, 2013-II Eur. Ct. H.R. 203, 227-28.

58. *Lindheim & Others v. Norway*, App. No. 13221/08; 2139/10, 61 Eur. H.R. Rep. 29, 37 (2015).

59. *Animal Defs. Int'l*, 2013-II Eur. Ct. H.R. at 228.

60. See *Handyside v. United Kingdom*, App. No. 5493/72, 1 Eur. H.R. Rep. (ser. A) 737, 755 (1979-80) (explaining that intrusions in certain spheres must be "proportionate to the legitimate aim pursued").

61. *Animal Defs. Int'l*, 2013-II Eur. Ct. H.R. at 227-28.

62. *A v. Norway*, App. No. 28070/06, 74 (2009), <http://hudoc.echr.coe.int/eng?i=001-92137>.

63. *Rasmussen v. Denmark*, App. No. 8777/79, 7 Eur. H.R. Rep. 371, 380 (1985); Brems, *The Margin of Appreciation Doctrine*, *supra* note 3, at 263; see also *X, Y & Z v. United Kingdom*, App. No. 21830/93 (1997), <http://hudoc.echr.coe.int/eng?i=001-58032> (granting wide margin of appreciation to contracting states with differing laws).

64. Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 *YALE L. J.* 273, 317 (1997-98).

65. *Tyrer v. United Kingdom*, App. No. 5856/72, 2 Eur. H.R. Rep. (ser. A/26) 1, 31 (1978).

may be a good way to check its dynamic interpretation of the ECHR. However, the Court does not appear to have an established procedure to ascertain the requisite consensus. And critics claim that the weight of the consensus factor is indeterminate.⁶⁶

Before moving to a normative assessment of the margin-of-appreciation doctrine as part of the ECtHR's practice, consider what may have motivated the Court to develop such a complex procedure. The judges may have had at least two, possibly compatible, objectives. First, the Court may have developed this doctrine to build its legitimacy by avoiding controversial decisions against powerful actors. However, this alone cannot explain the limits of the doctrine and its complex features and conditions. The Court's margin-of-appreciation doctrine goes beyond what a simple avoidance strategy would predict because these aspects are justified as elements of the subsidiary role of the ECtHR vis-à-vis the member states. These features can thus be better explained by the judges' attempts to pursue the Court's objectives as defined in the ECHR: to bolster the domestic authorities' respect for human rights and to help protect individuals against human-rights violations. Note that this role of the ECtHR as a mechanism for states to bind themselves to certain standards does not incentivize the Court to impose ever-stricter requirements on the states. To the contrary, the margin-of-appreciation doctrine expresses a principle of subsidiarity regarding the Court's respect for democratic decisionmaking.

V

DUE RESPECT FOR DEMOCRACY: THE CONDITIONAL CASE FOR INTERNATIONAL JUDICIAL RIGHTS REVIEW

Several Council of Europe states rate poorly on "democratic quality."⁶⁷ The case for a review body such as the ECtHR to protect citizens' human rights seems more plausible for these states. But for well-functioning democracies, the ECtHR's practices, including the margin-of-appreciation doctrine, appear odd: objectionably antidemocratic and not sufficiently protective of human rights.

To justify the ECtHR's role and authority, one must first recall the reasons to value democratic rule and the conditions under which these arguments apply. It will then become clear that, in light of the reasons for valuing democracy, the criticism that the Court is antidemocratic does not hold up.

Assume that democracy is a set of institutionally established procedures that regulate competition for control over political authority on the basis of deliberation where almost all adult citizens may participate as equals in an

66. Laurence R. Helfer, *Consensus, Coherence, and the European Convention on Human Rights*, 26 CORNELL INT'L L.J. 133, 139 (1993); see also Benvenisti, *supra* note 33, at 852 ("The consensus rationale . . . is but a convenient subterfuge.").

67. DEMOCRACY WATCH, www.democracywatch.ca (last visited Feb. 10, 2016); CENTER FOR SYSTEMIC PEACE, *Polity IV Project*, www.systemicpeace.org/polity/polity4.htm (last visited Feb. 10, 2016).

electoral mechanism.⁶⁸ At least two reasons to respect such democratic self-governance should give pause to international judicial review as done by the ECtHR. Indeed, the Court itself mentions several of them. The best instrumental argument for such democratic decisionmaking seems to be comparative. Democratic rule is, over time, more responsive to the best interests of all members of the political order than nondemocratic procedures. Such interests include self-determination and nondomination, as well as the security of basic needs and fairly shared benefits of social cooperation among inhabitants.⁶⁹ Thus, respect for individuals' interest in self-determination and nondomination is a concern the Court often acknowledges.⁷⁰ A second argument in favor of local democratic decisionmaking is epistemic: those closer to real-world circumstances are better equipped to determine the policy choices that promote and protect the interests of those affected by those choices.⁷¹

These arguments for democratic rule hold under only certain conditions. There are at least three reasons to be wary of unlimited majoritarian democratic rule, and in each case, an IC may help reduce the concern. First, the benefits of majority rule reliably accrue only from well-functioning democracies.⁷² An IC may be particularly important when such democratic institutions are not in place. Second, well-functioning majoritarian democratic procedures can deteriorate. An IC that monitors and safeguards the democratic process is thus consistent with valuing democracy.⁷³ Third, even well-functioning democracies sometimes render flawed decisions, due to insufficient information in a particular case, ignorance, or even ill will. A body that seeks to prevent miscarriages of democratic deliberation and abuse of majority voting may thus provide important services. Majoritarian rule should especially be reviewed to ensure that the interests of minorities are sufficiently secured and promoted given the high probability that democratic decisions could be to their detriment, with minority interests and basic rights on the chopping block.⁷⁴

Respect for majoritarian democracy is compatible with review of decisions that violate the rights of minorities or the individual rights necessary for a well-

68. Cf. ROBERT A. DAHL, ON DEMOCRACY 37 (1998); Andreas Føllesdal & Simon Hix, *Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik*, 44 J. COMMON MKT. STUD. 533, 547–49 (2006).

69. Cf. CHARLES R. BEITZ, POLITICAL EQUALITY: AN ESSAY IN DEMOCRATIC THEORY 113 (1989); Margaret Levi, *A State of Trust*, in TRUST AND GOVERNANCE, 77, 94–96 (Margaret Levi & Valerie Braithwaite eds., 1998).

70. See *Hatton v. United Kingdom*, 2003-VII Eur. Ct. H.R. Rep. 189, 216 (explaining that democratic national authorities, rather than international courts, are better equipped to evaluate local needs).

71. *Wingrove v. United Kingdom*, App. No. 17419/90, 24 Eur. H.R. Rep. 1, 30–31 (1997); *Handyside v. United Kingdom*, App. No. 5493/72, 1 Eur. H.R. Rep. (ser. A) 737, 755 (1979–80).

72. Characteristics of well-functioning democracies include, for example, the freedom of expression and a broadly dispersed right to vote.

73. See JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 43 (1980) (describing courts as “institution[s] charged with the evolution and application of society’s fundamental principles”).

74. BRIAN BARRY, DEMOCRACY AND POWER: ESSAYS IN POLITICAL THEORY 339 (1989).

functioning democracy. And the ECtHR provides precisely that. The Court's review enables states to better respect individuals' human rights and other interests.⁷⁵

Judicial review by an IC like the ECtHR contributes to domestic human-rights review in at least three ways.⁷⁶ First, an IC is even more independent from the domestic government than the domestic judiciary and can provide citizens more trustworthy assurance of their government's human-rights compliance. Second, the ECtHR can also enhance the independence and quality of the domestic judiciary with respect to human-rights protection by supporting its human-rights judgments against the state. Third, a state that subjects itself to the ECtHR thereby helps protect and promote the human rights of citizens in other European states by pressuring less democratic states to also consent to the Court's authority.⁷⁷ These three arguments apply a person-centered conception of subsidiarity; they support granting a body above the state certain authority in order to benefit the interests of individuals.

Regarding the margin-of-appreciation doctrine, if international judicial review is so valuable, why limit it by granting states a margin of appreciation? Subsidiarity arguments help clarify this issue. Recall from part IV several relevant aspects. First the limited scope of application of the doctrine: some nonderogable rights are excluded. Violations of nonderogable rights arguably do not merit deference, and the ECtHR should instead protect these individual rights with full force. The margin of appreciation is likewise not granted for rights central to the functioning of democratic mechanisms. The ECtHR, then, only grants a margin when the state's decisions reflect democratic deliberation.

On the other hand, subsidiarity considerations suggest that states should remain the final arbiter of human-rights violations when the ECtHR cannot or is unlikely to provide better protection of human rights, because then the objectives are not better achieved by allocating that authority above the state. A state should enjoy a margin of appreciation for those circumstances in which domestic courts and other authorities are expected to be at least as well equipped and willing as the ECtHR to determine whether there is a violation of human rights. These circumstances match several features of the margin-of-appreciation doctrine. The ECtHR claims that a margin of appreciation is particularly appropriate in those issue areas where domestic authorities are better suited to judge given that they have conducted a proportionality assessment.⁷⁸ There is no general reason to suspect that a well-functioning democratic majoritarian system with an independent, competent judiciary will

75. Helfer, *supra* note 13, at 262.

76. *Id.*

77. SIMMONS, *supra* note 8, at 58.

78. Recall that a proportionality assessment involves balancing rights against urgent issues such as emergencies, public safety, and the economic well-being of the country; balancing different rights against each other; and applying the human-rights norms to specific circumstances within a state. *See* notes 54–57.

make rights-infringing decisions in these cases. An IC is not clearly more likely than domestic courts to properly apply the ECHR to such disputes.

However, these instrumental and comparative arguments for respecting democratic decisions and domestic judicial review hold only when the appropriate deliberation and assessments have actually been carried out and when the legislature has explored alternative policies and their implications for human rights. Thus, there are good reasons for the ECtHR to grant a margin of appreciation only when it is convinced that domestic authorities have actually carried out a proper proportionality test. Indeed, this proportionality-test requirement may help nudge states into more careful public deliberation of the kind that gives citizens reason to value democratic decisions. If the legislature performs such a test, it is more likely to be granted a margin of appreciation and to avoid the embarrassment of being found in violation of the ECHR. The Court's proportionality-test requirement may thus promote better democratic deliberation and bolster the effectiveness of domestic judicial scrutiny.

The margin-of-appreciation doctrine may also weaken, but not refute, an argument against judicial review. The doctrine, at least when carefully specified and consistently applied, reduces the risk of states being subject to the arbitrary discretion of the judges of the ECtHR. The proportionality requirement also guides judges' discretion and thus reduces the possibility of arbitrariness.

The ECtHR also faces general challenges concerning how subsidiarity should be applied when states have drastically different democratic credentials. Other human-rights ICs such as the IACtHR have long been faced with these challenges.⁷⁹ In these circumstances, subsidiarity arguments may counsel more intervention and assistance to national authorities by the IC even though the IC may face more criticism from states and challenges to its authority.

The margin-of-appreciation doctrine lets the ECtHR avoid some such controversial assessments. The doctrine focuses exclusively on the proportionality test performed by domestic authorities in the particular case being considered, disregarding whether the test is the normal mode of decisionmaking in that state. Arguments based on subsidiarity may conclude that such nudging may be more appropriate than more contentious assertions by the Court about the democratic quality of the state insofar as the Court's role is to bolster domestic human-rights mechanisms and protect against human-rights violations among states that are generally committed to these values. Therefore, person-centered subsidiarity arguments support the limits to international review imposed by the ECtHR's margin-of-appreciation doctrine.

VI

CONCLUSION

This article has considered the role of subsidiarity in international human-rights courts, particularly the ECtHR, but also the IACtHR. Many ICs, for

79. See generally Contesse, *supra* note 2.

example those pertaining to trade, resolve various collective-action problems by ensuring that each state complies with agreed-upon standards. Human-rights ICs have a different main function when utilized by states. A state—even one with a well-functioning democracy—agrees to the authority of human-rights ICs largely to assure various audiences of their commitment to human rights. In examining how normative arguments for subsidiarity apply to human-rights ICs, this article explored how a person-centered conception of subsidiarity supports the ECtHR's margin-of-appreciation doctrine. This doctrine limits the scope of the ECtHR's human-rights review to issue areas where its review can better advance states' protection and promotion of their citizens' human rights than states' domestic judicial review. The discussion about the ECtHR and its margin-of-appreciation doctrine thus illustrates how subsidiarity may support either centralization or decentralization, depending on whether the state has conducted a proportionality test. Without such a test, the presumption in favor of the local authority disappears, and the ECtHR neither will nor should grant a margin of appreciation.

One upshot of these arguments is that a margin of appreciation may not be appropriate for international courts generally, notwithstanding other scholars' arguments to the contrary.⁸⁰ A convergence toward a margin-of-appreciation doctrine across ICs cannot be detected. Furthermore, the considerations in favor of a margin-of-appreciation doctrine do not obviously hold for ICs other than the ECtHR, as the ECtHR is significantly different from ICs established to address collective-action problems such as reducing barriers to international trade. States have good reason to be skeptical of granting each other discretion to determine their own compliance with such treaties where there are strong temptations for each state to free ride on the compliance of others.

The discussion also sheds light on the conjectures made in this issue's introduction. The ECtHR's increased independence and the backlash in the form of the U.K.-led agreement on Protocol No. 15, which seeks to constrain the Court, lends credence to several, but not all, of the conjectures.

Conjecture 1 holds that a vertical multilevel system with more significant authority at the global level will engender calls for subsidiarity to limit further expansion of IC authority. The concerns expressed by the United Kingdom and others leading to Protocol No. 15 exemplify conjecture one. As a multilevel system, the European human-rights regime has developed significant authority. At the same time, several states have less need for the credibility gained from self-binding arrangements. This has fueled an express demand for more decentralizing subsidiarity, with states therefore agreeing that the ECtHR should grant states a margin of appreciation in the Preamble of the ECHR.⁸¹

The support for this change also exemplifies conjectures two and three. Conjecture 2 calls for subsidiarity to increase as state consent recedes—a mode

80. Yuval Shany, *Toward a General Margin of Appreciation Doctrine in International Law?*, 16 EUR. J. INT'L L. 907, 909 (2005).

81. Council of Europe, Protocol No. 15, *supra* note 34, pmbl.

of legitimation, more so for delegated pooled authority. And conjecture 3 suggests that demand for subsidiarity also increases when global institutions intervene deeper into specific local affairs. The human-rights ICs do indeed review a wide range of domestic legislation and policies, even more so as a result of dynamic interpretation. Thus, the ECtHR influences issues often regarded as core to state sovereignty, such as determining who should have the right to vote and prohibiting expulsion of suspected threats to national security.⁸²

Conjecture 4 holds that subsidiarity arguments in favor of leaving issues to local authorities are accepted to a greater degree when few negative externalities are present. This article suggests that Conjecture 4 applies to human-rights ICs due to their main role as a self-binding mechanism rather than as a response to a collective-action problem among states. The main topic of concern to the ECtHR is how states treat their own citizens, with few implications that impinge on other states. Thus, few states, if any, have registered strong objections to granting a margin of appreciation.

Conjecture 5 asserts that powerful actors with strong interests in imposing uniform interpretation of regime rules upon other countries will protest subsidiarity, with less resistance by such actors indifferent to such uniformity. This is also consistent with the human-rights ICs, given their role as self-commitment devices. No strong actors object to the margin-of-appreciation doctrine, partly because it does not lend itself to free riding among states. Only seldom would a state have a major interest in restricting other states' human-rights practices. This is one of the differences between the collective-action-problem-solving ICs and the human-rights ICs. The main objective of the ECtHR is not to promote uniformity among states but, rather, to ensure human-rights standards in each state. Other states have little to lose by allowing variations as to how the standards are met, partly because there is no free-rider problem at stake among them.

Conjecture 6 holds that central-level institutions that enjoy significant and stable institutional and political autonomy are unlikely to support subsidiarity arguments in favor of more local authority. Regional human-rights courts such as the ECtHR seem to contradict this intuitively plausible conjecture. It was the ECtHR itself that initiated the margin-of-appreciation doctrine, which expresses such subsidiarity in favor of local autonomy. The Court has developed the doctrine since 1958—during periods when the Court has been autonomous and enjoyed broad support. Thus, the doctrine does not seem to be motivated only by a concern to avoid confrontations with powerful states. The complex scope and requirements of the margin-of-appreciation doctrine would not be expected if the Court introduced the doctrine only to maintain states' support. However, these complexities are plausible—and defensible—in light of the subsidiary role of the ECtHR vis-à-vis states. The ECtHR helps states

82. *Aswat v. United Kingdom*, App. No. 17299/12, 58 Eur. H.R. Rep. 1, 11 (2014); *Hirst v. United Kingdom (II)*, 2005-IX Eur. Ct. H.R. 187, 198.

enhance their long-term credibility with various stakeholders, including domestic populations and other states. This has left the ECtHR with few institutional incentives to empower itself at the cost of state sovereignty.

This article argued that the margin-of-appreciation doctrine with a proportionality test may provide a helpful, practical resolution of the dilemma the ECtHR faces of choosing between respecting democratic state sovereignty and promoting human rights. Considerations of subsidiarity help indicate how the margin-of-appreciation doctrine and the proportionality test may be defended in principle. Importantly, subsidiarity may also shed light on how international human-rights courts generally, and the ECtHR in particular, may be improved in practice. At the same time, this discussion has illustrated that appeals to a principle of subsidiarity do not settle the issue at hand or end the discussion. To the contrary, appeals to subsidiarity, at best, may help structure important debates about how to allocate and use authority in multilevel systems of global and regional governance.