Squaring the Circle at the Battle at Brighton: Is the War between Protecting Human Rights or Respecting Sovereignty Over, or Has it Just Begun?

Andreas Follesdal[*]

Approximately as will appear in

Shifting Centres of Gravity in Human Rights Protection: Rethinking Relations between the ECHR, EU, and National Legal Orders, Oddný Mjöll Arnardóttir and Antoine Buyse, (eds). Routledge, 189-204

http://www.follesdal.net/ms/Follesdal-2016-brighton.pdf

1. Introduction

How should the European Court of Human Rights best 'balance' respect for 'the sovereignty of Contracting Parties with their obligations under the Convention [on Human Rights]'?[1] Long simmering conflicts about this aspect of the European Court of Human Rights (ECtHR, the Court) came to a boil prior to the 2012 high level conference at Brighton. The result at Brighton was an innocuous-looking addition to the Preamble of the European Convention on Human Rights (ECHR), now expressed in Protocol 15 to the Convention:

> [T]he High Contracting Parties, *in accordance with the principle of subsidiarity*, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and […] *in doing so they enjoy a margin of appreciation*, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention.[2]

[*] This article was written under the auspices of ERC Advanced Grant 269841 MultiRights – on the Legitimacy of Multi-Level Human Rights Judiciary; and 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. I am particularly grateful to Oddný Mjöll Arnardóttir and Antoine Buyse for extensive helpful comments including several references to relevant cases. A previous version was presented at the Conference on 'Shifting Centres of Gravity in European Human Rights Protection' Reykjavik March 6-7, 2014.

[1] Ronald St. J. Macdonald, 'The Margin of Appreciation' in Ronald St. J. Macdonald and F Matcher (eds), *The European System for the protection of human rights* (Springer 1993) 123.

[2] Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 24 June 2013) CETS No 213, my emphasis.

Will these references to subsidiarity guide the Court's attempt to respect both the Treaty and its sovereign creators by granting the latter a certain scope of discretion – a margin of appreciation (the margin) which differs from its current practice?

Some parties, including the UK government, appealed to subsidiarity in order to secure broad discretion for states' domestic human rights review in the form of a wide margin of appreciation. By other, arguably better justified conceptions of subsidiarity, the Court should grant a narrower, more circumscribed margin. To give a sense of the conflict, consider the UK government's draft proposal for the Brighton meeting which outlined implications of what I shall term a 'state centric' conception of subsidiarity:

> Each State Party enjoys a *considerable* margin of appreciation in how it applies and implements the Convention. This reflects that *national authorities are in principle best placed to apply the Convention rights in the national context*. The margin of appreciation implies, among other things, that it is the responsibility of democratically-elected national parliaments to decide how to implement the Convention in reasoned judgments. The role of the Court is to review decisions taken by national authorities *to ensure that they are within the margin of appreciation*.[3]

The Brighton negotiations yielded a declaration with small yet crucial differences. The margin only applies to a limited set of apparent rights violations, and the Court remains authorized to review states' assessments. The parties agreed that

[3] UK Government, 'Draft Brighton declaration on the future of the European Court of Human Rights -- second version' <http://adam1cor.files.wordpress.com/2012/02/2012dd220e.pdf> accessed 6 August 2015, 17, my emphasis.

> The jurisprudence of the Court makes clear that the States Parties enjoy a margin of appreciation in how they apply and implement the Convention, depending on the circumstances of the case and *the rights and freedoms engaged*. This reflects that the Convention system is subsidiary to the safeguarding of human rights at national level and that national authorities are in principle better placed than an international court *to evaluate local needs and conditions*. The margin of appreciation goes hand in hand with supervision under the Convention system. In this respect, the role of the Court is to review whether decisions taken by national authorities are compatible with the Convention, having *due regard* to the State's margin of appreciation.[4]

In the literature, 'subsidiarity' appears to be used in different ways to support divergent implications for how powers should be allocated and used between states and the Court. Thus general appeals to 'subsidiarity' will neither settle the balancing between sovereignty and human rights protection, nor provide much guidance to the Court's attempts in the cases brought before it. Instead of resolving these issues, we should expect that Protocol 15 will fuel more attention to the Court's interpretation of subsidiarity. Indeed, we may hope that the Court draws on a well-reasoned conception of subsidiarity to further develop the margin of appreciation doctrine (the doctrine). Thus the battle at Brighton may be over, but the work has barely begun. The present chapter defends this analysis and points to parts of the future agenda for the Court in its jurisprudence – and parts of the research agenda for those who study the Court.

[4] High Level Conference on the Future of the European Court of Human Rights Brighton Declaration, 19-20 April 2012, <http://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf > accessed 5 November 2014, para 11, my emphasis.

Different conceptions of subsidiarity have in common that the burden of argument rests with those who seek to move decisions away from the fundamental units toward more centralized bodies. This chapter partly explores what version of subsidiarity should be brought to bear, since some such versions themselves rest on normative premises that are difficult to defend. I shall suggest that the Brighton Declaration's account of the role of the Court fits better with a 'person-centred' conception of subsidiarity, and that it is such a conception that should be brought to bear when the Court continues to elaborate and specify its margin of appreciation doctrine. Such a defensible principle of subsidiarity can alleviate the fears that human rights protection is at serious risk by a more developed doctrine by the Court – whilst expressing due deference to legitimate domestic decisions – or so I shall argue. In contrast, such fears may hold against a state centric conception of subsidiarity.

I then address some contested and salient aspects of the doctrine, in particular the proportionality test and the narrowed margin of appreciation when the ECtHR identifies an 'emerging European consensus'.

Section 2 lays out some relevant features of the margin of appreciation doctrine. Section 3 reports popular criticism against the present doctrine, focussing on the fear that human rights protection suffers from it. Section 4 presents a modest defense of the current practice by indicating that some objections miss their target. Section 5 presents competing principles of subsidiarity more fully, which in section 6 are applied to the doctrine to suggest areas to be maintained, changed or specified. Section 7 concludes by considering whether the changes to the Preamble and the person-centred conception of subsidiarity will help alleviate the criticisms.

2. The Margin of Appreciation Doctrine

The so-called margin of appreciation doctrine of the ECtHR grants a state the authority, within certain limits, and on certain conditions, to determine in a particular case whether the rights of the European Convention on Human Rights (ECHR) are violated. Hitherto the doctrine is not found in the Convention text proper, but is a long standing practice of the Court. The doctrine is claimed by the Court to be appropriate for at least three main issue areas:

- 'Balancing' private human rights against public interests such as emergencies, public safety, the economic well-being of the country etc. – as permitted for several rights (Article 8 on private life, Article 9 on religion, Article 10 on free expression, Article 11 on peaceful assembly). Indeed, many trace the doctrine back to the 1958 *Cyprus* case where the (then) Commission asserted that the UK authorities could enjoy a certain measure of discretion to assess the extent to which derogation from the Convention under Article 15 was strictly required by the exigencies of the situation – which in this case was a state of public emergency.[5]
- 'Balancing' or 'trade-offs' among different private human rights in the Convention – such as between freedom of expression (Article 10) and privacy (Article 8) – including conflicts between private interests in the same right.[6]
- How to apply the European norms to the specific circumstances of a state, which may depend on shared values and traditions within the state in question, or perceived threats to it.

[5] *Greece v United Kingdom* App no 176/56 (1958-9) Y.B. Eur.Conv. on H.R. 182.
[6] *Godelli v Italy* App no 33783/09 (ECtHR 25 September 2012), para 53.

These three may overlap, e.g. when the Court must balance several private human rights and public interests.[7]

One element of the current doctrine is that in order to grant a margin of appreciation, the Court often requires that the accused state has undertaken a 'proportionality test'. The state must have made a good faith check to ascertain whether the rights violation could have been avoided by other policies in pursuit of the same social objectives.

3. Criticism of the Present Margin of Appreciation Doctrine

The doctrine has received much praise and much criticism, some of both are well deserved. On the one hand, it expresses some respect for sovereign democratic self-government - within some limits. But a key objection to the current doctrine is that it is too vague: it is hardly a 'doctrine' in the sense of a principle or position that forms part of a legal system. There are at least three kinds of concern.

Firstly, the doctrine creates legal uncertainty, because states are unable to predict and hence cannot avoid violations of the ECHR.[8] Indeed, even the judges of the Court disagree about the doctrine to such an extent that legal certainty seems at risk. To some extent the uncertainty is due to the legal norms, rather than the doctrine itself. Consider Article 10, which protects freedom of expression – but

[7] *Evans v United Kingdom* ECHR 2007-I, para 74.
[8] Anthony Lester, 'The European Court of Human Rights after 50 Years' (2009) 4 European Human Rights Law Review 461, cf. Jeffrey A. Brauch, 'The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law' (2004) 11 Columbia Journal of European Law 113, 125; Patrick Macklem, 'Militant Democracy, Legal Pluralism, and the Paradox of Self-Determination' (2006) 4 International Journal of Constitutional Law 488; Yutaka Arai-Takahashi, 'The margin of appreciation doctrine: a theoretical analysis of Strasbourg's variable geometry' in Andreas Follesdal, Birgit Peters and Geir Ulfstein (eds), *Constituting Europe. The European Court of Human Rights in a National, European and Global Context* (Cambridge University Press 2013).

> subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

The Court often – but not always – grants states a margin in determining whether such interests override the right. Thus in the *Sunday Times* case, a majority of 11 judges found against the United Kingdom in holding that Article 10 protected newspapers reporting on a case. But nine dissenting judges held that this should have been left to the domestic judiciary, reasoning that '[t]he 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'.[9]

Similar disagreements among judges are legio.[10] One upshot of this criticism is that the doctrine should be made more precise, *and* should be more consistently applied, than is presently the case.

A second concern is that the vague doctrine leaves too much discretion to the judges. The above quote from *Sunday Times* illustrates this point. Similarly, scholars note that 'the Court leaves itself vulnerable to the charge that it manipulates the consensus inquiry to achieve an

[9] *Sunday Times (No 1) v United Kingdom* Series A , dissenting opinion of judges Iarda, Cremona, Thór Vilhjálmsson, Ryssdal, Ganshof van der Meersch, sir Gerald Fitzmaurice, Bindschedler-Robert, Liesch and Matscher para 4.
[10] *Observer and Guardian v United Kingdom* Series A no 216; *Wingrove v United Kingdom* ECHR 1996-V.

interpretation of the Convention that it finds ideologically pleasing'.[11] It would seem that one main response is to make the rules of the doctrine more precise.

However, a more precise doctrine does not automatically avoid other objections: that such discretion entails a failure of the ECtHR to protect human rights in the short and long run. This is the point of Benvenisti's criticism:

> By resorting to this device [of a margin of appreciation], the [European Court of Human Rights] eschews responsibility for its decisions. But the court also relinquishes its duty to set universal standards from its unique position as a collective supranational voice of reason and morality. Its decisions reflect a respect of sovereignty, of the notion of subsidiarity, and of national democracy. It stops short of fulfilling the crucial task of becoming the external guardian against the tyranny by majorities.[12]

The Court thereby 'side-step[s] its responsibility as the ultimate interpretative authority in the Convention system.'[13] Indeed, "[t]he essence of the international control mechanism may evaporate if there is in fact no effective check upon national power."[14] Thus there is a risk that a broad margin threatens the role of the Court as protector of the Convention.

4. A Modest Defense of the Current Doctrine

Are these criticisms to the point? I grant that if the margin were to become very wide, the

[11] Laurence R. Helfer, 'Consensus, Coherence and the European Convention on Human Rights' (1993) 133 Cornell International Law Journal 141, 154.
[12] Eyal Benvenisti, 'Margin of Appreciation, Consensus, and Universal Standards' (1999) 31 International Law and Politics 843, 852.
[13] Howard Charles Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (Kluwer 1996)181.
[14] ibid 181.

value added of ECtHR review diminishes: it would leave each state to be judge in its own case.

However, as practiced, the margin is limited. And it will remain circumscribed with the Brighton declaration, which specifies in para 11 that the Court remains responsible for assessing states' compliance with the Convention:

> the States Parties enjoy a margin of appreciation in how they apply and implement the Convention, depending on the circumstances of the case and the rights and freedoms engaged…. the role of the Court is to review whether decisions taken by national authorities are compatible with the Convention, having due regard to the State's margin of appreciation.

The margin does not apply in a general way to the non-derogable rights to life (Article 2), against torture (Article 3), or to slavery or forced labour (Article 4).[15] Moreover, recall that the margin often concerns a 'balancing' among private rights stated in the ECHR. Such 'balancing' does not entail *less stringent* human rights protection, but rather that the state gives some rights a certain weight compared to other rights. Furthermore, national courts enjoy such a margin only when the ECtHR is satisfied that the national court has duly considered several conditions - in the form of a proportionality test - in good faith.

I submit that a more specified margin can reduce several of the concerns stemming from vagueness, and not risk its objective unduly. But such specification must be guided by an

[15] Though the ECtHR has referred to the margin of appreciation concerning positive obligations with regard to some aspects of Article 2 (cf. *Budayeva v Russia* ECHR 2008, para 156) and Article 3 (*M.C. v Bulgaria* ECHR 2003-VII, paras 153-154 and *Berganovic v Croatia* App no 46423/06 (ECtHR 25 June 2090, para 80)). Thanks to Oddný Mjöll Arnardóttir for these and other references.

understanding of why a margin of appreciation should be accepted at all. This is the question for which a principle of subsidiarity may be thought to offer guidance.

Considerations of subsidiarity may help specify the doctrine so as to prevent human rights abuses over citizens from their own domestic authorities, *and* to prevent unchecked discretion by international judges. One way to limit such discretion is to specify the doctrine, in light of a general account of what the margin is for. This in turn can best be assessed by considering what the role of the ECtHR is, guided by a principle of subsidiarity.

5. Subsidiarity

Several authors, including Benvenisti and others, hold that a principle of subsidiary supports 'the' margin of appreciation doctrine.[16] I submit that there is some truth to this claim, mainly in that appeals to subsidiarity indicate the sorts of arguments that may be made.

The 'principle of subsidiarity' is a principle of political ordering which regulates the allocation and use of political or legal authority, typically amongst a centre and member units. In the history of political thought the principle has a variety of versions, each with long historical roots. Thus, we find a 'protestant' version based on Althusius, a Catholic version expressed in various papal Encyclicas; arguments by the 'Anti-Federalists', and economists' arguments favouring fiscal federalism.[17] For our purposes what unites the various traditions is the assumption that the burden of argument lies with attempts to centralize authority.The different principles of subsidiarity express a commitment to leave as much authority as

[16] Benvenisti (n 13); Dean Spielman, 'Allowing the Right Margin: The European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?' (2011) 14 Cambridge Yearbook of European Legal Studies 381; Jan Kratochvil, 'The inflation of the margin of appreciation by the European Court of Human Rights'(2011) 29 Netherlands Quarterly of Human Rights 324; de Ignacio de la Rasilla del Moral, 'The Increasingly Marginal Appreciation of the Margin-of-Appreciation Doctrine' (2006) 7 German Law Journal 611, 614.

[17] Andreas Follesdal, 'Subsidiarity' (1998) 6 Journal of Political Philosophy 231.

possible to the more local authorities, consistent with achieving the objectives being considered – be it human rights protection, economic efficiency, human flourishing of a certain kind, or some other goals. Different versions disagree on important issues, including

- Whether it is the member units or the centre that should have the final say for determining those objectives – be it human rights or trade liberalization - or whether central action is needed to achieve them;
- Whether central action should be permitted or required under certain conditions;
- Whether central action should aim to empower the member units, supplement them, or replace them.

For our purposes, it is helpful to distinguish a 'state-centric' principle of subsidiarity from 'person-centred' versions of the principle.[18] The former matches a standard presumption of international law, and may best be supported by the Althusian tradition of subsidiarity.[19] Sovereign units – here states – are taken to be free to decide whether they have shared objectives, and whether these objectives are better secured by delegating some of their authority to some central body – such as an international court. Such arguments may be based on states' inability or unwillingness to achieve sufficient coordination absent some centralised body, or simply the need for mutual trust that each state actually carry out their obligations. Such pooling of sovereignty may thus differ across issue areas depending on the interests of states, the nature of their collective problem, and the new risks induced by a centralized authority.

[18] Andreas Follesdal, 'The principle of subsidiarity as a constitutional principle in international law' (2013) 2 Global Constitutionalism 37.
[19] Johannes Althusius, *Politica Methodice Digesta* (Liberty Press 1995); Johannes Althusius, *Politica Methodice digesta of Johannes Althusius* (Harvard University Press 1932).

Generally, this version of subsidiarity would support as broad a margin as possible, consistent with these objectives, to ensure that the state retains maximal authority and immunity from interference. Three challenges to this version of subsidiarity merit mention, concerning the status of the states in this account. Firstly, there is no clear standard within this account to determine whether any state is beyond the pale with regard to internal legitimacy. Secondly, this account will not allow any other authority to override the domestic bodies' assessment of the objectives and the need for common responses. Thus standard coordination problems or collective action problems abound: often joint benefits can be achieved only if every participant is sanctioned for defection from certain common standards – e.g. concerning low trade barriers, non-aggression agreements etc. To require universal consent for such common standards to be maintained may often be impossible, whilst the benefits to all – even to those who withhold consent – are clear. Thirdly, the normative justification for such a principle is unclear: what reasons are there to accept this primacy of states, especially if we take as a normative starting point that it is individuals and their interests that are the units of ultimate normative concern. We witness all three flaws in our current system of states, which includes several rogue states who mistreat their citizens, yet are still immune from various kinds of interference. From the perspective of such a state centric conception of subsidiarity, the central puzzle of international human rights courts is: if they are the solution, what exactly is the problem states have? – and in light of the answer, what scope should a domestic court retain for adjudicating the state's compliance with the human rights treaty? From this point of view, *democratic* states may want to 'self-bind' to a regional or international human rights court in order to be more credible in the eyes of their own citizens to promote more willing compliance, or to hinder a takeover by undemocratic political forces. A state may also seek credibility in the eyes of other states for instance to convince them to pool sovereignty – such as in the EU. But heads of non-democratic states may not have such needs, and thus should

not agree to any curtailment of immunity beyond what the government's self-interest dictates. Thus, the general tendency on the side of many non-democratic states may be to promote as broad a margin as possible.

A 'person-centred' version of subsidiarity does not give such primacy to the state and the interests of states, but instead insists that subsidiarity goes 'all the way down' to the interests of individuals. The states are not the 'natural' reservoir of sovereign authority, but should only have such legal powers and immunities as needed to secure the shared interests of its members: the communities and municipalities – and ultimately the citizens whose states they are. Such accounts of subsidiarity are found inter alia in the Catholic or fiscal federal tradition.[20] Among the central problems of these accounts are how to avoid abuse of the central authority's power to identify and specify the objectives to be pursued. Thus, in the Catholic tradition consider how the Church authorities have identified some ideals for human flourishing which determines the proper composition and objectives of families – with contested implications. There is also a risk that the centre seeks its own interests rather than those of the citizens or sub-units. Moreover, even if the problem of deliberate ill will is checked, the centre will often be unable to remain sufficiently attuned to local variations in needs and feasible solutions. For our case these risks may be smaller: the human rights standards are agreed by state consent, and the aim is only to secure a minimum threshold.

From this point of view, an important design challenge of international human rights courts and the doctrine is to grant the state enough authority to promote the interests of its citizens and of foreigners, whilst preventing the abuse of such powers in the form of human rights violations. Regional or international human rights courts can provide such protection, and

[20] Pope Pius XI, 'Quadragesimo Anno (1931).' in Carla Carlen (ed.) *The Papal Encyclicals 1903-1939* (Mcgrath 1981); and R. A. Musgrave, *The Theory of Public Finance: a study in political economy* (Mcgraw-Hill 1959) and Wallace E. Oates, *Fiscal federalism*(Harcourt, Brace & Jovanovich 1972), respectively.

bolster the protection provided by independent domestic courts. At the same time, citizens run the risk that all these courts – domestic, regional and international alike - will misuse or even abuse their power due to incompetence or ill will. In particular, no court should limit *democratic* and other forms of self-governance unduly, especially when the governments are sufficiently responsive to the best interests of their and other citizens.

For our purposes here – namely human rights protection performed primarily by the domestic courts, supported by regional human rights courts – I submit that the 'person centric' principle of subsidiarity is more plausible. There seems to be no sound reason to insist that the principle of subsidiarity should stop at the state level, nor that states should retain a final veto. This is particularly so concerning human rights protection.

A 'state-centric' conception of subsidiarity will presumably support a broader margin. The person centered version, in contrast, will require more detailed delineation of the margin. Indeed, a person-centered account must include complex arguments for the doctrine, showing that certain interests of individuals require centralized authority above the state, e.g. human rights protected and promoted by the ECHR, but that a margin is still permitted or even required.

Why allow a margin at all, on a person-centred principle of subsidiarity? It would seem to re-create the problems for which international courts were the solution, namely to prevent the state from being judge in its own case – be it human rights violations or arbitration disputes. We now turn to consider why individuals' interests may require that international human rights judicial review be constrained by a margin. This requires us to

look at the ECtHR as part of a multi-level legal order.

6. Applying Subsidiarity to the Margin of Appreciation Doctrine

I shall suggest that the Court when following a duly specified margin of appreciation doctrine can help prevent human rights abuses of citizens from their own domestic authorities, *and* that the doctrine can help prevent domination by international judges. Some versions of a principle of subsidiarity can help specify the doctrine in more defensible directions. To apply a person-centred principle of subsidiarity properly to the doctrine, we first consider the objectives of individuals that are better secured by establishing a ECtHR than by domestic authorities alone; then consider the role of the ECtHR; and then the particular role of the doctrine as part of this complex.

6.1 The Objective of the ECtHR

The presumed objective of the ECtHR can be read out of the Preamble to the ECHR: the aim is to protect

> those fundamental freedoms which are the foundation of justice and peace in the world … [which] are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights upon which they depend

There are several aspects of this objective and function of the multi-level human rights judiciary worth noting.

States' main objective with human rights treaties is often to bind themselves. Some treaties serve primarily to bind all states to solve shared problems, and each state only binds itself as a necessary burden to convince other states to do likewise. Compared to such 'other-binding' conventions, some of the main aims for states that sign human rights treaties are different. The state binds itself in order to enhance its own credibility as a 'rule of law', human rights respecting political system. This self-binding is a feature these treaties share with investment treaties to attract foreign investors, unlike treaties concerning trade liberalization to gain access to foreign markets.[21] One implication is that treaty interpretation and adjudication should not obviously be made so as to minimize the curtailment of state sovereignty – as is often the case for 'other-binding' conventions which each state signs in order to make other states commit likewise for common gains.[22] It follows that a margin should not necessarily be as broad as possible.

The protection of citizens against certain kinds of avoidable abuse or neglect by means of the laws and policies of their government require detailed knowledge about the local culture and circumstances, the risks individuals face due to complex interplay between majority culture and institutions - and about a range of feasible alternatives. The abstraction of human rights may thus be amongst their virtues, since they can be specified in different ways to reflect such differing circumstances.[23]

Also note that the objective of the ECHR is human rights protection, not harmonization across all states. Certain treaty objectives require harmonization of regulations across jurisdictions, for instance to facilitate international trade. Different rules for tariffs would easily create

[21] Karen Alter 'Delegating to International Courts: Self-Binding vs. Other-Binding Delegation' (2008) 71 Law and Contemporary Problems 37.
[22] Andrew Moravcsik, 'The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe' (2000) 54 International Organization 217.
[23] Adam Etinson, 'Human Rights, Claimability and the Uses of Abstraction' (2013) 25 Utilitas 463 .

suspicion that some states were seeking to free ride on other more compliant states, and would challenge the objective of the treaty. For human rights protection, the same concern for harmonization does not apply. The aim is to secure some of the important interests of individuals against standard threats mainly stemming from their own state organs, whatever institutions and policies are in place. There are only few problems that arise by some states seeking to free ride on others' strict compliance – for instance, there may be a 'race to the bottom' for labour rights. But in general, the concern to protect important interests is compatible with a range of different institutions in different states, all of which are compatible with human rights. Consider, for instance, how different European states regulate the relationship between religions and the state: some states such as the United Kingdom maintain a state church, whilst others such as France insist on a sharp divide. Both of these arrangements, suitably tailored, are compatible with the ECHR. One implication is that some alleged problems of fragmentation are not as challenging as one might have thought, and that the role of an international court for human rights protection may be less intrusive into domestic regulations.

6.2 The Role of the ECtHR as a Regional Court in a Multi-Level Order

In the following I leave aside interesting 'de lege ferenda' questions concerning which role would be best for the Court to have. This is not only of theoretical interest given the current discussions e.g. about how to reconfigure the European legal order as regards the relationship between the Court and the EU's Court of Justice of the European Union.

According to the ECHR, the states remain the primary responsible actors to respect and protect human rights in the complex multi-level European legal order. The express objective of the ECtHR is to *assist* states in securing this objective, not to replace them: its task under

Article 19 is limited to 'ensur[ing] the observance of the engagements undertaken by the High Contracting Parties'. Thus its role is really 'subsidiary' or supportive and supplementary in the promotion of human rights. Subsidiarity is also taken to be expressed in Articles 1, 13 and 35. The Court interprets its own role in this light:

> The Court observes that within the scheme of the Convention it is intended to be subsidiary to the national systems safeguarding human rights … The Court must be cautious in taking on the role of a first-instance tribunal of fact, where this is not rendered unavoidable by the circumstances of a particular case. As a general rule, where domestic proceedings have taken place, it is not the Court's task to substitute its own assessment of the facts for that of the domestic courts and it is for the latter to establish the facts on the basis of the evidence before them. .. in normal circumstances it requires cogent elements to lead [the Court] to depart from the findings of fact reached by the domestic courts ... Nonetheless, … it is the Court's role definitively to interpret and apply the Convention... [24]

The impact of the ECtHR in the multilevel European legal order is profoundly shaped by the fact that it is a permanent court which interprets the Convention authoritatively. Its judgments thus have a certain 'erga omnes' effect and thereby shape states' expectations and future behavior. Domestic courts must consider relevant decisions by the ECtHR even about cases in other states – thus, for instance, the ECtHR's decision about balancing of freedom of expression against privacy in one case in Germany is generally heeded by all domestic courts when they decide similar cases.[25] This also applies to the ECtHR's claims about when it

[24] *Austin and Others v United Kingdom* Apps no 39692/09 etc (ECtHR 15 March 2012), para 61.
[25] *Von Hannover v Germany* ECHR 2004-VI and *Lillo-Stenberg and Sæther v Norway* App no 13258/09 (ECtHR 16 January 2014), respectively.

grants states a margin of appreciation. Thus the practice of the margin of appreciation shapes states' behavior broadly: domestic courts appear to argue cases in ways which the Court has recognized elsewhere as sufficient to grant a margin of appreciation, in the expectation that the Court will grant them a similar margin if the case goes to the ECtHR.[26]

6.3 Why a Margin of Appreciation? – An Argument from Subsidiarity

If the ECtHR is set up to support and strengthen the domestic judiciary's protection of human rights, why should its support be reduced by introducing a margin of appreciation? This practice appears to reduce the protection of human rights, since the ECtHR thereby hands back authority to the domestic judiciary which it was supposed to monitor and override if necessary.

From the perspective of a person-centred conception of subsidiarity, the state organs should retain the final authority when the international human rights court *cannot* or is *unlikely* to provide extra protection. That is: the ECtHR should apply a margin of appreciation, under certain conditions, insofar and for those objectives where the domestic courts and other authorities are at least as well suited to determine whether there is a breach. What arguments of this kind may be offered to assess and specify the current doctrine?

Consider several features of the doctrine. The Court hardly grants any margin when certain rights are at risk, regardless of what states claim, namely rights against torture and slavery, and the right to life.

The state may be better able to apply the ECHR to complex local circumstances than will an

[26] Cf. *Lillo Stenberg and Sæther v Norway* ibid, paras 44-45.

international court. Thus the Court often claims that domestic authorities are in principle better placed than an international court to evaluate local needs and conditions.[27] But when is a state more *likely* than an international court such as the ECtHR to evaluate the situation correctly, in ways that promote the objective of human rights protection *against* the state itself? I submit that this is more likely when the domestic laws and policies are sufficiently responsive to the best interests of all citizens, and where the domestic authorities have mechanisms of self-correction. This is arguably often the case for democratic rule under the rule of law.

Under functioning democratic mechanisms and the rule of law the population deliberates about alternative policies and legislative proposals in light of their implications for all affected parties, so as to promote broadly shared interests whilst avoiding harm to anyone. Insofar as this argument holds, the ECtHR should allow a very narrow margin for rights concerning political participation, freedom of expression and other rights required for well-functioning democratic decision making. And indeed, this appears to be a pattern of the practice.[28]

Furthermore, the majoritarian democratic mechanisms are not particularly reliable in securing the vital interests and equal respect for those who are likely to be in the minority when decisions are taken by majorities. For this reason, the ECtHR should not grant a wide margin for rights which protect interests of minorities which may likely be outvoted by persistent majorities– such as the curtailments of freedom of religion for religious minorities – even in well-functioning democracies. In such cases, the Court should at least engage in strict scrutiny

[27] *Hatton and Others v United Kingdom* ECHR 2003-VIII, para 97.
[28] Andrew Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (Oxford University Press 2012) 90-92; and Benvenisti (n 13) 847, citing inter alia *United Communist Party of Turkey v Turkey*, ECHR 1998-I.

as to whether the state has indeed carried out a proportionality test. Again, this pattern appears to be in accordance with the current doctrine.[29]

Finally, even democratic deliberative majoritarian decision making is not always well functioning. For instance, there are limits to the general claim that the domestic authorities are closer to the specific circumstances and *thus* in a better position to assess proportionality and judicial review. The domestic authorities may know more about the domestic setting, but there is no reason to believe that they are particularly well placed to know the Convention and the case law of the Court. Nor are they particularly well placed to assess the best set of policies to secure their social goals. The latter requires a comparative perspective which domestic authorities may be too myopic to discern. Thus it makes sense to have a proportionality test when certain human rights appear to be at stake, to ensure that state authorities have not overlooked less invasive alternatives, and have not ignored the impact on some groups – and at the same time ensure that the population can be sure that this is fact the case.

Such deliberation about alternatives and their impact is of course what well-functioning democratic decision making should secure. Insofar as such proportionality testing has not been carried out at all – in well-functioning democracies and elsewhere – the ECtHR has no reason from deference for democratic decision making to refrain from reviewing a decision. To the contrary, the Court may seek to nudge the domestic authorities to perform a thorough proportionality test, by letting it be known that the Court only grants a narrow margin, if at all, when there is no evidence of such testing by domestic organs – be it by the judiciary or the legislature. Indeed, this is the reason why the Court refused to grant the UK a margin of

[29] Cf. Legg ibid 93; and Alexandea Timmer, 'A Quiet Revolution: Vulnerability in the European Court of Human Rights', in Fineman and Grear (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Ashgate 2013) 145. I owe these references to Oddný Mjöll Arnardóttir.

appreciation in the *Hirst* case and likewise in the case *Lindheim and Others v Norway*.[30]

On this basis, I submit that a margin of appreciation doctrine with these features, with exception for the rights mentioned, seems compatible with and even required by the rationale for placing some authority with an international court to adjudicate human rights – when this *supplements* review by domestic courts. When constrained in this way, the doctrine serves the particular objectives of the ECtHR: to bolster the domestic protection of human rights. Note that it is not obvious that similar features and conditions should be part of a margin of appreciation doctrine for other international courts: they may have different relations to other actors in the multi-level regional or global system, and with other objectives with different normative weight than human rights.

A final aspect of the practice is more contentious. The Court may restrict the margin, or require better arguments from the accused state, when the Court detects a consensus in policies or regulation in Europe.[31] This is referred to by the Court in terms of 'the existence or non-existence of common ground between the laws of the Contracting States.'[32] The Court's attention to emerging consensus may be a good way to constrain the judges' discretion when they engage in dynamic or 'evolutive' interpretation of the ECHR. The Court might only interpret dynamically in areas where it detects common ground, and/or be particularly critical only when a state deviates from such a consensus. However, the Court does not appear to have an established procedure to ascertain the requisite consensus. Several scholars claim that

[30] *Hirst v United Kingdom (No. 2)* ECHR 2005‑IX, paras 79-82; Lindheim and Others v Norway App nos 13221/08 and 2139/19 (ECtHR , 12 June 2012), paras 128-130. In *Animal Defenders v United Kingdom* ECHR 2013, paras 108-109, this approach was confirmed by granting a wide margin of appreciation when a thorough proportionality assessment had been performed.
[31] Laurence Helfer and Anne-Marie Slaughter, 'Toward a Theory of Effective Supranational Adjudication' (1997) 107 Yale Law Review 314.
[32] *Rasmussen v Denmark* Series A no 87, para 40, cf. Eva Brems, 'The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights' (1996) 56 Heidelberg Journal of International Law 240, 248, 276.

'emerging consensus' in the eyes of the beholder.[33] These and other critics also claim that the weight of the consensus factor is indeterminate, opening up for too much judicial discretion. Indeed, this respect for a majority consensus seems to run counter to some of the central arguments for the Court: that the majority may well be in the wrong, and subject those in the minority to tyranny. More fundamentally, it appears unclear why an emerging consensus among other states should reduce the margin granted one state on issues where it faces particular dilemmas in balancing two Convention protected rights against each other and has established its own routines to handle them – routines that hitherto have appeared unobjectionable?

7. Conclusion: Criticisms Reconsidered

We have considered whether the proposed changes to the Preamble of the ECHR wrought by Protocol 15, with references to subsidiarity, can guide the Court's attempt to respect both the Treaty and its sovereign creators by means of a margin of appreciation. I have argued that general appeals to 'subsidiarity' neither help the balancing nor guide the Court's attempts in the particular cases. We should indeed expect Protocol 15 to focus attention onto the Court's interpretation of subsidiarity. I have argued that a person-centred conception of subsidiarity is to be preferred over a state-centric conception. The former can alleviate some of the criticisms voiced against the doctrine of the margin of appreciation.

The doctrine of the margin of appreciation should be specified *not* in the light of a state-centric conception of subsidiarity which would tend to grant all states a wide margin to be judge in their own case as long as trust in the state by their citizens or other states is not at risk. Rather, I have laid out some implications of a *person-centred* subsidiarity principle,

[33] Benvenisti (n 13); Helfer and Slaughter (n 34); but cf. George Letsas, 'Two Concepts of the Margin of Appreciation' (2006) 26 Oxford Journal of Legal Studies 705, 713.

which seems to support some of the alleged features of the current practice, in particular no margin for violations of the right to life and the right against torture, slavery or forced labour; and a very narrow margin where rights central to the well-functioning of a democratic order are at stake. Then the person-centric version supports a presumption that domestic democratic procedures can ensure that the domestic courts can be trusted to monitor whether the discretion of the state complies with the ECHR. But this presumption must be defended, not least when the rights of minorities are at stake, by requiring that the domestic authorities have indeed performed a proportionality test in good faith.

These aspects of the doctrine should thus be elaborated, and if guided by a subsidiarity principle then certainly a person-centred one. The arguments I have laid out do not challenge the widespread criticism that the current margin of appreciation 'doctrine' is very vague and partially inconsistent. Moreover, I have questioned the Court's reliance on an observed 'emerging consensus.' However, I have suggested that one plausible response is to make the rules of the doctrine more precise. I submit that this task will be even more urgent, and become more of a public concern, with the changes wrought by Protocol 15. It is only by making the substantive criteria of the doctrine more precise that the margin of appreciation 'doctrine' becomes worthy of that name. This is required if the member states of the Council of Europe are to become and remain worthy of their citizens' trust and deference – by showing more clearly that these authorities work to the best interest of all.