# NATIONAL DISCRETION AND INTERNATIONAL DEFERENCE IN THE RESTRICTION OF HUMAN RIGHTS:

# A COMPARISON BETWEEN THE JURISPRUDENCE OF THE EUROPEAN AND THE INTER-AMERICAN COURT OF HUMAN RIGHTS

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## I. Introduction

The emergence of human rights' regional courts has placed a challenge in defining the scope and normative content of universal human rights. A regional treaty of human rights is accompanied by the possibility of accepting geographical peculiarities when it comes to the enforcement of human rights obligations. So, how should international courts deal with moral and normative differences within each region?

One of the most important doctrinal creations in this area is the margin of appreciation ("MOA"), adopted by the European Court of Human Rights ("European Court"). The MOA doctrine is an interpretative criterion developed on one hand, to grant deference to States Parties so that they can regulate the content of rights and their restrictions and, on the other, to distribute power and levels of decision-making between

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domestic authorities and international courts. Although the expression MOA cannot be found in the text of the European Convention on Human Rights[1] ("European Convention") or in its preparatory works,[2] it is now a fixed part of the European Court case law in the interpretation of rights and their limitations.

The Inter-American Court of Human Rights ("Inter-American Court"), created under the American Convention of Human Rights[3] ("American Convention"), is another regional court. This Court has not developed a theory of deference for domestic authorities, which can be explained mainly by the number and the type of cases decided. There are two contextual differences between the European and the Inter-American system. First, while the European Court began its work in the 1960's and has decided more than 15,000 cases,[4] the Inter-American Court delivered its first contentious decision in 1988 and has decided only 140 contentious cases.[5] However, number differences do not constitute the major contrast between the two systems. While the European Court began deciding cases that arose in a small number of democracies during the 1960's, the

[1] [European] Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention"), *open for signature* Nov. 04, 1950, 213 U.N.T.S. 221.

[2] YUTAKA ARAI-TAKAHASHI, THE MARGIN OF APPRECIATION DOCTRINE AND THE PRINCIPLE OF PROPORTIONALITY IN THE JURISPRUDENCE OF THE ECHR 1-3 (2002).

[3] Organization of American States, American Convention on Human Rights ("American Convention"), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

[4] For the European Court statistics, see the official documentation found in the website of the Court: *Overview 1959-2011*, available at http://www.echr.coe.int/NR/rdonlyres/E58E405A-71CF-4863-91EE-779C34FD18B2/0/APERCU_19592011_EN.pdf (last visited Apr. 29, 2012).

[5] In the case of the Inter-American Court, every decision can be found online at http://www.corteidh.or.cr/casos.cfm?&CFID=364795&CFTOKEN=92236217 (last visited Apr. 29, 2012).

political and social environment of the Americas was diametrically the opposite.[6] Military dictatorships and authoritarian regimes were in power or had recently ceased.[7] The different contexts have determined the path of each court's jurisprudence.

The focus of this paper is to analyze and compare the degree of international deference granted by the European and the Inter-American courts to domestic authorities. Commentators have paid attention to the MOA doctrine developed by the European Court, but they have not analyzed the issue of national discretion in the Americas and have not addressed the issue in a comparative fashion. Therefore, this paper tries to fill two gaps in the literature. First, by providing an account of the Inter-American Court's jurisprudence on matters of national discretion and international deference. Secondly, by analyzing and comparing the jurisprudence of the European and the Inter-American courts on the restriction of human rights and the leeway granted to domestic authorities on these issues.

In the European context, the Court has developed the MOA doctrine that allows domestic discretion in the restriction of human rights. To understand how this doctrine operates, this paper classifies the leading cases in three groups. The first set of cases groups "core" or "fundamental" rights, such as the prohibition of torture, and political rights, such as freedom of expression or freedom of association.[8] Concerning fundamental rights, the European Court has exercised a stringent international supervision and denied any room for domestic discretion. In political speech cases or the

[6] SCOTT DAVIDSON, THE INTER-AMERICAN HUMAN RIGHTS SYSTEM 259 (1997).

[7] *See infra* III, 1.

[8] *See infra* II, 3.3, a).

rights of political parties, the Court has declared that only a "reduced" MOA is afforded to domestic authorities. The second set of cases can be exemplified by property rights decisions.[9] Here, the Court recognizes greater latitude and defers easily to national authorities decisions. A third set of cases demonstrates the different results in the application of the MOA doctrine and the doctrine's complexities. There is no unified criterion to group these cases. Here, dissimilar rights such as freedom of religion, free speech (in non-political speech issues), and the right to privacy are grouped.[10] Regarding defamation laws or the regulation of the display of religious symbols, the European Court has granted deference to domestic authorities, upholding in general their decisions. In contrast, the Court has exercised a more intense review in cases concerning the privacy rights of homosexuals and its case law has evolved towards the protection of transsexuals' rights.

The Inter-American system shows a different view on the matter of international deference. First of all, the Inter-American Court has no developed or adopted a theory of deference or a MOA doctrine. The latter only appears in isolated decisions and, as such, it has not been systematically incorporated in the Court's case law.[11] This paper classifies the Court's decisions so as to understand the degree of deference allowed under the Convention, even though the MOA doctrine does not appear in the Court's reasoning. The first set of cases groups the majority of the Court's decisions, involving gross and

[9] *See infra* II, 3.3, b).

[10] *See infra* II, 3.3, c).

[11] *See infra* III, 2.

systematic cases of forced disappearances, extrajudicial killings and acts of torture.[12] Unsurprisingly, the Inter-American Court does not grant any international deference in these situations. In addition, the Court has developed a doctrine of positive duties, obligating States to investigate, prosecute and punish those responsible for these acts. The imposition of positive obligations has a dual effect on national discretion. The interpretation of the Inter-American Court adds a "new" obligation to States Parties, not only to refrain from violating the Convention's rights but also to protect and to promote them. At the same time, the positive obligations open up a new sphere for national discretion. The Court has refined these obligations but domestic authorities have certain latitude in implementing them.

A second set of cases includes the rights of vulnerable groups, such as women or indigenous peoples.[13] The Court has declared that the principle of equality and the prohibition of non-discrimination is a *jus cogens* rule of International Human Rights law. In some circumstances, the importance of the principle of equality has lead the Court to promote affirmative actions for the purposes of protecting these groups. Affirmative actions are another type of positive duties. Therefore, they impose new obligations but, at the same time, afford some margins of national discretion. The third set of cases deals with free speech issues.[14] Here, the Court has upheld the prohibition of prior restraint and scrutinized carefully criminal offenses restricting free speech. Accordingly, the Court has refused to grant discretion in political speech cases or in cases involving any type of

[12] *See infra* III, 4.3, a).

[13] *See infra* III, 4.3, b).

[14] *See infra* III, 4.3, c).

censorship. The paper finally addresses the new challenges facing the Inter-American Court and speculates on the possibilities of a doctrine of deference under the American Convention.

## II. National discretion and international deference under the European human rights system

### 1. Margin of appreciation as a doctrine of deference to domestic authorities

The expression "margin of appreciation" is a term of art borrowed by the European Court from domestic legal systems. According to Macdonald, the origins of the expression are found in the French term *margé d'appreciation* used by the French *Conseil d'Etat*.[15] Another commentator has contested this finding and has said that the term also comes from "the system of administrative law within every civil law jurisdiction" and most notably, from the German theory of administrative discretion (*Ermessensspierlraum*), although such theory is much narrower than the MOA doctrine.[16]

The MOA has been defined as "the notion that each society is entitled to certain latitude in resolving the inherent conflicts between individual rights and national interests or among different moral convictions."[17] It is a jurisprudential creation adopted by the

[15] Ronald St. J. Macdonald, *The Margin of Appreciation*, *in* THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS 83 (Ronald St. J. Macdonald *et al*., eds., 1993)

[16] Arai, *Margin of Appreciation*, *supra* note 2, at 2-3.

[17] Eyal Benvenisti, *Margin of Appreciation, Consensus and Universal Standards*, 31 N.Y.U. J. Int. L. & Pol'y 843, 843-4 (1999).

European Court[18] that allows the Court to defer to domestic organs in the protection of rights and their limits but at the same time, maintaining those rights subject to international supervision.[19] It has been argued that the MOA is one of the legal vehicles that balances the universal aspect of human rights with the local and domestic peculiarities of each state.[20]

The MOA doctrine has been intimately linked to the resolution of human rights disputes involving highly contentious moral issues. Cases relating to the display of religious symbols in public schools[21] or the use of the Islamic veil in public places[22] have been among the most important issues where the MOA has been employed by the European Court to defer to domestic decisions. The European Court has acknowledged that it ought to defer to domestic authorities, especially when there is no regional consensus among the European Convention parties. A recent example of the Court's cautious deferential approach is found in *Schalk and Kopf v. Austria*,[23] where the European Court held that the States were not obliged to legislate or legally recognize gay marriage under the European Convention.

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[18] *See Handyside v. United Kingdom*, App. No. 5493/72, Dec, 7, 1976, ¶¶47-8.

[19] Luzius Wildhaber, *A Constitutional Future for the European Court of Human Rights?*, 23 Hum. Rts. L. J. 161 (2002).

[20] Benvenisti, *supra* note 17, at 844. Another legal principle that seeks to balance the international with the domestic level is the principle of subsidiarity. *See* Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 Am. J. Int'l L. 39 (2003).

[21] *Lautsi v. Italy*, App. No. 30814/06, Mar. 18, 2011.

[22] *Sahin v. Turkey*, App. No. 44774/98, Nov. 10, 2005.

[23] App. No. 30141/04, Jun. 24, 2010.

This section systematizes the European Court case law in order to understand the different degrees of discretion and deference afforded to European States in the regulation of rights and their restrictions. The MOA doctrine is complex not only because of the multiplicity and variety of decisions in which has been applied, but also because the MOA may evolve over time. States practices that were once considered valid under the MOA doctrine have subsequently been found in breach of the European Convention.[24] For the purposes of categorizing the case law of the Court, this paper adopts and combines two scholars' contributions to this field. First, the paper acknowledges the distinction adopted by Letsas, who has affirmed that the MOA doctrine encompasses two different dimensions: a substantive dimension, dealing with the limitations of rights, and another dimension which is structural, that addresses the subsidiarity of international courts in relation to national States.[25] After reviewing the origins of the MOA doctrine, this paper describes the distinction first developed by Letsas. Secondly, the paper also adopts a theory on the varying degrees of discretion that the European Court has granted to national authorities, depending on the type of right at stake. Here, the contribution of García Roca it is followed. García Roca has developed a concentric-circles theory showing the different levels of discretion afforded to national authorities.[26] The theory

[24] *See infra* II, 3.3, c).

[25] The distinction was first made in George Letsas, *Two Concepts of the Margin of Appreciation*, 26 Oxford Journal of Legal Studies 705 (2006), and later refined in GEORGE LETSAS, A THEORY OF INTERPRETATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (2009).

[26] Javier García Roca, *La Muy Discrecional Doctrina del Margen de Apreciación Nacional según el Tribunal Europeo de Derechos Humanos: Soberanía e Integración*, 20 Teoría y Realidad Constitucional 117 (2007).

only applies to the substantial dimension defined by Letsas, that is, the one that deals with the restrictions of rights under the European Convention. By combining these two scholars' contributions, this section seeks to provide a brief but comprehensive account of the deference and discretion that European Convention States Parties enjoy under the MOA doctrine.

The following parts of the paper are organized as follows. Part II.2 describes the origins of the MOA doctrine and how the jurisprudential evolution has led to its consolidation as a decisive interpretative criterion used by the ECtHR. From there, the paper distinguishes between the substantive and structural dimensions of the MOA doctrine summarized above, focussing on the former. The paper describes the doctrinal requirements established by the European Court in order to validly restrict rights. In this section, and under the analysis of the proportionality review undertaken by the Court, the paper advances an application of the concentric-circles theory as an illustration of the degrees of deference afforded to the domestic authorities when it comes to the restriction of rights. The analysis, in this section, introduces new decisions that García Roca did not cite supporting the proposed theoretical framework. The section concludes by summarizing its most important findings on the origins, application and evolution of the MOA doctrine as a decisive interpretative criteria developed by the ECtHR.

**2. The MOA doctrine: origins and dimensions**

The origins of the MOA doctrine show its jurisprudential application, on the one hand, in emergency situations and derogations of rights and, on the other, in the restriction of the rights under ordinary circumstances. It was first introduced by the

European Commission of Human Rights ("European Commission") in the context of emergency measures and derogations of human rights under article 15 of the European Convention.[27] The European Court, on the other hand, initially adopted the MOA doctrine in the landmark decision *Handyside v. United Kingdom*.[28] Two years later, the Court relied on the doctrine in a case dealing with derogations of rights. It has been said that the MOA doctrine has "dual origins", both in the state of emergency context under the regime of Article 15 of the Convention, and the normal or ordinary restriction of human rights, as authorized in by the Convention.[29] From emergencies to normal circumstances and then again to emergencies, the concept of the MOA completed a doctrinal circle that sealed its place in the jurisprudence of the European Court.

In cases dealing with emergencies and derogations of rights, the first traces of the doctrine can be found in the early reports of the European Commission. In the *Cyprus Case*, the Commission held that States "should be able to exercise a certain measure of discretion in assessing the extent strictly required by the exigencies of the situation."[30] The same European Commission would later rename domestic discretion as a "margin of

[27] ECHR, Article 15: "Derogation in times of emergency.

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law. . . ."

[28] *Supra* note 18.

[29] HOWARD CHARLES YOUROW, THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE 15 (1996).

[30] *Greece v. United Kingdom (Cyprus Case)*, App. No. 176/56, 1958-9 Y.B. Eur. Conv. on H.R. 174, at 176 (Eur. Comm'n on H.R.).

appreciation" in the *Lawless v. Ireland* decision.[31] The Commission held that states should be allowed "a certain discretion –a certain *margin of appreciation* . . . in determining whether there exists a public emergency which threatens the life of the nation and which must be dealt with by exceptional measures derogating from its normal obligations under the Convention."[32] However, the European Court did not rely on the MOA doctrine on emergency and derogations issues until it decided *Ireland v. United Kingdom*,[33] a case addressing the discretion on the use of the state's power to derogate from the obligations established in the European Convention. The Court had to examine whether the British government had applied drastic restricting measures of rights "to the extent strictly required by the exigencies of the situation" as prescribed by article 15. In this case, and for the first time in the context of emergencies, the European Court held that "[b]y reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it" and, consequently, domestic organs enjoy "a *wide margin of appreciation*" in this matter.[34]

In cases dealing with the ordinary restrictions and limitations of human rights, the European Court introduced the MOA doctrine to decide those cases in which States invoked a legitimate aim to restrict a right under the Convention. The Convention establishes rights using the following structure: first, it recognizes a right –e.g. paragraph

[31] *Lawless v. Ireland*, App. 332/57, 1958-9 Y.B. Eur. Conv. on H.R. 308 (Eur. Comm'n on H.R.).

[32] *Id.*, at ¶36.

[33] App. No. 5310/71, Jan. 18, 1978.

[34] *Id.*, at ¶207 (emphasis added).

1 of Articles 8-10– and secondly, the Convention allows the restriction of the right under certain legitimate aims and confined to the necessity on a democratic society. Initially, the interpretation of the restriction of rights was done in terms of affording a generic discretion or deference to domestic authorities. Therefore, in the 1970's, the Court considered that national authorities enjoyed discretion in defining measures to protect the right to education and the principle of non-discrimination in educational matters,[35] in regulating freedom of assembly when it came to trade unions,[36] and in restricting the rights of soldiers and the application of disciplinary measures inside the military.[37] The "decisive breakthrough"[38] came with the Court's decision in the *Handyside* case.[39] The case concerned the seizure of copies of a book entitled *The Little Red Schoolbook*, a publication intended for teenagers on a wide array of issues, including sex education. The editor was convicted for the possession of obscene books for publication for gain.[40] Having exhausted domestic judicial proceedings, Handyside filed a communication claiming the violation of his right to freedom of expression under Article 10 of the

[35] *Case "Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium" v. Belgium*, App. No. 1474/62, Jul. 23, 1968, ¶10 (holding that national authorities "remain free to choose the measures which they consider appropriate in those matters which are governed by the Convention. Review by the Court concerns only the conformity of these measures with the requirements of the Convention.").

[36] *See*, among others, *Swedish Engine Drivers' Union v. Sweden*, App. No. 5614/72, Feb. 6, 1976, ¶40 (where the Court interpreted that the ECHR "certainly leaves each State a free choice of the means to be used" to protect the rights of each of the members of a given union.).

[37] *Engel and others v. Netherlands*, App. No. 5100/71, Jun. 8, 1976, ¶¶72, 100.

[38] Arai-Takahashi, *Margin of Appreciation*, *supra* note 2, at 7.

[39] *Handyside v. United Kingdom*, *supra* note 18.

[40] *Id.*, at ¶¶16-7.

Convention.[41] The Court laid down, for the first time, a formulation of the MOA doctrine applied to rights' restrictions, specifically by interpreting section 2 of article 10. The European Court considered that the "the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights."[42] Given this situation, the Court reasoned that "the task of securing the rights and liberties [that the European Convention] enshrines" relies, in the first place, on each of the State party's national authorities.[43] Accordingly, the internal organs of each state should judge if the restrictive measure, based on the protection of "public morals", was "necessary in a democratic society", as prescribed by Article 10. The Court used the MOA notion to examine the level of discretion that domestic authorities enjoy in these cases. In particular, the European Court held that

[41] ECHR, Article 10: "Freedom of expression.

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be 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."

[42] *Handyside*, supra note 18, at ¶48.

[43] *Id*.

> it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterised by a rapid and far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the "necessity" of a "restriction" or "penalty" intended to meet them. . . . [I]t is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of "necessity" in this context.[44]

The Court concluded that the British Parliament and judicial organs enjoy a MOA in the assessment of any "pressing social need" that might justify the restriction of freedom of expression. Deference, nevertheless, is neither absolute nor "unlimited": "[t]he domestic margin of appreciation . . . goes hand in hand with a European supervision. Such supervision concerns both the aim of the measure challenged and its 'necessity'; it covers not only the basic legislation but also the decision applying it, even one given by an independent court."[45] The European Court found that British courts "were entitled, in the exercise of their discretion, to think at the relevant time that the Schoolbook would have pernicious effects on the morals of many of the children and adolescents who would read it."[46] The Court found no breach of Article 10 of the ECHR.

[44] *Id*.

[45] *Id*., at ¶49.

[46] *Id*., at ¶52.

The *Handyside* decision is considered the first time that the European Court established the "prototype" of the MOA analysis[47] –although it never really defined the doctrine with enough specificity– by connecting the elements of subsidiarity, necessity and international supervision in the review of rights' restrictions.[48] The relevance of the decision is best understood by its effect in the Strasbourg Court's jurisprudence: *Handyside* consolidated the application of the MOA doctrine from extraordinary measures of derogations –where it was argued originally by the European Commission– to the ordinary restriction of rights in accordance with the clause "necessary in a democratic society" found in paragraph 2 of Articles 8 to 11 of the ECHR and in Article 2.3 of Protocol No. 4 to the same treaty.[49] In addition, the MOA analysis in *Handyside* is clearly designed to deal with hard cases involving moral issues, where different national standards could be found among the European Convention States Parties.

Three components of the Court's decision in *Handyside* are critical to this paper. First, the decision tries to strike a balance between two competing interests: an individual right secured by the Convention –freedom of expression– and a collective goal –the protection of morals–, authorized by the same international instrument as a potential source for the restrictions of the right. The MOA doctrine allows national authorities to evaluate how such equilibrium can best be achieved. The doctrine seeks to provide a substantive interpretation on rights restrictions. Secondly, international supervision as understood by the European Court in reviewing rights' restrictions, encompasses the

[47] García Roca, *supra* note 26, at 122.

[48] Arai-Takahashi, *Margin of Appreciation*, *supra* note 2, at 8

[49] *Id*.; Yourow, *supra* note 29, at 15.

application of the principle of proportionality, especially in assessing the necessity of the domestic measure adopted inside the context of a democratic society. This level of analysis of the MOA doctrine is also substantive, in terms of defining the scope and extension of rights under the European Convention. In the third place, the European Court declined to turn itself into a "fourth instance" court of appeal: it circumscribed its jurisdictional role as one that was "subsidiary to that of member states" and "essentially one of review" of alleged violations of rights at the regional level.[50] This level of analysis in the MOA doctrine could be considered structural: it describes the relationship between a regional court of human rights and domestic authorities under parameters of subsidiarity.[51]

Both the substantive and the structural layers of the MOA doctrine describe the varying degrees of deference afforded by the European Court to domestic authorities. This research analyzes only one of the two core elements of the MOA from the distinction adopted by Letsas: the substantive component, dealing with the restriction of rights. The structural dimension of the MOA doctrine, although it is useful to understand the role of the European Court and its relation to domestic authorities, is left aside for future comparative research.[52]

## 3. National deference, the MOA doctrine and the restrictions of rights

[50] STEVE GREER, THE MARGIN OF APPRECIATION: INTERPRETATION AND DISCRETION UNDER THE EUROPEAN CONVENTION OF HUMAN RIGHTS 19 (2000).

[51] Letsas, *Theory*, *supra* note 25, at 91-93.

[52] Letsas, *Two Concepts*, *supra* note 25.

The MOA doctrine allows substantive deference to domestic authorities, which may restrict the scope and extension of human rights established in the ECHR. The Court has developed a doctrinal test to review the conduct of States Parties in the restriction of those rights. Such requirements can be considered part of a general theory of human rights under the European Convention.[53] Three doctrinal requirements must be met for a restriction of a right to be considered compatible with the Convention: a) the restriction must have been "prescribed by law" (or established "in accordance with the law");[54] b) the domestic restricting measure must have pursued one or more "legitimate aims" under the European Convention; c) and every interference with the exercise of a right must be deemed "necessary in a democratic society."[55] The last doctrinal requirement involves the application of the principle of proportionality in the assessment and review of the restricting measures.

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[53] Joaquín Brage Camazano, *Aproximación a una Teoría General de los Derechos Fundamentales en el Convenio Europeo de Derechos Humanos*, 74 Revista Española de Derecho Constitucional 111, 128-35 (2005); Yutaka Arai, *The System of Restrictions*, *in* THEORY AND PRACTICE OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS 333-50 (Peter van Dijk *et al*., eds., 4th ed., 2006).

[54] The text of the European Convention employs different phrases to establish the same requirement. In recognizing the right to freedom of expression, the Convention allows its restriction when it is "prescribed by law" (Article 10.2). The same term is used in Article 9.2. In recognizing the right to respect for private and family life, the Convention allows restrictions "in accordance with law" (Article 8.2). The same term is used in Article 2.3 of the Protocol No. 4 to the European Convention.

[55] The paper does not address the issue of "implied" or "inherent" limitations of human rights under the European Convention. On that subject, *see* Arai, *System*, *supra* note 53, at 342-8; Brage, *supra* note 53, at 131.

The European Court examines each conventional requirement in a sequential fashion: it first analyzes if the restriction was authorized or prescribed by law, then examines the presence of a legitimate aim, and finally reviews the necessity of the restrictive measure under the context of a democratic society. Accordingly, "it is clear that in case of any finding of a breach of the first or the second standard, this will obliterate the need for evaluations based on the third standard . . . ."[56] The Court, however, tends to pay more attention to the third requirement, "finding it innecessary [*sic*] to ascertain compliance with the first and second standards."[57] The small relevance of the second standard is explained by the fact that most States justify their conduct under a legitimate aim and the Court connects the material analysis of the justification with the proportionality review of the restrictive measure.[58]

It is relevant to note that the European Court affords varying degrees of domestic discretion when it comes to compliance of each requirement. The difference is explained partly in light of the definition of each requirement, but mostly it can be understood as growing out of the divergent and factual-based application of the proportionality principle. For the purposes of clarity, each requirement is analyzed separately.

### 3.1 The restriction must have been "prescribed by/in accordance with" the law

The first step is to determine if the restriction has been authorized by, or executed in accordance with, the law. The main issue with respect to this requirement is the

[56] Arai, *System*, *supra* note 53, at 335.

[57] Arai-Takahashi, *Margin of Appreciation*, *supra* note 2, at 9.

[58] Brage, *supra* note 53, at 131-2.

definition and meaning of law. A first question that arises is whether the European Convention demands that every restriction must be enshrined in a statutory provision, requiring legislation *strictu sensu*. If the answer is no, then another question emerges: what conditions must a norm satisfy to lawfully restrict a right under the European Convention? The first question deals with the potential sources of law that can restrict rights in full conformity with the Convention. The second question deals with the material or substantive conditions that the restricting law must satisfy to be compatible with the Convention.

The European Court has determined that a right can be restricted by a norm that has not necessarily been codified or legislatively enacted. "Law", accordingly and for the purposes of the system of rights' limitation of the Convention, should not be identified with either a statute or an act of the legislature. Two major consequences follow from this: first, the restriction of rights under the common law of some State –most prominently, the United Kingdom– is, in principle, compatible with the European Convention;[59] secondly, restrictions of rights can come from a different source that is not a *loi* –in the French sense– as the normative expression of the legislative power, permitting regulations by Executive decrees or administrative rules or ordinances.[60]

By accepting a plurality of sources of law, the European Court had to develop a substantive notion of the "quality" of law under the Convention.[61] The substantive criteria

[59] *Id*., at 10.

[60] Greer, *supra* note 50, at 16.

[61] Arai-Takahashi, *Margin of Appreciation*, *supra* note 2, at 10; Lorenzo Martín-Retortillo Báquer, *La Calidad de la Ley según la Jurisprudencia del Tribunal Europeo de Derechos Humanos (Especial*

for determining whether a right's limitation was "prescribed by law" were addressed by an early Court decision. In *Sunday Times v. United Kingdom*,[62] the Court interpreted for the first time the meaning of the phrase "prescribed by law" from Article 10 of the European Convention.[63] The European Court had to decide whether the common law offense of contempt of court could be considered as "law" for restricting the right of freedom of expression. The decision says that two conditions follow from the expression "prescribed by law" in Article 10: first, the law must be "accessible" and second, it must be "foreseeable".[64] The former condition prescribes that "the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case."[65] The latter requires that the restrictive rule "is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able –if need be with appropriate advice– to *foresee*, to a degree that is reasonable in the circumstances, the consequences which a given action may entail."[66] Therefore, the European Court rejects a narrow

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*Referencia a los Casos "Valenzuela Contreras" y "Prado Bugallo" ambos contra España)*, 17 Derecho Privado y Constitución 377 (2003).

[62] App. No. 6538/74, Apr. 26, 1979.

[63] In *Sunday Times*, the European Court compared the English and the French versions of the European Convention to interpret the meaning of the word "law." *Id*., at ¶48. The Court did not rely on any previous decision and assess for the first time the requirements that "flow" from the expression "prescribed by law."

[64] *Id*., at ¶49.

[65] *Id*. The European Court uses the expression "indication" that could be read as requiring that the law should provide sufficient notice to citizens of their rights and the restrictions of those rights.

[66] *Id*. (emphasis in the original).

reading of the word "law" as being only a synonym for a statute or a code.[67] Although a statute did not establish the offense of contempt of court, the European Court decided in *Sunday Times* that the claimants were in a position to foresee –on a reasonable basis– the risks of disobedience of the court's ruling and the negative consequences that should follow.[68]

The two material conditions of accessibility and foreseeability have different tests. "Accessibility" demands "that the law [be available] at the reasonable disposal of the citizens with the advice of legal experts"[69] and that it does not require legal codification of every law.[70] Accessibility can be read as availability. "Foreseeability," on the other hand, connects with the specifics of the legal mandate, permission or prohibition. It does not require complete and absolute certainty of the legal obligations and restrictions of a given right, but demands enough textual precision (both in statutes or precedents), so that individuals have a real opportunity to adjust their conduct in accordance with the law.[71] Foreseeability can be read as normative precision in the definition of rights restrictions.

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[67] *See Kruslin v. France*, App. No. 11801/85, Apr. 24, 1990, ¶29; *Huvig v. France*, App. No. 11105/85, Apr. 24, 1990, ¶28: "the Court has always understood the term 'law' in its 'substantive' sense, not its 'formal' one; it has included both enactments of lower rank than statutes . . . and unwritten law."

[68] *Id.*, at ¶52.

[69] Arai-Takahashi, *Margin of Appreciation*, *supra* note 2, at 10.

[70] *Sunday Times v. United Kingdom, supra* note 62, at ¶49.

[71] *Id. See also Silver et al. v. United Kingdom*, App. Nos. 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75, 7136/75, Mar. 25, 1983, ¶88.

In determining the level of precision that a restricting rule of law must satisfy in order to be compatible with the Convention, the Court has considered a variety of elements to judge the foreseeability of a law: the national courts' case law and its administrative rules. In *Kokkinakis v. Greece*, for example, the Court held that "a body of settled case-law" –which is published and accessible to citizens– might contribute in achieving the necessary foreseeability of a lawful restriction of rights under the European Convention.[72] The jurisprudence of the Court accepts that "excessive rigidity" in restricting rights is not desirable and that the law should be able to adapt to "changing circumstances." Accordingly, a certain degree of vagueness in the law is not, per se, a violation of the State's obligations.[73] Executive or administrative directives also may help to define the reach of a right's restriction. In *Silver et al. v. United Kingdom*, the Court considered that prison regulations limiting the privacy of correspondence satisfied the standard of "in accordance with the law" established in Article 8 of the Convention. The European Court held that although the "directives did not themselves have the force of law, they may –to the admittedly limited extent to which those concerned were made sufficiently aware of their contents– be taken into account in assessing whether the criterion of foreseeability was satisfied in the application of the [Prison Act and its] Rules."[74]

The quality of law requirement that flows from the expressions "prescribed by/in accordance with" the law, allows certain but not unlimited national discretion. A certain

[72] *Kokkinakis v. Greece*, App. No. 14307/88, May 25, 1993 ¶40.

[73] *Id.*; *Sunday Times v. United Kingdom, supra* note 62, at ¶49; *Silver et al. v. United Kingdom*, *supra* note 71, ¶88.

[74] *Silver et al. v. United Kingdom*, *supra* note 71, ¶88.

level of discretion is granted to domestic authorities in choosing the source of law where the restriction of rights is established. The European Convention allows plural and different sources of law as valid norms in the restriction of rights.[75] This range of flexibility could be considered as a regional compromise to avoid interfering with the different legal traditions of law coexisting in Europe, especially by recognizing the common law tradition as a valid legal source for the restrictions of rights. The substantive conditions, however, allow the domestic authorities to regulate rights by administrative rules. The standard that the European Court has used in these cases could be considered more deferential when they are contrasted with the Inter-American Court's interpretation.[76]

### 3.2 The restriction must pursue a "legitimate aim" under the European Convention

A right established in the European Convention can be restricted only if the domestic measure pursues a "legitimate aim" established in the text of the Convention. A "legitimate aim" is one of the elements of the limitation clauses established in the treaty for some rights.[77] Most of the interests protected in the limitation clauses are "public

[75] Greer, *supra* note 50, at 16 (listing not only domestic legislation but also "judge-made law typical of common law jurisdictions, international legal obligations applicable to the state in question, and a variety of 'secondary' sources, for example, royal decrees, emergency decrees, and certain internal regulations based on law.") (footnotes omitted).

[76] *See infra* III, 4.1.

[77] Rights with limitation clauses have different legitimate aims. Some of them are repeated in the different rights, for example, "national security" (Arts. 6.1, 8.2, 10.2, 11.2), "public safety" (Arts. 8.2, 9.2, 10.2, 11.2), "prevention of disorder or crime" (Arts. 8.2, 10.2, 11.2), "protection of health" (Arts. 8.2, 9.2, 10.2,

interest objectives"[78] but others are "individual rights" interests, depending on the circumstances of each case.[79] Both, nonetheless, may constitute a permissible governmental purpose to restrict a right under ordinary circumstances.

States Parties are only authorized to interfere with a right if they justify their action based on a "legitimate aim" under the European Convention. The Convention establishes an exhaustive enumeration of permissible interests that can be claimed to restrict a right.[80] The European Court, nonetheless, has "very rarely found a violation of Convention rights by reference to the second standard."[81] One of the few cases where the Court has found a violation of the Convention due to the absence of a legitimate aim is *Darby v. Sweden*.[82] The European Court held that there was no legitimate aim supporting

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11.2), "protection of morals" (Arts. 6.1, 8.2, 9.2, 10.2, 11.2), and "protection of the rights and freedoms of others" (Arts. 8.2, 9.2, 10.2, 11.2). Some legitimate aims appear only in respect to certain rights: "protection of the private life of the parties" (Art. 6.1), "interests of justice" (Art. 6.1), "interests of juveniles" (Art. 6.1), "economic well being of the country" (Art. 8.2), "interests of territorial integrity" (Art. 10.2), "protection of the reputation or the rights of others" (Art. 10.2), "maintaining the authority and impartiality of the judiciary" (Art. 10.2).

[78] The expression "public interest objective" is found in GRÉGOIRE C. N. WEBBER, THE NEGOTIABLE CONSTITUTION: ON THE LIMITATION OF RIGHTS 72-5 (2009). It is worth noting that domestic courts and scholarship sometimes use different expressions to express the same idea –like "collective goals", "collective interest", "public interest" or "State interest"– but all of them have a common denominator as a public interest competing against an individual right. *Id*., at 74.

[79] Greer, *supra* note 50, at 25.

[80] Webber, *supra* note 78, at 73.

[81] Arai-Takahashi, *Margin of Appreciation*, *supra* note 2, at 11; Arai, *System*, *supra* note 53, at 339.

[82] App. No. 11581/85, Oct. 23, 1990.

the discrimination of the exemption of a church tax for a registered foreign worker and not for non-registered ones.[83] In that case, even the government of Sweden "did not argue that the distinction in treatment had a legitimate aim"[84] which may have made the case quite easy for the Court.[85]

There are several arguable reasons on why this second standard is not a major obstacle to restrict a right. First of all, legitimate aims are particularly vague and abstract, allowing the government to seek the justification for domestic measures under the broad meaning of the "protection of morals" or "public order", to name two classic examples of vague clauses. Another explanation is found in the democratic nature of the European Convention States Parties: "[n]o democratically accountable State wishes to be accused of expressly or implicitly incorporating arbitrary purposes into its legislation."[86] Scholars tend to agree that the Court does not exercise strict supervision on the merits of the legitimate aim argued by the State party, tending to fuse this analysis with the third

[83] *Id*., at ¶34.

[84] *Id*., at ¶33.

[85] The European Court sometimes conflates the "legitimate aim" and the "necessary in a democratic society" analysis. In *Thlimmenos v. Greece*, the Court decided that the conviction of a Jehovah's Witness, under insubordination charges and for refusing to wear a military uniform at a time of general mobilization into the Greek armed forces, violated the prohibition of non-discrimination (Article 14 of the European Convention), in connection with freedom of religion (Article 9 of the same treaty). The Court said that imposing such sanction was "disproportionate" but it also added the following: the criminal punishment "did not pursue a legitimate aim. As a result, the Court finds that there existed no objective and no reasonable justification for not treating the applicant differently from other persons convicted of a felony." *Thlimmenos v. Greece*, App. No. 34369/97, Apr. 6, 2000, at ¶47.

[86] Arai-Takahashi, *Margin of Appreciation*, *supra* note 2, at 11.

standard: the necessity in a democratic society.[87] If that is the case, the requirement of a "legitimate aim" is either a mere formality, because its analysis on the merits is done in conjunction with the proportionality principle, or it operates as a negative requirement, granting great latitude to domestic authorities. The latter possibility seems more plausible and can be reconciled with the text of the European Convention. In other words, the European Court is going to review whether the State party has justified the restrictive measure under one of the legitimate aims prescribed in the Convention. If there is no legitimate aim invoked –as in *Darby*– the restriction of the right constitutes almost an automatic violation of the Convention. However, States will usually argue that the restriction had a certain justification under one or more legitimate aims enshrined in the Convention. But if the States claim a legitimate aim, then the Court moves on reviewing the necessity of the restrictive measure. Such a methodological approach can only imply that the Court grants almost complete deference to States in choosing the legitimate aim under the European Convention. No substantive control is exercised to judge if the aim itself was correctly invoked and the merits review of the aim is deferred to the last analytical stage. In conclusion, States are required to claim a legitimate aim established in the Convention, while having almost complete deference in choosing one of them; after that, the analysis turns to the third standard, where the necessity of the measure –in light of the aim pursued– is examined.

[87] Arai-Takahashi, *Margin of Appreciation*, *supra* note 2, at 11; Arai, *System*, *supra* note 53, at 340 (stating that "this standard is normally carried out in conjunction with the third, 'necessary in a democratic society', and in particular, with the application of the principle of proportionality."); Webber, *supra* note 78, at 73 (affirming that "acknowledging a public interest as within the realm of permissible public ends at the second stage is almost without consequence.").

### 3.3 The restriction must be "necessary in a democratic society"

Most cases brought before the European Court satisfy the first and second prongs of the doctrinal test on rights restrictions. That is not the case with the final part of that review. The third standard requires that the European Court examine if each rights' restriction is "necessary in a democratic society." The restriction of a right has to be justified by a "pressing social need." States parties enjoy a MOA in assessing the national reality and the factual and normative circumstances that constitute the aforementioned "need" for each society.[88] Under the European Court's doctrine, nonetheless, the domestic MOA is not unlimited: it "goes hand in hand" with the international supervision exercised by the Court to verify whether a government's actions have been proportionate to the legitimate aim pursued.[89]

Under the "necessary in a democratic society" standard, the European Court has developed a proportionality review of rights restrictions. The principle of proportionality has legal origins that are not limited to the European human rights system and have been documented at considerable length elsewhere.[90] Proportionality review constitutes a general principle of judicial review in several constitutional systems[91] and in public

[88] *Handyside v. United Kingdom*, *supra* note 18, at ¶48-9.

[89] *Id*.

[90] *See* JONAS CHRISTOFFERSEN, FAIR BALANCE: PROPORTIONALITY, SUBSIDIARITY AND PRIMARITY IN THE EUROPEAN CONVENTION OF ON HUMAN RIGHTS 33-40 (2009).

[91] In Germany, *see* ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS (Julian Rivers trans., Oxford University Press, 2002); in Spain, *see* CARLOS BERNAL PULIDO, EL PRINCIPIO DE PROPORCIONALIDAD Y LOS DERECHOS FUNDAMENTALES (3rd ed., 2007); in the United States, *see* T. Alexander Aleinikoff,

international law at large.[92] Under the European system of human rights, the MOA doctrine and the proportionality principle are intimately connected: the latter has been called "the other side" of the former.[93] Both interpretative criteria developed by the European Court are conceptually interrelated, so the degree of domestic appreciation will affect the intensity of the proportionality review and vice versa: the more national discretion is granted, the less intense is the proportionality examination; on the other hand, the more strict the principle of proportionality is applied, the more reduced is the amount of deference afforded to States authorities.[94] It is also worth noticing that both the MOA and the proportionality standards require considering the factual circumstances of each case, which has given rise to a strong scholarly critique of the case-by-case approach adopted in the European Court's jurisprudence.[95] This has lead some to argue that it is quite difficult to group and classify cases where either the MOA doctrine or the proportionality principle has been applied. Critics charge that no general doctrine or

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*Constitutional Law in the Age of Balancing* 96 Yale L. J. 943 (1987). In general, *see* DAVID M. BEATTY, THE ULTIMATE RULE OF LAW (2004); Webber, *supra* note 78, at 87.

[92] Christoffersen, *supra* note 90, at 35ff.

[93] Arai-Takahashi, *Margin of Appreciation*, *supra* note 2, at 14.

[94] *Id*.; García Roca, *supra* note 26, at 124; MARK JANIS, RICHARD KAY & ANTHONY BRADLEY, EUROPEAN HUMAN RIGHTS LAW 156 (2nd ed., 2000); Letsas, *Two Concepts*, *supra* note 25, at 707.

[95] Christoffersen, *supra* note 90, at 31; Greer, *supra* note 50, at 20 (stating that while proportionality should, in principle, limit "the scope for national discretion, the particular facts of any given case, and the circumstances prevailing in the given country at the time, may broaden it in practice."); Macdonald, *supra* note 15, at 83-124; Nicholas Lavender, *The Problem of the Margin of Appreciation*, Eur. Hum. Rts. L. Rev. 380 (1997)

theory can be construed around these concepts.[96] Although proportionality and MOA are clearly interrelated, this paper will focus on the latter rather than the former.

In order to classify the vast jurisprudence of the European Court, cases are distinguished based on the intensity of international supervision and the level of discretion afforded to domestic authorities in the restriction of rights.[97] The classification of cases can be described in concentric circles. The inner circle comprises those cases where the Court has held that rights are considered so fundamental that almost no restriction is permitted: international supervision is quite strict and national deference is considerably reduced. The outer circle includes those cases where the Court has granted great latitude for domestic appreciation and limited international supervision is exercised. The middle circle is probably the largest one: here you find an intermediate level of international scrutiny that is balanced against the MOA of domestic authorities.[98] Each circle can be exemplified by leading cases of the European Court's jurisprudence and adding new evidence to García Roca's original paper.

**a) Inner circle: fundamental rights and democratic rights**

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[96] JUKKA VILJAEN, THE EUROPEAN COURT OF HUMAN RIGHTS AS A DEVELOPER OF THE GENERAL DOCTRINES OF HUMAN RIGHTS LAW – A STUDY OF THE LIMITATION CLAUSES OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 30, 271 and 339-40 (2003). Others have pointed out that the MOA doctrine "while clear and sensible in concept, has proven highly malleable in application." Janis, Kay & Bradley, *supra* note 94, at 163.

[97] This research follows the distinction proposed by García Roca, *supra* note 26, at 127-8. A partially similar approach can be found in Yourow, *supra* note 29, at 189-91.

[98] *Id*., at 127-8.

The first group of cases –the inner circle of the metaphorical figure– is where the European Court has intensified its international supervision and has strictly applied the proportionality principle, leaving a slight –if any– MOA to national authorities. In some cases, there is even no mention of the MOA doctrine, but they are analyzed here because they show that there is no national discretion in the restriction of certain rights.[99] At this level, cases are found which involve the alleged violation of fundamental rights such as the right to life and the prohibition of torture and of inhuman or degrading treatment or punishment. In other cases, the Court says explicitly that there is only a *reduced* MOA for domestic authorities. Here we find critical democratic rights that ensure political participation, like freedom of association or political speech.

The Court exercises a careful scrutiny of States actions that had allegedly violated Article 3 of the European Convention. At the time the Convention was adopted, the Court had to deal with complex issues of state of emergency derogations[100] and core fundamental rights, such as the prohibition of torture.[101] As was exemplified with *Ireland v. United Kingdom*, the European Court developed a deferential approach to the

[99] These rights are treated as "absolute rights." As one commentator has put it, "[i]t is logically impossible to use the principle of proportionality to delimit the scope of absolute rights. If the fair balance-test were applied, a wider scope of protection would be recognized and the right would not be absolute." Christoffersen, *supra* note 90, at 83.

[100] Cees Flinterman, *Derogation From the Rights and Freedoms in Case of a Public Emergency (Article 15)*, *in* THEORY AND PRACTICE OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS 1054-5 (Peter van Dijk *et al*., eds., 4th ed., 2006) (affirming that "effective Strasbourg supervision" in the field of rights derogations "has not yet materialized", due to the "approach taken by the Court . . . on the basis of the doctrine of the margin of appreciation.").

[101] *Ireland v. United Kingdom*, *supra* note 33.

definition of the scope and extension of rights in forming the MOA doctrine.[102] The standard of review, however, shifted in the 1990's when the Court decided *Soering v. United Kingdom*.[103] The European Court held that the extradition of an individual to a country where there are "substantial grounds" to believe that that individual faces a "real risk" of suffering the "death row phenomenon", constitutes a violation of the prohibition of inhuman and degrading treatment or punishment under the European Convention.[104] In *Soering*, the European Court reasoned that Article 3 of the Convention[105] contains no exceptions and no derogations are allowed[106] and no reference was made there the domestic discretion or to the MOA of national authorities. On the contrary, the decision confirmed a European consensus rejecting the death penalty and interpreting the Convention as a "living instrument."[107] *Soering* constitutes a strong precedent in the European Court's jurisprudence providing protection of core fundamental rights without conditions or caveats. The Court has reaffirmed its decision and has said that "Article 3

[102] Yourow, *supra* note 29, at 15.

[103] *Soering v. United Kingdom*, App. No. 14038/88, Jul. 07, 1989

[104] *Id.*, at ¶¶88, 91, 111. The "death row phenomenon" is described as consisting in "a combination of circumstances to which the applicant would be exposed if, after having been extradited to Virginia to face a capital murder charge, he were sentenced to death." *Id.*, at ¶81.

[105] "Article 3. Prohibition of torture.

No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

[106] *Id.*, at ¶88.

[107] *Id.*, at ¶102.

admits of no exceptions to this fundamental value and no derogation from it is permissible under Article 15 . . . ."[108]

The European Court case law on deportations, extraditions and/or expulsions shows other examples of cases where a strong protection of fundamental rights can be found. Following *Soering*, the Court has considered other violations of the prohibition enshrined in Article 3. In *Cruz Varas v. Sweden*, a Chilean national and his family challenged a deportation ordered by the Swedish government "because of the risk that he would be tortured by the Chilean authorities and because of the trauma involved in being sent back to a country where he had previously been tortured."[109] The Court decided that the criteria applied in *Soering* for extradition proceedings were also applicable to expulsions, under the human rights standards established in the European Convention. The Court reached this conclusion although in this particular case found that the evidence presented by the applicant was not enough to find "substantial grounds" to believe that a breach of Article 3 could happen if the applicants were expelled to Chile. By agreeing to scrutinize deportations and expulsions, the Court expanded the reach of Article 3 to new situations. In *D. v. United Kingdom*, the Court found that a violation of the prohibition of torture would result from an expulsion to another country, even if the danger of maltreatment would come from "non-State bodies" and where the domestic authorities of

[108] Aydin v. Turkey, App. No. 57/1996/676/866, Sept. 25, 1997, ¶81.

[109] *Cruz Varas v. Sweden*, App. No. 15576/89, Mar. 20, 1991, ¶68.

the recipient State were in no condition to afford the applicant "appropriate protection."[110] This line of reasoning has remained stable over time.[111]

All of these cases show a similar doctrinal pattern: no reference is made to any MOA for domestic authorities. The Court determines if the evidence is sufficient to prove the "real risk" of torture or inhuman and degrading treatment if the applicant is extradited, deported or expelled. The nature of the rights involved in these cases –considered as "fundamental" by the European Court–[112] eliminates any possibility of deference to national authorities. In other words, there is no gradual application of their scope of protection: once the conditions of their application are identified –e.g. "substantial grounds" and "real risk" of facing maltreatment–, the prohibition of Article 3 of the European Convention applies in an all-or-nothing fashion.[113]

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[110] *D. v. United Kingdom*, App. No. 146/1996/767/964, May 2, 1997, ¶49. In this case, the applicant was suffering a terminal and incurable disease. *Id.*, at ¶51.

[111] *See*, *Ahmed v. Austria*, App. No. 25964/94, Dec. 17, 1996 (holding that an expulsion to Somalia would entail a violation of Article 3 where the applicant faced a "real risk" to be subject to torture or inhuman or degrading treatment by one of the factions of the local civil war); *H. L. R. v. France*, App. No. 24573/94, Apr. 29, 1997 (where it reaffirmed the principle that Article 3 applies to potential maltreatment by groups or persons who are not public officials –in this context, the guerrilla groups in Colombia– but did not found sufficient evidence on the real danger faced).

[112] Arai-Takahashi, *Margin of Appreciation*, *supra* note 2, at 226. According to Meron, these rights should be deemed as *ius cogens* rules of Public International Law, due to its non-derogable nature under the major human rights treaties. *See* Theodor Meron, *On a Hierarchy of International Human Rights*, 80 Am J. Int'l L. 1, 15-17 (1986).

[113] On the gradual or all-or-nothing application of fundamental rights, *see* Alexy, *supra* note 91, at 44ff.

Another sphere of rights where the international scrutiny of restrictions is conducted rigorously can be found with respect to democratic rights, especially when it comes to the exercise of political speech or with respect to those rights that facilitate political participation in a democratic society. Political speech has been strongly protected and the Court has allowed almost no room for national discretion in its restriction. This standard of international review was set forth in *Lingens v. Austria*, where an Austrian journalist criticized the President of the National Liberal Party of Austria for his past connection to the Nazi party and the SS.[114] Criminal proceedings were instituted against Lingens, who was finally convicted of defamation under Austrian criminal law.[115] The Court had to decide whether the criminal conviction of the journalist was "necessary in a democratic society." The State justified the conviction in the protection of "the reputation or rights of others." The Court's decision acknowledged a MOA with respect to local bodies in the assessment of a "pressing social need" that would justify the interference with Lingen's freedom of expression but, at the same time, made it clear that such deference is followed by international supervision.[116] In exercising its international review, the European Court declared that "freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the [European Convention]" and, therefore, "[t]he limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual."[117] The Court held that the newspaper articles "dealt with political issues of public interest"

[114] *Lingens v. Austria*, App. No. 9815/82, Jul. 8, 1986, ¶¶12-4.

[115] *Id.*, at ¶35.

[116] *Id.*, at ¶39.

[117] *Id.*, at ¶42

and the defamation conviction was "liable to hamper the press in performing its task as purveyor of information and public watchdog."[118] In this case, the European Court held that the conviction was disproportionate to the legitimate aim pursued and constituted a breach of freedom of expression under the Convention. The Court, by applying the proportionality principle to scrutinize the restriction, reduced to the minimum the MOA provided to domestic authorities. The Court reaffirmed the "core" nature of political speech and the protection of freedom of speech in a democratic society, by finding other breaches of Article 10 in generic defamation cases –such as convictions for "insulting the Government"–[119] and specific defamation cases involving civil servants in the exercise of their public functions.[120] The European Court has constantly upheld the "freedom of political debate."[121]

Similar democratic rights, such as freedom of association, have been protected by an equally stringent standard of international judicial review. In *United Communist Party of Turkey v. Turkey*,[122] the Court had to deal with the issue of whether the dissolution of the communist party ordered by the Turkish Constitutional Court was compatible with Turkey's Convention obligations. The Court held that political parties "are a form of association essential to the proper functioning of democracy. In view of the importance of

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[118] *Id.*, at ¶43-4.

[119] *Castells v. Spain*, App. No. 11798/85, Apr. 23, 1992.

[120] *Thorgeir Thorgeirson v. Iceland*, App. No. 13778/88, Jun. 25, 1992.

[121] *See, e. g., Oberschlick v. Austria*, App. No. 11662/85, May 23, 1991, ¶59; *Fressoz and Roire v. France*, App. No. 29183/85, Jan. 21, 1999, ¶45; *Bergens Tidende and Others v. Finland*, App. No. 26132/95, May 2, 2000, ¶49; *Sabou and Pircalab v. Romania*, App. No. 46572/99, Sept. 28, 2004, ¶¶33-4.

[122] App. No. 133/1996/752/951, Jan. 30, 1998.

democracy in the Convention system . . . , there can be no doubt that political parties come within the scope of Article 11."[123] The Court did not rule out the discretion of States to dissolve those political parties that might seek to undermine "the constitutional structures of the State" but that such decision could only be executed in accordance with the obligations of the European Convention.[124] In determining if the drastic measure of banning a particular political party was "necessary in a democratic society", the European Court affirmed that Article 11[125] –which protects freedom of association– should be "considered in the light of Article 10" –which establishes freedom of speech–.[126] This interconnection is not an accidental finding. It is based on the overarching function that these liberties play in a democratic society, especially by assuring political pluralism.[127] This framework of analysis emphasizes the importance of democracy as a fundamental part of the "European public order" and led the Court to say that "[i]n determining whether a necessity within the meaning of Article 11(2) exists, the Contracting States

[123] *Id*., at ¶25.

[124] *Id*., at ¶27.

[125] "Article 11. Freedom of assembly and association.

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

[126] *Id*., at ¶42.

[127] *Id*., at ¶¶43-4.

have *only a limited margin of appreciation*, which goes hand in hand with *rigorous European supervision* embracing both the law and the decisions applying it, including those given by independent courts . . . ."[128] The European Court expressly admits a different standard of review for the restrictions of democratic freedoms than is employed for other rights and freedoms and a lesser latitude is also given for national discretion. Applying this doctrine, the Court found that Turkey had violated the applicants' freedom of association under the European Convention.[129] In a later case, however, the Court ratified the national dissolution of the Turkish Welfare Party, a political party that purported to apply of Islamic principles that were incompatible with the secular principle of the Turkish Constitution.[130] The European Court said that only "compelling reasons" could justify this type of drastic measures, although it relied largely on the national authorities' judgement for the "appropriate timing for dissolution" of the political party and the "main grounds" that validated the decision.[131]

**b) Outer circle: property rights**

A completely different standard of review can be found when we turn to cases dealing with property rights. The European Court has acknowledged a wide MOA for national authorities in the domestic regulations of these rights by trying to strike a

[128] *Id*., at ¶46 (emphasis added).

[129] *Id*., at ¶61.

[130] *Refah Partisi (The Welfare Party) and Others v. Turkey*, App. Nos. 41340/98, 41342/98, 41343/98 and 41344/98, Feb. 13, 2003.

[131] *Id*., at ¶¶100, 102, 116, 135.

balance between the local peculiarities of each State party and the regional human rights standards.

In this outer circle it is possible to find cases reviewing interferences with the right to property, a right established in Article 1 of Protocol No. 1 to the European Convention.[132] From a general point of view, the European Court has accepted restrictions here that are in accordance with the "general interest" and, in principle, it has acknowledged that national authorities are in a better position to appreciate and judge such interests of a given community.[133] The Court has established a balance and proportionality criteria in reviewing interferences with the right to private property. In *Fredin v. Sweden*, the Court analyzed the validity of the revocation of a permit to exploit gravel in light of environmental concerns.[134] In deciding the case, the Court said that an interference with the right to property protected under Article 1 of Protocol No. 1 must "achieve a 'fair balance' between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights."[135] That "fair balance" is defined as "a reasonable relationship of proportionality between the

[132] "Article 1. Protection of property.

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

[133] García Roca, *supra* note 26, at 139.

[134] App. No. 12033/86, Feb. 18, 1991, ¶39.

[135] *Id.*, at ¶51.

means employed and the aim pursued", and the European Court explicitly recognized "that the State enjoys a *wide* margin of appreciation with regards both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question."[136] The Court found that the revocation of the permit was not disproportionate to the legitimate environmental aim pursued by the Swedish government.

This same "wide" margin of appreciation has been accepted in other situations as well. The European Court has upheld changes in the legislation regulating leases –a "rent reduction law"– for the purpose of reducing "excessive and unjustified disparities between rents for equivalent apartments and to combat property speculation."[137] The legitimate aim pursued by the government, in these cases, was not "manifestly unreasonable" according to the Court.[138] The decision emphasized that in the field of "remedial social legislation" it is appropriate for the legislature to choose among the most efficacious measures available.[139] The European Court has stressed similar latitude in other cases involving the domestic regulation of debt adjustments situations and the market of credits and loans.[140] The concept of "public interest" for the purposes of Article 1, Protocol No. 1 of the European Convention has been defined as "necessarily extensive" and the Court recognizes that "[t]he national authorities are in principle better placed than the international judge to appreciate what is 'in the public interest'", finding

[136] *Id*. (emphasis added).

[137] *Mellacher and Others v. Austria*, App. No. 10522/83, 11011/84, 11070/84, Dec. 19, 1989, ¶47

[138] *Id*.

[139] *Id*., ¶51.

[140] *Bäck v. Finland*, App. No. 37598/97, Jul. 20, 2004.

"natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one."[141] The same deferential approach can be seen in cases dealing with pension rights covered under the aforementioned provision,[142] although the European Court has asserted that there is a limit when the "essence" of the pension rights has been impaired.[143]

The recognition of a different level of review for laws that interfere with the right to private property shows how differently the Court has applied the MOA doctrine in different contexts. The European Court relies almost exclusively on the State's definition of the legitimate aim involved in these cases and its application of the proportionality test is lax.

**c) Middle circle: freedom of religion and right to privacy**

An intermediate level of scrutiny is applied in another group of cases. The different rights involved and the interpretative criteria adopted by the European Court

[141] *Id*., at ¶53.

[142] *Kjartan Asmundsson v. Iceland*, App. No. 60669/00, Oct. 12, 2004.

[143] *Domalewski v. Poland*, App. No. 34610/97, Jun. 15, 1999. The same expression has been used in Article 3 of Protocol No. 1 to the ECHR. *See Latiba v. Italy*, App. No. 26772/95, Apr. 6, 2000, ¶201: States "have a wide margin of appreciation in this sphere, but it is for the Court to determine in the last resort whether the requirements of Protocol No. 1 have been complied with; it has to satisfy itself that the conditions do not curtail the rights in question to such an extent as *to impair their very essence* and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate." (emphasis added).

give support to Viljaen's criticism of the aimless or non-systematic approach upon which the Court decides cases by using the proportionality principle and the MOA doctrine.[144]

A good starting point is to look at the MOA doctrine in connection with the restriction of rights found in blasphemy cases that dealt with the limits of freedom of expression. These cases show a similar pattern. First, there is an interference with the right of freedom of expression that is justified under the legitimate aim of protecting "the rights of others" to freedom of religion. Under this framework, the Court has upheld as compatible with the European Convention the seizure and forfeiture of a blasphemous film[145] and the refusal to grant a distribution certificate for a video considered blasphemous.[146] The European Court considered, in the first case, that the film attacked the Roman Catholic religion –which is the religion of the "overwhelming majority of Tyroleans" in Austria– and the Court held that, in seizing the film, the domestic authorities had "acted to ensure religious peace in that region" and to prevent some people from feeling that "their religious beliefs [had been attacked] in an unwarranted and offensive manner."[147] The Court determined that the domestic authorities did not overstep their MOA under these circumstances.

In the second case, the Court acknowledged different levels of scrutiny in reviewing the restriction or interference with the right to freedom of expression. The European Court explicitly stated that

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[144] Viljaen, *supra* note 96, at 249-251.

[145] *Otto-Preminger-Institut v. Austria*, App. No. 13470/87, Sept. 20, 1994.

[146] *Wingrove v. United Kingdom*, App. No. 17419/90, Nov. 25, 1996.

[147] *Otto-Preminger-Institut v. Austria*, *supra* note 145, ¶56.

> [w]hereas there is little scope under [Article 10(2)] for restrictions on political speech or on debate of questions of public interest . . . a *wider margin of appreciation is generally available* to the Contracting States *when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion*. Moreover, as in the field of morals, and perhaps to an even greater degree, *there is no uniform European conception* of the requirements of 'the protection of the rights of others' in relation to attacks on their religious convictions.[148]

The MOA doctrine imposes two level of scrutiny, depending on the content of the speech. For restrictions on political speech there is almost no national discretion available, but more latitude is afforded when restrictions on speech are justified under the guise of the protection of the religious rights of others. The decision in the latter case said also that national authorities were in a better position to judge the potential effects of these attacks and the necessity restricting a right, due to their "direct and continuous contact with the vital forces of their countries."[149] International supervision in these blasphemy cases, according to the decision, is only limited to review the "risks of arbitrary or excessive interferences" with freedom of expression.[150]

A second set of cases showing different levels of domestic discretion is found in the exigencies of democratic pluralistic societies and the wearing of religious clothing or the display of religious symbols in the public space. There is an inherent tension in these cases between the principle of secularism –which has been considered to be consistent

[148] *Wingrove v. United Kingdom*, *supra* note 146, ¶58 (emphasis added).

[149] *Id*.

[150] *Id*.

with the values underlying the ECHR– and the freedom of religion.[151] The jurisprudence of the Court has been particularly deferential in some cases where States have prohibited wearing the Islamic veil in public places, as in France and Turkey. In *Sahin v. Turkey*, the European Court compared the different European national legal systems on the issue of the Islamic veil and noted that there was a lack of consensus among States Parties, concluding that there was no "uniform conception of the significance of religion in society and the meaning or impact of the public expression of a religious belief will differ according to time and context."[152] It appears to be that when there is no regional consensus, international supervision decreases in intensity and the Court provides a great deal of leeway to domestic authorities in the regulation of rights. In this particular case, the issue at stake was the validity of a Turkish university's ban on the wearing of the Islamic veil. The Grand Chamber of the European Court held that, in the context of Turkish society where the veil has adopted political significance and may affect the equality of women, the "pressing social need" to suppress the veil was properly justified by national authorities.[153] The Court reaffirmed the exercise of the MOA in these cases involving prohibitions on the use of religious garments.[154]

The display of religious symbols in public schools constitutes another example of the deference that the European Court has afforded to domestic authorities. In the controversial case *Lautsi v. Italy*, the presence of crucifixes in an Italian State-school –as

[151] Rafaella Nigro, *The Margin of Appreciation Doctrine and the Case-Law of the European Court of Human Rights on the Islamic Veil*, 11 H. R. Rev. 531, 539 (2010).

[152] *Sahin v. Turkey*, App. No. 44774/98, Nov. 10, 2005, ¶29.

[153] *Id.*, at ¶¶115, 122.

[154] *See*, in general, *Dahlab v. Switzerland*, App. No. 42393/98, Jan. 15, 2001 (admissibility decision).

part of an Italian tradition– was part of the MOA of the State.[155] Italy argued that the presence of crucifixes was the result of the State's "historical development" and that the symbol did not have only a "religious connotation" but also "symbolized the principles and values which formed the foundation of democracy and western civilization."[156] The Court granted special consideration to the fact "that Europe is marked by a great diversity between the States of which it is composed, particularly in the sphere of cultural and historical development."[157] The decision upheld the MOA of national authorities in reconciling "education and teaching with respect for the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions."[158] In the European Court's proportionality review, the lack of a European consensus on the issue of crucifixes display was critical in defining the extension of freedom of religion. The Court concluded that the symbols do not coerce children with respect to religion –the mere display was insufficient "to denote a process of indoctrination"–[159] and therefore, the national authorities had discretion under the Convention to act as they did.[160]

Notwithstanding these clear examples of wide deference to States in the definition of rights and their limits, the MOA doctrine has proved its malleability in the progressive development and crystallization of gay rights under the European Convention. The first

[155] *Lautsi v. Italy*, *supra* note 21.

[156] *Id.*, at ¶67.

[157] *Id.*, at ¶68.

[158] *Id.*, at ¶69.

[159] *Id.*, at ¶71. The Court considered the crucifix as an " essentially passive symbol." *Id.*, at ¶72.

[160] *Id.*, at ¶76.

line of cases dealt with the national criminal offences prohibiting sodomy, which were declared to be violations of the right to respect for the individuals' private life, established in Article 8 of the European Convention.[161] The Court acknowledged the MOA of domestic authorities in "the initial assessment of the pressing social need in each case" that might justify the restriction of the right enshrined in Article 8, but the Court recognized that certain factors are critical in the definition of the scope of that margin, such as the "nature of the aim of the restriction" and the "nature of the activities involved" in it.[162] In these cases, States were attempting to impose a penal or criminal sanction for a conduct that concerned one of the "most intimate aspect[s] of private life," demanding "particularly serious reasons" to justify the restriction of the rights involved.[163] The European Court considered that reasons such as the "need for caution and for sensitivity to public opinion in Northern Ireland" –although evident– were not sufficient to satisfy the "necessity" requirement of the proportionality review.[164] The Court compared the Irish legislation with the "great majority" of the member States of the Council of Europe –in sharp contrast to the lack of regional consensus as in other cases– and determined that the "marked changes" towards decriminalization of this conduct cannot justify the "pressing social need" required to validly restrict the right to respect private life.[165] The European consensus, in this case, served as a yardstick to reject

[161] *Dudgeon v. United Kingdom*, App. No. 7525/76, Feb. 24, 1983; *Norris v. Ireland*, App. No. 10581/83, Oct. 26, 1988.

[162] *Dudgeon v. United Kingdom*, *supra* note 161, ¶52.

[163] *Id.*

[164] *Id.*, at ¶58.

[165] *Id.*, at ¶60.

interferences with an intimate sphere of personal autonomy. The Court reaffirmed this holding in *Norris v. Ireland* where it stated that the respondent government did not present new evidence "which would point to the existence of factors justifying the retention of the impugned laws which are additional to or are of greater weight than those present in the aforementioned *Dudgeon* case."[166] The standard of review in these decisions has been adopted in other cases involving homosexuals, particularly one challenging the discriminatory policy of the British Armed Forces excluding them from service.[167] While the Court noted the MOA granted to States Parties –especially in the field of national security–, it found no specific examples and justifications that could sustain the alleged argument that protection of gay rights would diminish the forces' morale.[168] All of these cases show a strict international scrutiny, reducing the MOA of domestic authorities at its minimum.

Finally, we should note the evolution of the scope of review and the scrutiny standard used by the European Court in addressing cases involving transsexual rights. The Court adopts, in these cases, an "evolutive technique of interpretation" in defining the MOA of States parties and, consequently, in evaluating the proportionality of domestic interferences on rights and the extension of the Convention obligations.[169] The international scrutiny exercised by the Court evolves from a *wide* MOA for States Parties in the initial cases, to denying domestic discretion in later decisions. The absence/presence of regional consensus in a given matter may affect the intensity of the

[166] *Norris v. Ireland*, *supra* note 161, ¶46.

[167] *Lustig-Prean and Beckett v. United Kingdom*, App. Nos. 31417/96 and 32377/96, Sept. 27, 1999.

[168] *Id.*, at ¶¶81, 82 90.

[169] Arai-Takahashi, *Margin of Appreciation*, *supra* note 2, at 197-203.

proportionality review and the leeway allowed to States Parties. The transsexuals' rights cases show the evolution of the Court's review. In one of the first major decisions on transsexual rights' issues, *Rees v. United Kingdom*, the applicant complained that several legal and social constraints –most prominently, his inability to change his sex classification in his birth certificate– affected his capability to fully integrate into society and violated his right to a private life.[170] The case involved the positive duties of States under Article 8 of the ECHR[171] and the Court held that there was, "at present[,] little common ground between the Contracting States in this area and that, generally speaking, the law appear[ed] to be in a transitional stage" and, therefore, the Court afforded a "wide" MOA to States parties.[172] It consequently ruled that there was no violation of Article 8 at that time. The Court maintained its interpretation in new cases filed after *Rees* and stated that States parties to the European Convention enjoyed a wide MOA and that there was still "no generally shared approach" to this issue among them.[173] The trend, however, shifted dramatically in 2002, when the Court overruled its previous decisions and accepted that "changing conditions" within the United Kingdom and in regard to the European consensus –in connection with a "dynamic and evolutive approach" to the interpretation of the Convention– were key considerations that might lead to finding a

[170] *Rees v. United Kingdom*, App. No. 9532/81, Oct. 17, 1986. The applicant was "recorded in the register of births as a female" and later sought a hormonal treatment to turn into a male. In the decision, the applicant is referred to as a "he." *Id.*, at ¶¶12-3.

[171] Letsas, *Two Concepts*, *supra* note 25, at 727.

[172] *Rees v. United Kingdom*, *supra* note 170, ¶37.

[173] *Cossey v. United Kingdom*, App. No. 10834/84, Sept. 27, 1990, ¶40; *Sheffield and Horsham v. United Kingdom*, App. No. 22985/93 and 23390/94, ¶¶57-8.

violation of Article 8.[174] The Court looked to the conduct of the State party "in the light of present-day conditions" and it expanded its proportionality review and reduced the MOA of the United Kingdom. The State's failure to guarantee a change in the legal birth certificate impacted on different spheres of the applicant's life –pension, retirement age, etc.– thus, constituting a violation of Article 8 of the Convention. In addition, the Court found "no justification for barring the transsexual from enjoying the right to marry under any circumstances."[176]

Contrasting the groups of cases in this section, one can notice the different levels and layers of discretion and deference that the MOA doctrine may provide to the European Court in assessing the proportionality of domestic rights' restrictions. Even when it comes to the same right –e. g. freedom of expression– the level of scrutiny may differ, depending on the type of speech and the legitimate aim sought to be protected by domestic authorities.[177] In other cases, the same right may afford more or less protection depending on the level of agreement or consensus among the European Convention States Parties. Since that consensus may vary over time, the standard of review could get more rigorous over time, as the transsexual rights cases show.

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[174] *Christine Goodwin v. United Kingdom*, App. No. 28957/95, Jul. 11, 2002, ¶74; *I v. United Kingdom*, App. No. 25680/94, Jul. 11, 2002.

[176] *Christine Goodwin v. United Kingdom*, *supra* note 174, ¶¶75, 103.

[177] *See* Paul Mahoney, *Universality versus Subsidiarity in the Strasbourg Case Law on Free Speech: Explaining some Recent Judgements*, 4 Eur. Hum. Rts. L. Rev. 364, 378 (1997) ("One can infer from Strasbourg case law on free speech generally that different kinds of speech enjoy different levels of protection, with journalistic speech –the public watchdog– coming near the top end of the sliding scale and artistic speech somewhat lower down the scale.").

## 4. Conclusion

The European Court case law shows how the MOA doctrine has played a determinant role in articulating and solving hard cases under the European Convention. Developed first in the context of rights' derogations by the European Commission, the doctrine has been applied expansively to create a zone of domestic discretion in the regulation of rights at large. Deference, nonetheless, varies from right to right and the MOA analysis is always based on the particularities of each case. By combining the contributions of Letsas and García Roca, this section shows the different levels of domestic discretion in the restrictions of rights but also the organizational features in the distribution of power between the European Court and national authorities.

The relevance of the MOA doctrine lies in the ultimate definition of the rights' scope of protection under the European Convention. The MOA appears as the other side of the proportionality review. The application of either of them shapes the extension of the European Convention rights, especially in freedom of expression and freedom of religion issues. They also allow understanding the evolution and changes of the Court's decisions, especially in the field of gay rights. The major problem of the doctrine is, at the same time, its most praised advantage: its flexibility and malleability in adjusting different States particularities with supranational human rights standards. The fact that the Court has been cautious in the exercise of international review does not preclude the possibility that, in the near future, the discretion afforded to domestic authorities –which goes "hand in hand" with international supervision– may shrink noticeably.

## III. National discretion and international deference under the Inter-American human rights system

### 1. The context of the Inter-American human rights system

The role of the Inter-American Court and its jurisprudence are better understood by reviewing two major contextual differences with the European Court. The first difference is a historical one:[178] the Inter-American Court decided its first contentious case almost 20 years after the European Court. The American Convention entered was adopted in 1969 and entered in force in 1978.[179] The Inter-American Court started its functions the following year. However, the Court delivered its first contentious opinion only in 1988, in the famous *Velásquez Rodríguez* case.[180] By contrast, the European Court decided its first case in 1961. [181] The Inter-American Court, therefore, has acted during a shorter period of time than the European Court. By that time, several important human rights treaties had already been adopted[182] and international bodies had delivered general

[178] A brief history of the Inter-American Court can be found in its web site, available at http://www.corteidh.or.cr/historia.cfm (last visited March 15, 2012).

[179] *See* United Nations Treaty Collection, available at http://treaties.un.org/pages/showDetails.aspx?objid=08000002800f10e1 (last visited May 16, 2012).

[180] Velásquez-Rodríguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988).

[181] *Lawless v. Ireland* was the first merits decision adopted by the European Court. *See Lawless v. Ireland*, App. No. 332/57, Jul. 1, 1961.

[182] Davidson, *supra* note 6, at 31 (stating that the American Convention used, as references and "source[s] of inspiration", the European Convention and the International Covenant on Civil and Political Rights).

comments or decisions on different human rights issues[183] (most prominently among them, the European Court). This global and regional body of human rights legal ideas provided a different starting point for the Inter-American Court. In other words, it did not have to start from zero in developing arguments or in justifying doctrinal decisions on issues that already had been decided by others. Indeed, the Court has openly cited to others courts decisions or international organizations resolutions.[184] It is not clear, however, why the Inter-American Court did not adopt the MOA doctrine that was already part of the European Court's jurisprudence. It seems that the Inter-American Court, by deciding on things long settled in international human rights law and by referring to other courts' decisions, asserts its own definition on the meaning and scope of the Convention rights. At the same time, as will be discussed below, the Court strengthens its own case law by converging towards a universal meaning of human rights obligations, even though the American Convention establishes only regional mandates and prohibitions.

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[183] Tom Farer, *The Rise of the Inter-American Human Rights Regime: No Longer a Unicorn, Not Yet an Ox*, in THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS 34 (David J. Harris & Stephen Livingstone eds., Clarendon Press, Oxford, 1998) (noting how the European institutions –the Court and the Commission– served as models for the Inter-American system).

[184] There are many examples on this. *See*, *e. g.*, on free speech cases, Fontovecchia y D'Amico v. Argentina, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 238, ¶54 (Nov. 29, 2011) (citing the European Court); on right to property cases, Xákmok Kásek Indigenous Community. v. Paraguay. Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 214, ¶157 (Aug. 24, 2010) (citing the Convention No. 169 of the International Labour Organization); on children's rights, Case of the Mapiripán Massacre v. Colombia, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 134, ¶¶154, 157 (Sept. 15, 2005) (citing the Convention on the Rights of the Child and the reports of the United Nations High Commissioner for Human Rights), among many decisions.

The second difference between the Inter-American and the European Court relies in the type of cases decided by each system. The former has dealt mostly with cases involving arbitrary arrests or detentions, forced disappearances and extrajudicial killings or, in general terms, violations to the right to life, to personal liberty, and to the right to personal integrity.[185] In the second half of 20th century, the majority of Latin American countries were ruled by military dictatorships or authoritarian regimes where systematic and massive violations of human rights were taking place.[186] When new democratic regimes ratified the American Convention, they had to confront the past violations of rights, not always successfully. In contrast, Western Europe, subject to the European Convention, was comprised initially by a small number of democratic States –ten of them, when the Convention got into force in 1953. In that context, cases brought before the European Court concerned issues of allegedly invalid restrictions of human rights by democratic governments.[187] The type of cases before the Inter-American Court is a crucial factor that has determined the way that this court has reduced the margin of national discretion.

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[185] Farer, *supra* note 182, at 42-6.

[186] David Harris, *Regional Protection of Human Rights: The Inter-American Achievement*, in THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS 2 (David J. Harris & Stephen Livingstone eds., Clarendon Press, Oxford, 1998). Describing the violations of human rights by those military dictatorships, *see* WOLFGANG S. HEINZ & HUGO FRÜLING, DETERMINANTS OF GROSS HUMAN RIGHTS VIOLATIONS BY STATE AND STATE-SPONSORED ACTORS IN BRAZIL, URUGUAY, CHILE AND ARGENTINA, *passim* (1999).

[187] Harris, *supra* note 185, at 2 (stating that cases, at the Inter-American system, "have been much more to do with the forced disappearance, killing, torture and arbitrary detention of political opponents and terrorists than with particular issues concerning, for example, the right to a fair trial or freedom of expression that are the stock in the trade of the European Commission and Court.").

**2. The idea of the MOA doctrine in the Inter-American Court's jurisprudence**

There are few decisions in which the Inter-American Court has relied upon the MOA doctrine. The Court used the concept initially in an advisory opinion and has cited it later in recent decisions. This part of the paper analyzes the use and justification of the MOA doctrine in the decisions of the Inter-American Court of Human Rights.

The first time that the Inter-American Court used the expression "margin of appreciation" was in a 1984 advisory opinion concerning proposed amendments to the constitutional rules regulating naturalization in Costa Rica.[188] The opinion addressed the alleged incompatibilities of the constitutional amendments proposed with the right to nationality[189] and the right to equal protection[190] established in the American Convention. The amendment required a different period of residence as condition for someone to acquire the Costa Rican nationality, "depending on whether the applicants qualify as native-born nationals of 'other countries of Central America, Spaniards and Ibero-Americans' or whether they acquired the nationality of those countries by

[188] Proposed Amendments to the Naturalisation Provisions of the Political Constitution of Costa Rica, Advisory Opinion OC-4/84, Inter-Am. Ct. H.R. (ser. A) No. 4 (Jan. 19, 1984).

[189] Article 20. Right to Nationality

1. Every person has the right to a nationality.

2. Every person has the right to the nationality of the state in whose territory he was born if he does not have the right to any other nationality.

3. No one shall be arbitrarily deprived of his nationality or of the right to change it.

[190] Article 24. Right to Equal Protection

All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.

naturalization."[191] The Court had to decide whether the different treatment was in accordance with the right to equality and the opinion borrowed what the European Court held in the *Belgian Linguistic Case*,[192] where it was stated that only those differences having "no objective and reasonable justification" can be considered discriminatory, under the American Convention.[193] From this basis, the Court reasoned that, in addressing cases regarding different treatment, it should be recognized that "[o]ne is here dealing with values which take on concrete dimensions in the face of those real situations in which they have to be applied and which permit in each case *a certain margin of appreciation* in giving expression to them."[194] The cited paragraph, however, did not quote any European Court's decision relying on such doctrine.[195] For the Court,

> "there is no doubt that it is within the sovereign power of Costa Rica to decide what standards should determine the granting or denial of nationality to aliens who seek it, and to establish certain reasonable differentiations based on factual differences which, viewed objectively, recognize that some applicants have a closer affinity than others to Costa Rica's value system and interests."[196]

[191] *Proposed Amendments*, *supra* note 187, at ¶52.

[192] *Supra* note 35.

[193] *Proposed Amendments*, *supra* note 187, at ¶56.

[194] *Id*., at ¶58 (emphasis added).

[195] The advisory opinion only cites the *Belgium Linguistic* case in ¶¶12 and 56, but only for the purposes of developing the standard to review differences in treatment and the right to equality and not to justify the MOA doctrine.

[196] *Proposed Amendments*, *supra* note 187, at ¶59.

The Inter-American Court, under such standard of deference, went on to decide the particularities of the proposed amendments, which were found to be consistent with the right to equality. For example, the differentiation on residence requirement for Central Americans, Ibero-Americans and Spaniards were justified in terms of the "historical, cultural and spiritual bonds with the people of Costa Rica."[197] Even in differences regarding those individuals that acquired nationality by birth and those by naturalisation, the Court wrote that it was "fully mindful of the *margin of appreciation* which is reserved to states when it comes to the establishment of requirements for the acquisition of nationality and the determination whether they have been complied with[,]" considering them as compatible with the American Convention.[198] The Court also accepted as valid the condition demanding a proof of ability to "speak, write and read" the Spanish language or an exam about the country's history, for the purposes of acquiring the Costa Rican nationality. The decision summarized the deference granted to national authorities in the following terms: "[t]hese conditions can be deemed, <u>prima facie</u>, to fall within the *margin of appreciation* reserved to the state as far as concerns the enactment and assessment of the requirements designed to ensure the existence of real and effective links upon which to base the acquisition of the new nationality."[199]

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[197] *Id*., at ¶60.

[198] *Id*., at ¶62 (emphasis added).

[199] *Id*., at ¶63 (underlining in original, italicize emphasis added). The Inter-American Court found, however, one potential violation with the American Convention: the different treatment between a married and a single woman for the purposes of acquiring the Costa Rican nationality (*id*., at ¶67). No mention to the MOA of the State is made in this hypothesis.

This initial formulation of the MOA in the Inter-American Court's jurisprudence follows the European doctrine. Despite the absence of explicit references to its European counterpart, the margin reserved to States allows certain domestic discretion –denoted especially by the use of the Latin expression "prima facie." The Court also –and again, similarly to the European Court– retained the power to exercise international supervision over State actions regulating or restricting rights.

Some differences between the Inter-American and the European use of the MOA doctrine should be noted, though. One major difference is that the MOA doctrine is invoked in this particular case without any reference to the principle of proportionality. As we have pointed out, the European Court always seeks to strike a balance between the proportionality of a restricting measure and the discretion that national authorities enjoy under the MOA.[200] On a similar note, the Inter-American Court did not mention anything on the whether the aim of restrictive measures should satisfy a "pressing social need," a standard well consolidated in the European Court's case-law.[201] As will be discussed below, this prong of the system of rights restrictions will come one year later with another advisory opinion and the case law on free speech.[202]

The limits of this first formulation of the MOA doctrine by the Inter-American Court might be better understood by explaining two factors: first, the Court was delivering one of its initial advisory opinions and second, the decision concerned a constitutional amendment. The first factor relates to the limitations concerning review

[200] *See supra* II, 3.3.

[201] *See supra* II, 2.

[202] *See infra* III, 4.3, c).

powers of the Court in addressing abstract questions on the American Convention. This was the Court's fourth advisory opinion and, by that time, it had not decided any contentious case. In that context, a cautious holding was strategically recommended. The second factor –the opinion analyzed the proposal for constitutional amendments– might also contributed to a moderate international supervision. The reform of a national constitution in matters of nationality and naturalisation is intimately connected to the republican self-definition of the human group that may constitute a democratic community in a given territory. Although the Court has found that national constitutions may violate the American Convention,[203] the constitutional definition of nationality requirements may have influenced a certain leeway for the Costa Rican constituent power.

The MOA doctrine will not be used in any other Inter-American Court decision until 2004. In *Herrera Ulloa v. Costa Rica*, the Inter-American Court analyzed the State's alleged violations to free speech, in the case of a journalist convicted for the crime of publishing offenses constituting defamation.[204] The Court reviewed the scope of valid restrictions that States may apply to an individual's freedom of expression in political speech matters. The Court said that "[d]emocratic control exercised by society through public opinion encourages the transparency of State activities and promotes the accountability of public officials in public administration, for which there should be a *reduced margin* for any restriction on political debates or on debates on matters of public

[203] "The Last Temptation of Christ" (Olmedo-Bustos et al.) v. Chile, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 73, ¶72 (Feb. 5, 2001).

[204] Herrera-Ulloa v. Costa Rica, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 107 (July 2, 2004).

interest."[205] Although the Court did not use the whole expression "margin of appreciation" in this paragraph, the context explains that the decision is referring to such concept.[206] The employment of the MOA concept is made with the deliberate purpose to ascertain a reduced scope of valid restrictions to freedom of expression under the American Convention. This is similar to the approach of limited and reduced national discretion adopted by the European Court in matters of political speech.[207] The Inter-American Court has held that statements concerning public officials –and/or private individuals that exercise public functions– should have "a certain latitude in the broad debate on matters of public interest that is essential for the functioning of a truly democratic system."[208] Such "latitude" implies a severe reduction of national discretion in restricting freedom of expression.

In the same decision, the Court also recognizes that States have a MOA in determining the legal regulation of the right to a judicial remedy for the effective protection of human rights.[209] Again, as in the issue of the violation on the journalist's freedom of expression, the Court uses the concept of MOA in a reduced fashion. The decision stated that "[w]hile States have a *margin of discretion* in regulating the exercise of that remedy, they may not establish restrictions or requirements inimical to the very

[205] *Id*., at ¶127 (emphasis added).

[206] The decision cites two European Court's decisions using the MOA doctrine. *See id*. citing Feldek v. Slovakia, App. No. 29032/95, Jul. 12, 2001, ¶¶73, 78; Sürek and Özdemir, App. No. 26682/85, Jul. 8, 1999, ¶¶58, 61.

[207] *See supra* II, 3.3, a).

[208] *Herrera-Ulloa v. Costa Rica*, *supra* note 203, at ¶128.

[209] *Id*., at ¶161.

essence of the right to appeal a judgment."[210] The English version of the decision employed the phrase "margin of discretion." However, the decision was originally written in Spanish and it used the expression "margen de apreciación." The original paragraph reads as follows: "[s]i bien los Estados tienen un *margen de apreciación* para regular el ejercicio de ese recurso, no pueden establecer restricciones o requisitos que infrinjan la esencia misma del derecho de recurrir del fallo." It could be a mistaken translation from Spanish to English.

According to this, States have national discretion in the legal regulation of judicial remedies but international supervision can review if the "essence" of the right has been impaired. After the *Herrera-Ulloa* decision, the Court has not referred to the MOA doctrine in its decisions, except for the individual opinions that certain members of the Court have delivered in recent cases.[211]

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[210] *Id*. (emphasis added).

[211] *See* Cabrera-García and Montiel-Flores v. Mexico, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 220 (Nov. 26, 2010) and Atala Riffo and daughters v. Chile, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239 (Feb. 24, 2012) (available only in Spanish). These individual opinions have addressed the "control of compliance" (*control de convencionalidad*) mandate established by the Inter-American Court and they have analysed some of the issues that arise in connection to the MOA of domestic authorities. Although the Inter-American Court's decisions in Spanish use the same concept in each case (*control de convencionalidad*), some English translations use the term "conventionality control." The Court defined the mandate in the following terms: "when a State has ratified an international treaty such as the American Convention, its judges, as part of the State, are also bound by such Convention. This forces them to see that all the effects of the provisions embodied in the Convention are not adversely affected by the enforcement of laws which are contrary to its purpose and that have not had any legal effects since their inception. In other words, the Judiciary must

### 3. The debate in the Americas on the use of the MOA doctrine

This section analyzes the scholarly debate on the advantages or disadvantages of using the MOA doctrine to interpret the human rights obligations established in the American Convention. The Inter-American Court has used this concept only in two opportunities, and with different results. This limited use may explain why commentators have not considered the Inter-American use of the MOA doctrine in major depth. The debate could be summarized in three different positions found across the literature. The first position rejects the use of the MOA doctrine in the Inter-American Court's jurisprudence.[212] A completely opposite thesis –a second position– is also found, where some commentators have pushed towards the adoption of a deference doctrine for

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exercise a sort of '*conventionality control*' between the domestic legal provisions that are applied to specific cases and the American Convention on Human Rights. To perform this task, the Judiciary has to take into account not only the treaty, but also the interpretation thereof made by the Inter-American Court, which is the ultimate interpreter of the American Convention." Almonacid-Arellano et al. v. Chile, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 154, ¶124 (Sept. 26, 2006) (emphasis added). This paper does not address the "control of compliance" mandate. *See* Juan Carlos Hitters, *Control de Constitucionalidad y Control de Convencionalidad. Comparación (Criterios Fijados por la Corte Interamericana de Derechos Humanos)*, 7 Estudios Constitucionales 109 (2009); Néstor Pedro Sagüés, *Obligaciones Internacionales y Control de Convencionalidad*, 8 Estudios Constitucionales 117 (2010).

[212] Antonio Cançado Trindade, *Reflexiones sobre el Futuro del Sistema Interamericano de Protección de los Derechos Humanos*, *in* EL FUTURO DEL SISTEMA INTERAMERICANO DE PROTECCIÓN A LOS DERECHOS HUMANOS (Juan E. Méndez & Francisco Cox eds., Instituto Interamericano de Derechos Humanos, 1998).

domestic authorities under the American Convention.[213] A third position –an intermediate one– does not necessarily reject the use of a MOA doctrine, but stresses the need to have a cautious approach to that concept under the rules of the Convention and the jurisprudence of the Court.[214] Each position is explained separately.

### 3.1 Frontal opposition to the use of the MOA doctrine in the interpretation of the American Convention

Perhaps the most popular thesis regarding the use of the MOA doctrine in the interpretation of the American Convention is the one that rejects this doctrine completely. The former President of the Inter-American Court, Antonio Cançado Trindade –now one of the judges of the International Court of Justice– has written on the subject, denying any room under the American Convention system for such doctrine.[215] Judge Cançado

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[213] Sergio Verdugo & José Francisco García, *Radiografía al Sistema Interamericano de Derechos Humanos*, 25 Rev. Actualidad Jurídica 175 (2012). An earlier version of their ideas can be found in Sergio Verdugo & José Francisco García, *Radiografía Política al Sistema Interamericano de DD.HH.*, available at http://www.lyd.com/wp-content/files_mf/sij7radiografiapoliticaalsistemainteramericanodeddhhjfgarciaysverdugodiciembre2011.pdf (last visited in Apr. 25, 2012).

[214] Ximena Fuentes Torrijo, *La Protección de la Libertad de Expresión en el Sistema Interamericano de Derechos Humanos y la Promoción de la Democracia*, 13 Revista de Derecho (Universidad de Valdivia) 225 (2002); Víctor Abramovich, *Autonomía y Subsidiariedad. El Sistema Interamericano de derechos Humanos frente a los Sistemas de Justicia Nacionales*, *in* EL DERECHO EN AMÉRICA LATINA. UN MAPA PARA EL PENSAMIENTO JURÍDICO DEL SIGLO XXI (César Rodríguez Garavito coord., Siglo XXI editores, 2011).

[215] Cançado Trindade, *supra* note 211.

stated, in 1998, that the MOA doctrine has not been adopted by the Inter-American Court's jurisprudence,[216] although in doing so, he did not recognize the use of the doctrine in the advisory opinion requested by the Costa Rican government.[217] Despite this omission, Cançado's argument is based on the type of cases that the Inter-American Court has dealt with in the past. According to him, the majority of the cases before the Court have involved alleged violations to non-derogable rights where "no invocation of a margin of appreciation could be conceived."[218] Cançado relies on a simple but very strong idea: if there is no effective application of the rule of law in States Parties and there are violations of core rights –that cannot be suspended even in times of emergency–, then there is no possible room for any MOA doctrine under the American Convention.[219]

The argument relies on a normative premise and a contingent assumption. The normative premise is easy to elucidate: no national discretion should be granted when *jus cogens* human rights obligations are at stake.[220] Cançado criticizes the very notion of the MOA, considering that the doctrine is an "artifice" created to permit a "relative

[216] *Id*., at 582.

[217] *See supra* III.2.

[218] Cançado Trindade, *supra* note 211, at 582.

[219] *Id*., at 582-3. He argues also that the rejection of the application of the MOA doctrine under the American Convention, should lead towards strengthening international mechanisms of human rights protection.

[220] *Id*., at 583.

application of International Human Rights Law."[221] From this point of view, human rights –even those established in regional instruments, such as the American Convention– should be treated as posing universal obligations and no relativism or particularism is desirable or even conceptually compatible with the very notion of human rights.[222] Accordingly, for Judge Cançado Trindade, there could be no different degrees of national discretion in the application of human rights obligations under the American Convention. Brazil, Ecuador, and Guatemala –to name some– should be held accountable to the same standard of rights protection.

The contingent assumption is different. His normative argument has been built considering the practice of the Inter-American Court in deciding cases that have involved gross, massive, and grave violations of human rights. That is why he developed an argument where no domestic discretion is allowed when non-derogable rights have been violated. The bloody history of past Latin American dictatorships avails this thesis.[223] The empirical evidence, however, should not confuse our conceptual analysis. Judge Cançado is refusing to accept *any* degree of MOA for domestic authorities, concerning *every* right

[221] *Id*., at 593. Cançado thinks that protecting and safeguarding human rights at the domestic level is mainly possible if national authorities assume and incorporate international standards of rights protection required by human rights treaties (*Id*.).

[222] According to Benavides, the Inter-American Court has a "universalist" tendency in interpreting the regional treaty. María Angélica Benavides Cassals, *El Consenso y el Margen de Apreciación en la Protección de los Derechos Humanos*, 15 Ius et Praxis 295, 308 (2009). For Hennebel, the Inter-American Court asserts the regional distinctiveness "through its own construction of legal universalism." Ludovic Hennebel, *The Inter-American Court of Human Rights: The Ambassador of Universalism*, 2011 Quebec Journal of International Law 57, 60 (2011).

[223] *See supra* note 185.

established in the American Convention, and under *any* circumstance. This is an all-or-nothing rejection of the MOA doctrine. Such reading of the American Convention assumes too much. First of all, not every right and not every obligation under the American Convention constitutes a peremptory rule of Public International Law. The recognition of *jus cogens* rules by the Inter-American Court has been restricted to certain core principles of International Human Rights law, as will be analyzed below. It might be the case that Judge Cançado has a broad opinion that makes extensive this *jus cogens* character to other obligations under the American Convention, but that has no correlation in the Court's jurisprudence.

In addition, the argument assumes too much is in its pessimistic forecast of the types of cases that might be subject to the Court's review. Past decisions of the Court, dealing mostly with forced disappearances, extrajudicial killings, widespread torture – among other grave breaches–, should not necessarily be the only type of alleged violations under review. Hopefully, the whole continent and the young democratic governments will ensure an environment of relative peace that will allow overcoming the horrors of the past. Cases concerning forced disappearances, extrajudicial killings and torture should tend to decrease over time. In the future, and under normal circumstances, new type of cases might arise and *other* human rights issues could be brought before the Court.[224]

**3.2 A doctrine of deference for domestic authorities under the American Convention**

[224] *See infra* III, 4.3, d).

Recent scholarship has expressed a completely different view on the desirability of a MOA doctrine for the Inter-American Human Rights system. Two Chilean commentators have argued that the Inter-American Court should develop a doctrine of deference to domestic authorities, citing the European example.[225] Their argument is developed under a broad critique of the democratic deficit of the Inter-American Court and a possible left wing political agenda adopted by the same court.[226] According to Verdugo and García, the lack of a doctrine of deference constitutes one of the democratic deficits affecting the Inter-American Court's legitimacy. The Court, in their opinion, has not developed any doctrine to respect the autonomy of democratic states or to allow certain levels of interpretative pluralism under the American Convention.[227] Verdugo and

[225] Verdugo & García, *Radiografía*, *supra* note 212, at 195-6.

[226] *Id*., at 201-2. The democratic deficit critique of International Human Rights Law is not new. *See* John O. McGinnis & Ilya Somin, *Democracy and International Human Rights Law*, 84 Notre Dame L. Rev. 1739, 1763-78 (2009).

[227] Verdugo & García, *Radiografía*, *supra* note 212, at 201. Another commentator has argued that the Inter-American Court does not take into consideration almost any separation of powers concerns in deciding States responsibilities and obligations under the American Convention. The Court has relied on this theory only for the purposes of defining the concept of "law" under the American Convention and when the Court has interpreted the judicial guarantees of independence and impartiality of judges and courts. *See* Hugo Tórtora Aravena, *La Relativa Irrelevancia de la Teoría de la Separación de los Poderes en la Jurisprudencia de la Corte Interamericana de Derechos Humanos*, *in* ESTUDIOS DE DERECHO PÚBLICO 117-143 (Juan Carlos Ferrada Bórquez ed., Legal Publishing, 2010). Benavides seems to be in a similar position: she argues against Judge Cançado's position by stressing the fact that "diversity is the result of a democratic system" and that democratic societies understand differently the normative content of certain rights. Benavides, *supra* note 221, at 309.

García are not arguing generally on the MOA doctrine. Nonetheless, they have suggested that such doctrine or any deference doctrine could diminish the Court's democratic legitimacy concerns. Therefore, they are in a position that promotes certain degrees of international deference for domestic authorities. It is not clear *how much* deference they believe should be granted or in *what kind of cases* they believe the Court should defer to domestic authorities.

A broad support of doctrine of deference based on the critique of the counter-majoritarian nature of international courts does not address the complexity of the MOA concept. The European notion of the MOA has considered that national authorities are, in principle, in a "better place" to assess the political, economic or social conditions that may lead to rights' regulations or restrictions.[228] At the same time, the European Court has always retained its powers of international supervision. The "better placed" principle, however, does not show the different degrees of discretion afforded to domestic authorities. The European Court has allowed the restriction of rights but it has made several distinctions depending on the type of rights at stake and the concrete application of a proportionality review for each restrictive measure.[229] Furthermore, international review increases in its intensity when democratic or political rights are being allegedly violated. That has been the case when the European Court has addressed political speech

[228] *See*, among many decisions, *Handyside v. United Kingdom*, *supra* note 18, at ¶48; *Kokkinakis v. Greece*, *supra* note 72, at ¶47; *Ireland v. United Kingdom*, *supra* note 32, at ¶207; *Lingens v. Austria*, *supra* note 114, at ¶39; *United Communist Party of Turkey v. Turkey*, *supra* note 122, at ¶46; *Fredin v. Sweden*, *supra* note 134, at ¶51; *Mellacher and Others v. Austria*, *supra* note 137, at ¶51; *Wingrove v. United Kingdom*, *supra* note 146, at ¶58.

[229] *See supra* II, 3.3.

issues[230] and the Inter-American Court has adopted a similar standpoint.[231] Since Verdugo and García have focused on democratic deficit of international courts, then the legitimacy of these international bodies should be uphold when international judicial review develops a representation-reinforcing task, just like when they protect civil and political rights. In other words, Ely's famous argument in support of judicial review[232] is compatible with a narrow –or almost null– doctrine of deference when democratic rights violations are under international scrutiny.

Verdugo and García tend to overlook the democratic deficits of Latin American States themselves. Judge Cançado rejected any room for a MOA doctrine precisely based on the lack of fully democratic states.[233] Granted, Cançado was arguing in 1998 with a different background, whereas Verdugo and García are doing so in 2011-2012. In recent years, the democratic situation has improved. To accept this change of circumstances, however, does not lead us to assume that democratic issues have disappeared completely in the Americas. A doctrine of deference under the American Convention should take into consideration all of these factors and others as well.

### 3.3 The peculiarities of the Americas and national deference under the American Convention

A generic support of a doctrine of deference is too broad and does not properly address several particularities that should be considered in the Inter-American system of

[230] *See supra* II, 3.3, a).

[231] *See infra* III, 4.3, c).

[232] JOHN HART ELY, DEMOCRACY AND DISTRUST. A THEORY OF JUDICIAL REVIEW (1980).

[233] Cançado Trindade, *supra* note 211, at 390.

human rights protection. Two scholars have argued for a more careful understanding of the potential application of a MOA doctrine. Their arguments pay attention to both the text of the American Convention and the political context of the Americas.

In an article on freedom of expression under the Inter-American system of human rights, Fuentes Torrijo has affirmed that a MOA doctrine should pay attention to the differences between the American and the European Convention on human rights.[234] One of them is particularly important for our study. Article 29 of the American Convention prescribes restrictions regarding the interpretation rights.[235] The rules prohibit any suppression of the "enjoyment or exercise" of the Convention's rights as well as any restriction of them "to a greater extent" than is provided by the Convention. There is no similar rule to Article 29 in the European Convention. [236] The Court has explicitly

[234] Fuentes Torrijo, *supra* note 213, at 243.

[235] "Article 29. Restrictions Regarding Interpretation.

No provision of this Convention shall be interpreted as:

a. permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein;

b. restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party;

c. precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or

d. excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have."

[236] The author also emphasizes the difference in the recognition of freedom of expression in both international instruments. The American Convention establishes an explicit prohibition of prior restraint, whereas the European Convention has no such provision. *Id*., at 236.

acknowledged this difference.[237] Therefore, the application of a MOA doctrine should consider to what extent the mandate of Article 29 can be compatible with the deference sought by the doctrine.[238] The Convention, as will be analyzed below, also incorporates Article 30 regulating the scope of rights restrictions, also impacting on the development of an Inter-American theory of deference.[239]

Similarly, one could add another difference between the European and the American Convention: the rules framing derogations of rights under each treaty. Although Fuentes Torrijo does not raise this point, the systems of derogations – "suspensions" under the American Convention– are quite different, especially when it comes to the enumeration of non-derogable rights. The European Convention establishes that only four rights are exempted from the provision regulating derogations, whereas the American Convention has a considerable longer list.[240] A MOA doctrine under the

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[237] Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights), Advisory Opinion OC-5/85, Inter-Am. Ct. H.R. (ser. A) No. 5, ¶44 (Nov. 13, 1985).

[238] Fuentes Torrijo does not provide any criteria making Article 29 compatible with the MOA doctrine. Fuentes Torrijo, *supra* note 213, at 244.

[239] *See infra* III, 4.1.

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

American Convention should consider if the differences in the enumeration of non-derogable rights are important enough to determine the degree of deference afforded to domestic authorities.

Both textual requirements of the American Convention –Article 29, restricting interpretations of rights, and Article 27, providing a long list of non-derogable rights– are factors that should determined a narrow MOA doctrine for domestic authorities. In other words, the development of an Inter-American MOA doctrine demands taking into account the textual differences between the American and the European Convention. This precaution also applies to the interpretation of each right's restrictions, legitimate aims or special clauses. One example, as will be discussed below, is freedom of expression, which under the American Convention has a textual prohibition of prior restraint.[241]

Fuentes Torrijo also considers Cançado's position as too "paternalistic" and she proposes to weigh three criteria in considering a MOA for domestic authorities regarding free speech cases: (1) to analyze the type and the intensity of the challenged interference to free speech; (2) to evaluate the type of speech at stake (whether it is political speech or not); and (3) to consider the legitimate aim protected (e. g. morality or national security).[242] In general terms, she thinks that a MOA doctrine could serve judicial self-restraints purposes, without diminishing rights protection.[243]

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(Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights."

[241] *See infra* III, 4.3, c).

[242] *Id*., at 243.

[243] *Id*., at 241.

Víctor Abramovich, a former member of the Inter-American Commission of Human Rights, has presented an additional perspective on the application of a doctrine of deference. In his opinion, the tensions between the political autonomy of Latin American States and the international protection of human rights should not forget the "patterns of inequality and [social] exclusion" found in the region.[244] For Abramovich, the Inter-American system has correctly focused on the protection of certain groups, which have been historically or structurally discriminated inside their States. Indigenous people, women, undocumented migrants, small farmers or street children are among these target groups.[245] The Court has paid especial attention to these classes of individuals in the interpretation of the rights contained in the American Convention. These are groups that have been systematically marginalized by State authorities. International supervision, for these groups, tends to correct the deficit in the domestic protection of their members' rights.

Abramovich thinks that the Inter-American Court should respect the democratic sovereignty of States. At the same time, international judicial review must consider the patterns of exclusion suffered by these individuals[246]. According to this commentator, a

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[244] Abramovich, *supra* note 213, at 227. Abramovich has considered that the tension between State sovereignty and international protection of human rights is merely a "mild" (*leve*) one. *See* Víctor Abramovich, *¿Autonomía vs. Derechos Humanos?*, available at http://www.youtube.com/watch?v=dOnDbD6snEw (last visited May 7, 2012).

[245] Abramovich, *supra* note 213, at 217. *See also* Hennebel, *supra* note 221, at 60-5 (affirming that the Inter-American Court has adopted a "victim oriented" reading of American Convention).

[246] The argument is partially similar to the one made by Benvenisti, who rejects the use of the MOA doctrine in rights conflicts between majorities and minorities. *See* Benvenisti, *supra* note 17, at 847.

fair balance between the demands of political sovereignty and the required international protection of human rights can achieved by complying with two necessary conditions. The first condition requires to seek the protection of rights at the national level and to exhaust domestic remedies in alleged violations of human rights. The second condition seeks to restraint the power of the Inter-American Court and rejects the role of international courts as a "fourth instance."[247] The "exhaustion of domestic remedies" condition is a basic procedural requirement to trigger the Court's jurisdiction.[248] The Inter-American Court can only act *in a subsidiary fashion*, after the domestic means of protection have been used and they have not provided optimal results. The so called the "fourth instance" doctrine or formula –the second condition–, has been defined by the Inter-American Commission in the following way: "[t]he basic premise of this formula is that the Commission cannot review the judgments issued by the domestic courts acting within their competence and with due judicial guarantees, unless it considers that a possible violation of the Convention is involved."[249] The Inter-American Court has refused to declare admissible a case when domestic courts have properly and definitively

[247] Abramovich, *supra* note 213, at 224-5.

[248] *See* American Convention, *supra* note 3, Art. 46(1)(a).

[249] *Marzioni v. Argentina*, Inter-Am. C.H.R., Case No. 11.553, 119, OAS/ser.L/V/II.95, doc.7 (1997). *See also* H. VICTOR CONDÉ, A HANDBOOK OF INTERNATIONAL HUMAN RIGHTS TERMINOLOGY 52 (2nd ed., 2004) (stating that "the international forum will not second-guess the national forum's findings of fact nor whether the national court has applied the national law properly."); Diego Rodríguez Pinzón, *The "Victim" Requirement, the Fourth Instance Formula and the Notion of "Person" in the Individual Complaint Procedure of the Inter-American Human Rights System*, 7 ILSA J. of Int'l & Comp. L. 1, 8 (2001) (defining the fourth instance formula in the following way: "decisions of impartial and independent domestic courts are not subject to scrutiny under the American Convention.").

settled the question, thus not requiring an international "confirmation" or "approval."[250] This type of decisions might be understood as an application of the "fourth instance" formula. By restraining the exercise of their own powers, the Court trusts and defers to the judgment of domestic judicial authorities.

### 3.4 Conclusion

The debate among scholars shows the different issues that the application of the MOA doctrine may raise in the context of the Inter-American human rights system. Deference to domestic authorities under the American Convention should at least consider the following factors: the textual restraints of the Convention (restrictions on treaty interpretation and list of non-derogable rights), the patterns of inequality that demand a more focused international review, and the existence/non-existence of democratic governments. A balanced approach to the issue of domestic deference and national discretion does not automatically rejects the application of the MOA doctrine. However, providing a MOA for domestic authorities should not be a *carte blanche*. In the following section, the paper analyzes how the Inter-American Court has dealt in the past with the issue of domestic discretion and international review.

## 4. National discretion in the restriction of rights under the American Convention

The Inter-American Court has adopted a group of conditions to justify a restriction upon a right established in the American Convention. In its early case law, the Court adopted three conditions, similar to the European Court: rights restrictions must

[250] *Las Palmeras* (merits), Inter-Am. Ct HR, Dec. 6, 2001, Ser. C No. 90, ¶33.

have been established by law, they must respond to a legitimate aim under the Convention, and they must be necessary in a democratic society.[251] Some years ago, the Court modified the test for restrictions and added a new condition: restrictions must be "strictly proportional" to the aim pursued, at least for reviewing free speech's restrictions.[252]

The Inter-American Court has accepted margins of domestic deference only in a few opportunities. The doctrinal standards are similar to the European Court's case law but their application has narrowed the latitude afforded to domestic authorities. The scarce reference to the MOA doctrine has been addressed above. The paper now focuses on the cases in which the Court has defined the varying degrees of national discretion, even though the Court may not have employed the expression "margin of appreciation." This section is organized as follows. First, it analyzes each condition separately. After reviewing the conditions of "prescribed by law" and the "legitimate aim" required under the Convention, the paper focuses on the necessity and proportionality review. However, since most of the cases decided by the Court have not demanded a necessity or

[251] Claude-Reyes et al. v. Chile, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 151, ¶¶89-91 (Sept. 19, 2006). This decision established more precisely the three conditions. Previous precedents also required the same conditions but they were not explicitly distinguished one from the other. *See Herrera-Ulloa v. Costa Rica*, *supra* note 203, at ¶101.1); Ricardo Canese v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 111, ¶¶95-6 (Aug. 31, 2004).

[252] Kimel v. Argentina, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 177, ¶58 (May 2, 2008). The fourth condition has been later reaffirmed in the Court's jurisprudence. *See* Usón Ramírez v. Venezuela, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 207, ¶49 (Nov. 20, 2009).

proportionality review, that part explores the different degrees of discretion afforded to domestic authorities, depending on the right under review. The section concludes exploring the potential new challenges for the Inter-American Court, in matters of national discretion of domestic authorities and international supervision in the enforcement of the American Convention obligations.

**4.1 Restrictions must been prescribed by law**

The Inter-American Court addressed the issue of the meaning of the word "law" in one of its first advisory opinions.[253] Article 30 of the American Convention establishes that "[t]he restrictions that, pursuant to this Convention, may be placed on the enjoyment or exercise of the rights or freedoms recognized herein may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established." The Court has interpreted the "laws" as requiring both "formal" and "material" considerations. "Law," in its formal meaning, relates to the procedure under which rules restricting rights are created. According to the Court, the word "law" "can have no other meaning than that of formal law, that is, a legal norm passed by the legislature and promulgated by the Executive Branch, pursuant to the procedure set out in the domestic law of each State."[254] A law approved by the legislature connects a democratic procedure with the protection of

[253] The Word "Laws" in Article 30 of the American Convention on Human Rights, Advisory Opinion OC-6/86, Inter-Am. Ct. H.R. (ser. A) No. 6 (May 9, 1986).

[254] *Id*., at ¶ 27.

rights.[255] The political deliberation that emerges from the legislative proceedings is encompassed with guarantees of transparency and political pluralism. In the words of the Court, "[s]uch a procedure not only clothes these acts with the assent of the people through its representatives, but also allows minority groups to express their disagreement, propose different initiatives, participate in the shaping of the political will, or influence public opinion so as to prevent the majority from acting arbitrarily."[256] Democracy, therefore, constitutes the underlying assumption in the interpretation of the American Convention. The Inter-American Court recognizes that the interpretation of Article 30 has to be connected with the intention of the States Parties to the Convention. Referring to the Convention's Preamble and the Organization of American States Charter, the Court said that representative democracy constitutes a "determining factor" in the interpretation of the restrictions of rights allowed under Convention.[257]

The "material" sense of law, on the other hand, refers to the quality of the law. The quality of law is understood as a substantive requirement that any law restricting rights must fulfil. The Court has paid special attention to the quality of law when States sought to restrict rights by placing criminal punishments on certain activities.[258] In accordance with the principle of *nullum crimen nulla poena sine lege praevia*, criminal

[255] Davidson, *supra* note 6, at 52; Tórtora Aravena, *supra* note 226.

[256] *The Word "Laws"*, *supra* note 252, at ¶22.

[257] *Id*., at ¶34.

[258] *See*, e. g., Castillo-Petruzzi *et al* v. Peru, Merits, Reparations and Costs, Judgment, Inter-Am., Ct. H.R. (ser. C), No. 52 (May 30, 1999), ¶121.

laws must be "formulated previously, in an express, accurate, and restrictive manner."[259] The Court has added this "material" component for the drafting of laws and confining domestic legislatures to provide clear notice to the group of citizens targeted by the rule. The precision required for the restriction of rights has been extended beyond the realm of criminal law. In *Tristán Donoso v. Panama*, the Court faced the issue of whether the disclosure of a telephone conversation by a public official implied an interference with the right to privacy.[260] In assessing the legality of the interference, the Court held that "the general conditions and circumstances, which allow restricting the exercise of a declared human right must be clearly established by statute. The rule, which allows for such restriction must be both an enacted statute and a written rule of a general scope."[261]

By placing both formal and material exigencies in the enactment of laws, the Court has narrowed the margin of discretion that national authorities have in the restriction of rights. The formal requirement connects democracy with the protection of human rights. A democratic State has the necessary conditions of political pluralism and transparency that facilitate public deliberation for adopting restrictions of rights. But that is not all. A mere legislature enactment is not enough to protect rights. The quality of the

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[259] Kimmel v. Argentina, Merits, Reparations and Costs, Judgment, Inter-Am., Ct. H.R. (ser. C), No. 117, ¶63 (May 2, 2008).

[260] "Article 11. Right to Privacy

1. Everyone has the right to have his honor respected and his dignity recognized.

2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation. . . ."

[261] Tristán-Donoso v. Panama, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 193, ¶77 (Jan. 27, 2009).

law relates to the level of precision that laws should have, as required under the American Convention. Citizens should have a clear notice to understand the extension and scope of their rights. Such notice can only be achieved if the law is formulated in an express, clear, and accurate way.

The difference between the European and the Inter-American systems relies on the formal condition. As was described above, the European Court places great weight on the quality of law –or the "material" sense of law– leaving to States Parties certain flexibility to decide which source of law is convenient for framing restrictions to a given right. The Inter-American Court, on the other hand, has adopted both formal and material notions of law, increasing the safeguards against arbitrary impositions of rights restrictions.[262] The formal notion of law assumes democracy as a structural protection of human rights, though not the only one.[263] Discretion in selecting the source of law, accordingly, is more reduced in the Inter-American compared to the European system.

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[262] But *see* LAURENCE BURGORGUE-LARSEN & AMAYA ÚBEDA DE TORRES, THE INTER-AMERICAN COURT OF HUMAN RIGHTS. CASE LAW AND COMMENTARY 553 (2011) (stating that the wording "any limitation or restriction must be both formally and materially provided for by law" used in the *Kimmel* decision, "was doubtless intended to correct what seemed to be a clumsy declaration (eradicating the law in the formal sense of the word in 1994 was obviously excessive)." The authors appear to suggest that it would be preferable to favour only a "material" sense of law, focusing on the conditions necessary to achieve the desired quality of law.)

[263] The Court recognizes that structural protections are not enough: "[a]lthough it is true that this procedure does not always prevent a law passed by the Legislature from being in violation of human rights --a possibility that underlines the need for some system of subsequent control-- there can be no doubt that it is an important obstacle to the arbitrary exercise of power." *The Word "Laws"*, *supra* note 252, at ¶22.

### 4.2 Legitimate aims under the American Convention

The grounds for restricting a right are stated explicitly in each provision of the Convention. Any restriction must be justified by the legitimate aim that the domestic measure is trying to pursue. This condition is established, in general terms, in Article 30,[264] and it is inferred from each provision that allows restrictions under certain legitimate purposes.[265]

Unlike the European Court,[266] the Inter-American Court has subjected to review certain domestic measures not pursuing a legitimate aim. In *Ivcher-Bronstein v. Peru*,[267] the Court had to review the interference with the applicant's right to property –among many other alleged violations of rights–.[268] The applicant' rights on shares controlling a

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[264] Article 30 establishes a general rule on the restrictions of the Convention's rights and it expressly states that "laws enacted *for reasons of general interest* and *in accordance with the purpose for which such restrictions have been established*." (emphasis added).

[265] *See, e. g. Herrera Ulloa v. Costa Rica*, *supra* note 203, at ¶120. Rights with limitation clauses have different legitimate aims. Some of them are repeated in the different rights, for example, "national security" (Arts. 13, 15, 16, 22), "public safety" (Arts. 12, 15, 16, 22), "protection of health" (Arts. 12, 13, 15, 16, 22), "protection of morals" (Arts. 12, 13, 15, 16, 22), and "protection of the rights and freedoms of others" (Arts. 12, 13, 15, 16, 22, 32).

[266] As noted above, there is only one rare exception where the European Court found that there was no legitimate aim justifying the restriction of a right under the European Convention. *See supra* II, 3.2.

[267] Ivcher-Bronstein v. Peru, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 74 (Feb. 6, 2001).

[268] "Article 21. Right to Property

1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.

Company were suspended. It was argued before the Court that "he was arbitrarily deprived of the exercise of the fundamental rights that such ownership implied."[269] The Court reasoned that "[i]n order for the deprivation of the property of a person to be compatible with . . . the Convention, it should be based on reasons of public utility or social interest, subject to the payment of just compensation, and be restricted to the cases and according to the forms established by law."[270] The Court found that there was no evidence whatsoever to justify, "based on reasons of public utility or social interest[,]" the restrictive measure of the applicant's right; "to the contrary, the proven facts in this case coincide to show the State's determination to deprive Mr. Ivcher of the control of Channel 2, by suspending his rights as a shareholder of the Company that owned it."[271] The decision established that the Peru violated the applicant's right to property.

The Inter-American Court usually focuses its review on the necessity or the proportionality of each restrictive measure. Accordingly, most of the cases are decided under the next step of analysis.

### 4.3 National discretion and the necessity and proportionality review

This section analyzes the different levels of discretion afforded to domestic authorities by the Inter-American Court. In stark contrast to its European counterpart, the

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2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law. . . .".

[269] *Ivcher-Bronstein v. Peru*, *supra* note 266, at ¶117, c).

[270] *Id.*, at ¶128.

[271] *Id.*, at ¶129. The Court also found that no compensation was paid for the deprivation of the applicant's right to property (*id.*, ¶130).

Inter-American system has not developed a consolidated theory of deference. Therefore, it is not possible to classify cases in concentric circles similar to the European system.[272] On the contrary, the Inter-American Court has developed a "universalist" jurisprudence, declaring several *jus cogens* rules of Public International Law.[273] Most of the case law recognizing peremptory or *jus cogens* rules has dealt with the major atrocities committed in Latin American countries. Forced disappearances, extrajudicial killings and acts of torture have motivated the Inter-American Court to adopt a strong commitment with the protection and promotion of fundamental human rights throughout the continent. These cases show that, concerning *jus cogens* rules, there is no domestic discretion available, same as the European Court's case law. Moreover, the Court imposes specific positive duties to States Parties, shrinking even more the spectrum of action from which national authorities can select alternatives for protecting rights.

At the same time, the Court has declared that the prohibition of non-discrimination constitutes a peremptory rule of Public International Law. The affirmation of a broad rule upholding equality has served the Court to protect vulnerable or marginal groups and to assert affirmative or positive duties to the States, concerning the protection and promotion of these individual's rights. Regarding these groups –and in connection with the principle of non-discrimination–State's authorities have a number of obligations to act under the American Convention. Once again, the Court not only does not specify a MOA doctrine in these cases: it imposes positive mandates to national authorities on how to act in order to protect and promote the rights of these vulnerable groups.

[272] *Supra* II, 3.3.

[273] Hennebel, *supra* note 221.

The Inter-American Court has also addressed violations of freedom of expression. The Court has vigorously protected political speech, in a similar way as the European Court. Unlike the other categories of cases, the Court has not acted boldly by declaring *jus cogens* rules regarding free speech. Nonetheless, in accordance with the very broad language of the American Convention, the Inter-American Court has relied on the *social* dimension of freedom of expression to establish a right to *receive* public information held in the hands of the State.

Finally, a last set of cases show that the Inter-American Court on occasions has permitted some discretion for national authorities under very limited circumstances. This is a minority of decisions in the whole Court's case law. This last part of the paper identifies the levels of discretion afforded to domestic authorities, even though the Court may not use the MOA doctrine as such.

**a) Forced disappearances, extrajudicial killings and acts of torture**

The first contentious case decided by the Inter-American Court addressed the issue of forced disappearances perpetrated by State agents. In the landmark *Velásquez Rodriguez* case, the Court held that forced disappearances violated the right to life, the prohibition of torture, and the right to personal liberty of the victims (Articles 4, 5 and 7 of the American Convention).[274] While there was not conclusive evidence that Honduran public officials killed the victims, the Court reasoned that it was enough to prove that "there was an official practice of disappearances in Honduras, carried out by the

[274] *Velásquez-Rodríguez v. Honduras*, *supra* note 179, ¶¶155-7. *See* also Godínez-Cruz v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 5, ¶¶163-5 (Jan. 20, 1989).

Government or at least tolerated by it," and then linking the specific disappearances to such practice.[275] The *Velásquez Rodríguez* decision is also critically relevant for recognizing positive obligations upon States parties to the American Convention. The Court held that each State has the "legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of the violations committed within its jurisdiction."[276] Such duty is broad in essence: it includes "all those means of a legal, political, administrative and cultural nature that promote the safeguard of human rights and ensure that any violations are considered and treated as illegal acts . . . ."[277]

Since the *Velásquez Rodríguez* decision, the Court has delivered a considerable number of cases involving forced disappearances and extrajudicial killings.[278] But the relevance of the decision extends beyond cases about disappearances or extrajudicial killings, and cannot be underestimated in the field of International Human Rights law. The European Court has incorporated the holding of the decision into its own case law.[279]

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[275] *Velásquez-Rodríguez v. Honduras*, *supra* note 179, at ¶126.

[276] *Id.*, at ¶174.

[277] *Id.*, at ¶175.

[278] The great bulk of the Inter-American Court's jurisprudence deal with these issues. For the most recent decision, *see* Gonzalez-Medina and relatives v. Dominican Republic, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 240 (Feb. 27, 2012) (available only in Spanish).

[279] *Cyprus v. Turkey*, App. No. 25781/94, May 10, 2001, ¶132 ("The Court recalls that there is no proof that any of the missing persons have been unlawfully killed. However, in its opinion, and of relevance to the instant case, the above-mentioned procedural obligation also arises upon proof of an arguable claim that an

The major impact, though, will come in the evolution of the Inter-American Court's jurisprudence.

An important breakthrough came with the *Goiburú* case.[280] The case concerned the infamous "Operation Condor" (*Operación Cóndor* or *Plan Cóndor*), a military and intelligence campaign conducted by the military dictatorships of the southern cone of South America –Chile, Paraguay, Bolivia, Argentina, Brazil, and Uruguay– aimed to detain and to kill leftist dissidents called "subversive elements."[281] The military operation was a carefully crafted strategy to detain, to torture –with the purpose of gathering intelligence– and to kill political dissidents that were labelled as communists.[282] It was in this decision where the Inter-American Court took the *Velásquez Rodríguez* doctrine to the next level. The Court expressly declared that the "prohibition of the forced disappearance of persons and the corresponding obligation to investigate and punish those responsible has attained the status of *jus cogens*."[283] Later decisions have confirmed this declaration.[284]

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individual, who was last seen in the custody of agents of the State, subsequently disappeared in a context which may be considered life-threatening.").

[280] Goiburú et al. v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 153 (Sept. 22, 2006).

[281] *Id*., at ¶61(5). On the Operation Condor, *see* GOBIERNO DE CHILE INFORME DE LA COMISIÓN NACIONAL DE VERDAD Y RECONCILIACIÓN, RETTIG REPORT (1991), available at http://www.ddhh.gov.cl/ddhh_rettig.html (last visited May 2, 2012); GOBIERNO DE CHILE, INFORME DE LA COMISIÓN NACIONAL SOBRE PRISIÓN POLÍTICA Y TORTURA (2004), available at http://www.comisionvalech.gov.cl/InformeValech.html (last visited May 2, 2012).

[282] *Goiburú et al. v. Paraguay*, *supra* note 279, at ¶61(12).

[283] *Id*., at ¶84. *See* also *id*., at ¶¶93, 128, and 131.

The Court has recognized identical duties in the cases involving extrajudicial killings and acts of torture. On a similar note, it has also declared that certain obligations under the American Convention have the status of *jus cogens* rules. Regarding extrajudicial killings, the Court has adopted the criteria expressed by the Colombian Constitutional Court that certain rules of International Humanitarian Law should be deemed as *jus cogens*. In the *Case of the Mapiripán Massacre*, the Court has considered that such corpus of law can be used to interpret the right to life and the general duties under Article 1 of the Convention.[285] In a series of cases, the Court has said that

> "[i]n compliance with the obligations imposed by Article 4 of the American Convention, in relation to Article 1(1) thereof, this not only assumes that no one shall be deprived of his life arbitrarily (negative obligation), but also, in light of the State's obligation to guarantee the full and free exercise of human rights, it requires States to adopt all the appropriate measures to protect and preserve the right to life (positive obligation). This active protection of the right to life by the State involves not only its legislators, but all State institutions, and those responsible for safeguarding security, whether they are members of its police forces or its armed forces. Consequently, States must adopt the necessary measures, not only at the legislative, administrative and judicial level, by issuing penal norms and establishing a system of justice to prevent, eliminate and punish the

[284] Case of La Cantuta v. Peru, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 162, ¶157 (Nov. 29, 2006); Tiu-Tojín v. Guatemala, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 190, ¶91 (Nov. 26, 2008) (adding that "the forced disappearance of persons cannot be considered a political crime or related to political crimes under any circumstance . . .").

[285] *Case of the Mapiripán Massacre v. Colombia*, *supra* note 183, at ¶155.

> deprivation of life as a result of criminal acts, but also to prevent and protect individuals from the criminal acts of other individuals and to investigate these situations effectively."[286]

The "absolute" prohibition of torture has been considered also a *jus cogens* rule.[287] The Court has declared that the prohibition is completely applicable under any circumstance.[288] Also, both negative and positive obligations arise from this prohibition. Positive duties, just like in forced disappearances and extrajudicial killings cases, impose the obligation upon States to investigate and punish those responsible for the violations.[289]

The declaration of the *jus cogens* rules of International Law, adopted by the Court, impacts on the national discretion of domestic authorities in two ways: by imposing new duties and, simultaneously, opening new possibilities for domestic

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[286] Case of the Pueblo Bello Massacre v. Colombia Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 140, ¶120 (Jan. 31, 2006) (footnotes omitted). *See* also Baldeón-García v. Peru, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 147, ¶84 (Apr. 06, 2006).

[287] Maritza Urrutia v. Guatemala, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 103, ¶92 (Nov. 27, 2003); Gómez-Paquiyauri Brothers v. Peru, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 110, ¶112 (July 8, 2004).

[288] The Inter-American Court has said that the "[p]rohibition of torture is complete and non-derogable, even under the most difficult circumstances, such as war, the threat of war, the struggle against terrorism, and any other crimes, state of siege or of emergency, internal disturbances or conflict, suspension of constitutional guarantees, domestic political instability, or other public disasters or emergencies." Tibi v. Ecuador, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 143, ¶143 (Sept. 7, 2004).

[289] *See*, e. g., *id*., at ¶159.

discretion in the enforcement of these obligations. First, it should be noted that not only the prohibitions of forced disappearance of persons, of extrajudicial killings or of acts of torture constitute *jus cogens* rules; the Court has extended the same status to the positive duties to investigate and punish these acts. Both obligations are considered to be peremptory norms of Public International Law. The positive duty to investigate and punish is conceptually an independent obligation under the American Convention.[290]

Second, the definition of these duties, first established in the *Velásquez Rodríguez* decision, has been refined over time. In the *Goiburú* decision, the Court held that the American Convention requires a "prompt, serious, impartial and effective investigation *ex officio*" to address alleged forced disappearances of persons.[291] These conditions limit the national discretion of domestic authorities, especially in matters like prosecutorial discretion. Although the Court imposes "an obligation of means and not of results," investigations cannot be "a mere formality preordained to be ineffective."[292] These conditions fall within the obligations with which police and prosecutorial bodies in each State must comply. In addition, other cases have limited the legislative branch of government. The Court has declared that statutes of limitations do not apply to massive human rights violations.[293] Another restriction is found in amnesty laws: "any norm the aim of which is to grant amnesty for such massive human rights violations is null and void from the outset as it is a direct violation of the obligations under Article 2 of the

[290] Burgorgue & Úbeda, *supra* note 261, at 304-5.

[291] *Goiburú et al. v. Paraguay*, *supra* note 279, at ¶88.

[292] González et al. ("Cotton Field") v. Mexico, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205, ¶289 (Nov. 16, 2009).

[293] *Almonacid-Arellano et al. v. Chile*, *supra* note 210, at ¶153.

[American] Convention."[294] The whole jurisprudence of the Court denies any MOA doctrine in these cases, just like the European Court's case law on fundamental rights.[295] Despite this similarity, there is an important qualifier. The Inter-American system has been developing a series of conditions required to satisfy the obligations of protecting and promoting the Convention's rights. Therefore, States Parties have seen how the imposition of positive duties and their refinement by the Court have narrowed any margin of discretion that domestic authorities may have in addressing these issues. The Court's interpretation on the Convention's positive duties also applies in the next group of cases.

**b) Vulnerable groups**

The second set of cases has a common characteristic: these cases concern different groups of individuals that have suffered "structural or historical" patterns of discrimination within society.[296] The Court has adopted a "victim oriented" approach, which can be explained as follows: its jurisprudence "systematically deduces a special need for protection tailored according to the vulnerabilities of certain groups which are particularly targeted."[297] The principle of equality and the rule of non-discrimination are directly or indirectly at stake in each of these cases.

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[294] Burgorgue & Úbeda, *supra* note 261, at 251. In *Almonacid-Arellano v. Chile* decision, the Inter-American Court confirmed the holding of the Case of Barrios Altos v. Peru, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 74 (Mar. 14, 2001). *See*, in general, Lisa J. Laplante, *Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes* 49 Va. J. Int'l L. 915 (2009).

[295] *Supra* II, 3.3, a).

[296] The expression is taken from Abramovich, *supra* note 213, at 217.

[297] Hennebel, *supra* note 221, at 64.

It is important to note that the Inter-American Court has declared "that the principle of equality before the law, equal protection before the law and non-discrimination belongs to *jus cogens*, because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws."[298] The Court considers that the principle of equality and the prohibition of non-discrimination impose affirmative duties upon States parties to the American Convention. Expressed in broad terms, the Court held that States "are obliged to take affirmative action to reverse or change discriminatory situations that exist in their societies to the detriment of a specific group of persons. This implies the special obligation to protect that the State must exercise with regard to acts and practices of third parties who, with its tolerance or acquiescence, create, maintain or promote discriminatory situations."[299] The affirmative mandate impacts on decisions concerning violence against women, rights of street children, rights of indigenous peoples and rights of undocumented migrant workers. Two examples are helpful to understand the extension of the positive obligations imposed upon States authorities: the cases of women and indigenous peoples.[300]

In the case of women, the Court has delineated the conditions under which the affirmative duty must be undertaken by national authorities. The decision upholding these duties is known as the *Cotton Field* case, involving the shocking rights violations

[298] Juridical Condition and Rights of Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, ¶101 (Sept. 17, 2003).

[299] *Id*., at ¶104.

[300] *See* Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 63 (Nov. 19, 1999); *Juridical Condition*, *supra* note 297.

perpetrated in Ciudad Juárez, México.[301] The situation of structural and systematic violence against women is hard to summarize. The report of the Inter-American Commission describes a "grave situation of violence faced by the women and girls of Ciudad Juárez, including murder and disappearance, as well as sexual and domestic violence."[302] The Court found that, although there "are no reliable assumptions about the number of murders and disappearances of women in Ciudad Juárez, . . . whatever the number, it is alarming."[303] Since 1993, estimations on the number of women murdered or disappeared range from, in some reports, 260 to 370 women, to more than 4,000 women missing, in others.[304] In the *Cotton Camp* decision, the Court specified the obligations to respect and to guarantee the rights of women. The obligation to respect the right to life, to physical integrity and to personal liberty entails a negative duty: State agents should refrain from violating these rights. The Court did not find that Mexico violated this obligation.[305] A different outcome came regarding the obligation to guarantee rights. Here it found positive duties to prevent human rights violations and to investigate them effectively once they have occurred.[306] The obligation of prevention "encompasses all those measures of a legal, political, administrative and cultural nature that ensure the

[301] *González et al. ("Cotton Field") v. Mexico*, *supra* note 291.

[302] Inter-American Commission of Human Rights, *The Situation of the Rights of Women in Ciudad Juarez, Mexico: The Right to be Free from Violence and Discrimination*, OEA/Ser.L/V//II.117, Doc. 44, March 2003, ¶1.

[303] *González et al. ("Cotton Field") v. Mexico*, *supra* note 291, at ¶121.

[304] Burgorgue & Úbeda, *supra* note 261, at 433-4 (evaluating different estimations).

[305] *González et al. ("Cotton Field") v. Mexico*, *supra* note 291, at ¶¶235, 242.

[306] *Id.*, at ¶¶248, 281-2.

safeguard of human rights, and that any possible violation of these rights is considered and treated as an unlawful act, which, as such, may result in the punishment of the person who commits it, as well as the obligation to compensate the victims for the harmful consequence."[307] The Court explicitly demanded the adoption of "positive measures" to address the needs of women's protection.[308] The decision also reaffirmed the duty to investigate and punish gross violations to Articles 4, 5, and 7 of the American Convention.[309]

The second example involves the protection afforded by the Court to indigenous peoples, especially in cases involving the right to property and political rights. The Court has recognized ancestral and communal rights to property under Article 21 of the Convention.[310] In the *Sawhoyamaxa Indigenous Community* case, the Court identified a collective dimension to the right to property. The Court said that "indigenous communities might have a collective understanding of the concepts of property and possession" and though that notion "does not necessarily conform to the classic concept of property," it nonetheless "deserves equal protection under Article 21 of the American

[307] *Id*., at ¶252.

[308] *Id*., at ¶243

[309] *Id*.

[310] Article 21 of the American Convention, *supra* note 2. *See* in general, Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001); Sawhoyamaxa Indigenous Community v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146 (Mar. 29, 2006); Saramaka People. v. Suriname, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172 (Nov. 28).

Convention."[311] Communal property has been protected even against those States Parties to the Convention that have not recognized the right to communal property in their domestic laws.[312] The Court based its decision on the restrictions regarding interpretation of the Convention's rights – established on Article 29(b)– and held that Suriname had "an obligation to adopt special measures to recognize, respect, protect and guarantee the communal property right of the members of the Saramaka community to said territory."[313] The use of Article 29(b) shows how the textual differences between the American and the European Conventions affect the scope of obligations and the degree of national authorities' discretion under each international instrument.

In these cases, the Court has accepted that property rights can be subject to limitations. Nonetheless, the Court assumes the centrality of communal property at the core of the existence of indigenous communities, conditioning its proportionality review. Accordingly, the Court has reasoned that "the restriction of the right of private individuals to private property might be necessary to attain the collective objective of preserving cultural identities in a democratic and pluralist society."[314]

Political rights and political participation of indigenous peoples have been understood in light of the non-discrimination principle and therefore favoring a preferential treatment. In a landmark statement, the Court considered that

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[311] *Sawhoyamaxa Indigenous Community v. Paraguay*, *supra* note 309, at ¶120.

[312] *Saramaka People. v. Suriname*, *supra* note 309.

[313] *Id.*, ¶96.

[314] Yakye Axa Indigenous Community v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶148 (Jun. 17, 2005).

> "the State should adopt all necessary measures to ensure that the members of the indigenous and ethnic communities of the Atlantic Coast of Nicaragua can participate, in equal conditions, in decision-making on matters and policies that affect or could affect their rights and the development of these communities, so that they can incorporate State institutions and bodies and participate directly and proportionately to their population in the conduct of public affairs, and also do this from within their own institutions and according to their values, practices, customs and forms of organization, provided these are compatible with the human rights embodied in the Convention."[315]

The Court has upheld in these cases the *jus cogens* nature of the principle of equality and it has expanded the consequences of that recognition by requiring States Parties to adopt affirmative duties in favor of indigenous peoples. Political participation is one of the areas that require State promotion.

The way upon which the Court has confronted the violation of vulnerable groups' rights show a decisive jurisprudence upholding the positive duties established under the American Convention. In each decision, the Inter-American Court not only reaffirms the critical importance of non-discrimination under the Convention but also refines the duty to protect these vulnerable groups. The inevitable consequence of such jurisprudence is to impose more constraints on national discretion. The Court does not provide clear criteria of international deference in the implementation of the positive duties established under the Convention. On the contrary, each decision adds another specification on the several dimensions of these affirmative duties, raging from criminal prosecutions to the protection of communal property or the participation in the political process.

[315] Yatama v. Nicaragua, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 127, ¶225 (Jun. 23, 2005).

**c) Freedom of expression**

The third set of cases groups the Court's interpretations of the scope of freedom of expression under the Convention. The text of the American Convention imposes more constraints on the restriction of free speech than other human rights instruments.[316] One of the most important differences is found in the prohibition of "prior censorship" or prior restraint.[317] The explicit prohibition eliminates any national discretion on this matter. The *Last Temptation of the Christ* decision shows how categorically the Court applies the prohibition of prior censorship.[318] In this case, Chile's administrative agencies and courts banned the showing of Martin Scorsese's film *The Last Temptation of the Christ*. The Court said that the prohibition of prior restraint applies to the decisions of every branch of the government and that the censorship of the film constituted a violation of the right to freedom of expression.[319] The result stands in sharp contrast to the European Court decisions on the blasphemy cases reviewed above.[320] The European Court has upheld domestic decisions authorizing the seizure and forfeiture of blasphemous films as a valid mean to protect the rights of others, specifically, freedom of religion. Without any textual requirement on prior restraint in the European Convention, the Court held that domestic authorities did not go beyond their MOA under their international obligations.

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[316] *See Compulsory Membership*, *supra* note 236, at ¶45.

[317] American Convention, *supra* note 2, Article 13(2).

[318] *Case of "The Last Temptation of Christ" (Olmedo-Bustos et al.) v. Chile*, *supra* note 202.

[319] *Id.*, at ¶¶72-3.

[320] *Supra* II, 3.3, c).

Freedom of expression under the American Convention has an individual and a social dimension. The individual dimension requires that "no one [can] be arbitrarily limited or impeded in expressing his own thoughts" whereas the social one "implies a collective right to receive any information whatsoever and to have access to the thoughts expressed by others."[321] The social dimension grants great weight in the protection of the media and the formation of public opinion. Under this dimension, the Court has declared that States Parties to the American Convention have a positive duty to provide access to public information.[322] The Court ruled that Article 13 "protects the right of the individual to receive such information and the positive obligation of the State to provide it, so that the individual may have access to such information or receive an answer that includes a justification when, for any reason permitted by the Convention, the State is allowed to restrict access to the information in a specific case."[323] Commentators have underlined that the Court took "advantage of the broad scope of Article 13(1)"[324] which expressly states the freedom to *receive* information. Once again, the decision of the Inter-American Court imposes positive duties upon domestic authorities.

The democratic rationale underlying each of the Inter-American Court's decision upholding freedom of expression impacts in its robust protection of political speech. The Court has carefully scrutinized the adoption of restrictions to free speech in this area.

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[321] *Compulsory Membership*, *supra* note 236, at ¶30; *The Last Temptation of Christ*, *supra* note 202, at ¶64.

[322] Claude-Reyes et al. v. Chile, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 151 (Sept. 19, 2006).

[323] *Id.*, at ¶77.

[324] Burgorgue & Úbeda, *supra* note 261, at 544.

Decisions are quite similar to the European standard in cases like *Lingens* or *Castells*,[325] which have been cited by the Inter-American Court to interpret the scope of Article 13. One of the major obstacles to the protection of political speech in the Americas has been found in the existence of "desacato" (contempt) laws and criminal defamation. These laws establish a "criminal punishment of insults to public officials in the performance of their functions."[326] The "chilling effect" of these offenses constitutes a particular threat to free speech, particularly when public officials cannot be criticized without the threat of a potential criminal punishment. The Court has held that "statements concerning public officials and other individuals who perform public services are afforded, as set forth in Article 13(2) of the Convention, greater protection, thus *allowing some latitude for broad debate*, which is essential for the functioning of a truly democratic system."[327] The Court acknowledges that a "different threshold" is applicable to the protection of the information uttered in light of the "characteristics of public interest inherent in the activities or acts of a specific individual" like politicians, public servants or those who

[325] *See supra* II, 3.3, a).

[326] Inter-American Commission of Human Rights, *"Desacato" Laws and Criminal Defamation*, available at http://www.oas.org/en/iachr/expression/docs/reports/desacato/Desacato%202004.pdf (last visited May 1, 2012).

[327] Palamara-Iribarne v. Chile, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 135, ¶82 (Nov. 22, 2005) (emphasis added).

run to be elected to public office.[328] Therefore, political speech is protected with the same intensity before the Inter-American and the European courts.

There are basically two differences between the regional systems here compared. The first one flows from the explicit prohibition of prior restraint in the American Convention. The second difference concerns the interpretation of the Inter-American Court reading freedom of expression as a right to *receive* public information and, therefore, including positive duties under Article 13 of the American Convention.

**d) New challenges**

In this last part, the paper focuses on cases where the Court has defined minimum degrees of discretion for domestic authorities and some potential new challenges that the Court may have to face in the future. These decisions do not refer to the MOA doctrine.

As the paper has shown, the Inter-American Court exercises an intensive international scrutiny on the enforcement of the Convention's obligations. Nonetheless, the Court have acknowledge certain limits to international supervision, at least as *dicta* in some decisions. In matters of free speech, the Court has said that "there should be a reduced margin for any restriction on political debates or on debates on matters of public interest."[329] The Court has not come to the point of banning criminal offenses in speech related cases. In *Kimel*, the Court held that the domestic decision of criminalizing certain types of speech "should be carefully analyzed" by States Parties, "pondering the extreme

[328] Inter-American Commission of Human Rights, *"Desacato"*, *supra* note 325, at 139. In the Court's case law, *see Canese v. Paraguay*, *supra* note 250, ¶98; *Palamara-Iribarne v. Chile*, *supra* note 326 and *Herrera Ulloa v. Costa Rica*, *supra* note 203.

[329] *Herrera Ulloa v. Costa Rica*, *supra* note 203, at ¶127.

seriousness of the conduct of the individual who expressed the opinion, his actual malice, the characteristics of the unfair damage caused, and other information which shows the absolute necessity to resort to criminal proceedings as an exception."[330] The decision does not consider criminal offenses as violations *per se* of Article 13(2), allowing them under certain conditions. The opinion leaves a limited room for national discretion to decide between competing interests such as free speech in a democratic society and the protection of the privacy and the reputation of others, both rights protected under the Convention.

An exceptional –and almost marginal– example of a Court's exercise of self-restraint is found in *Castañeda-Gutman v. Mexico*.[331] One of the claims made before the Court involved the right to participate in the Government.[332] The government denied the registration of the independent candidacy of Castañeda-Gutman to run for the office of

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[330] *Kimel v. Argentina*, *supra* note 258, at ¶78. The Court added that, in the case of adopting a criminal offense, "[a]t all stages the burden of proof must fall on the party who brings the criminal proceedings."

[331] Castañeda-Gutman v. Mexico, Preliminary Objections Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 184 (Aug. 6, 2008).

[332] "Article 23. Right to Participate in Government

1. Every citizen shall enjoy the following rights and opportunities:

a. to take part in the conduct of public affairs, directly or through freely chosen representatives;

b. to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and

c. to have access, under general conditions of equality, to the public service of his country.

2. The law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings."

President of the United Mexican States. The electoral rules in Mexico required that only political parties are able to nominate presidential candidates. The Court had to decide whether the restriction placed upon independent candidates violated the right to participate in the government under Article 23 of the American Convention. The reasoning of the Court begins by acknowledging that "in general, international law does not impose a specific electoral system or a specific means of exercising the rights to vote and to be elected."[333] In addressing the issue of the right's restriction, the Court accepted that "the establishment and application of requirements to exercise political rights is not, *per se*, an undue restriction of political rights."[334] The decision goes on to apply the three standards in the restriction of rights: if the measure was prescribed by law, if it had a legitimate aim, and if it was necessary in a democratic society and proportional to the aim pursued. Regarding the first prong of the test, the Court found that a law, in its formal and substantive dimension, regulated the elections and the registration of candidacies.[335] On the second standard, the Court held that the restriction "was designed to organize the electoral process and the access of citizens to the exercise of public office under equal conditions and effectively."[336] Such objective was deemed "essential" to the exercise of the right to vote. The decision then examined the necessity and the proportionality of the restrictive measure. At this level of analysis, the Court recognizes that the American Convention "does not establish the obligation to implement a specific electoral system" or a "specific mandate on the mechanism that the States must establish to regulate the

[333] *Castañeda-Gutman v. Mexico*, *supra* note 330, at ¶162.

[334] *Id.*, at ¶174.

[335] *Id.*, at ¶179.

[336] *Id.*, at ¶183.

exercise of the right to be elected in general elections."[337] In other words, the Convention must leave a margin of discretion for domestic authorities in choosing the rules of any electoral system. Although the decision does not use the words *margin of appreciation*, its effects are practically equivalent in terms of international deference to States parties. The Court then declares that "[i]n the region, there is a certain balance between the States that have establishes the system of registration exclusively by parties and those that also allow independent candidacies."[338] Again, this phrase looks very similar to the idea of the absence of a regional consensus used in the European Court's MOA analysis. The Court concludes that the measure was proportional under the Convention.[339] As a final remark, it affirmed the following:

> "the Court considers that both systems, one built on the exclusive basis of political parties, and the other that also allows independent candidacies can be compatible with the Convention and, therefore, *the decision on which system to choose is subject to the political decision made by the State*, in accordance with its constitutional norms. The Court is aware that there is a profound crisis as regards the political parties, the legislatures and those who conduct public affairs in the region, which calls for a thorough and thoughtful debate on political participation and representation, transparency, and the rapprochement of the institutions to the people, in brief, on strengthening and improving democracy. Civil society and the State have the fundamental responsibility, which cannot be waived, to carry out this discussion and make proposals to reverse the situation. In this regard, *the States must assess the measures that will strengthen political rights and democracy according to their particular historical and political evolution*, and independent candidacies may be one among

[337] *Id*., at ¶197.

[338] *Id*., at ¶198.

[339] *Id*., at ¶203.

many of these mechanisms."[340]

The *Castañeda-Gutman* decision is unique in the Inter-American system, at least concerning the national discretion of domestic authorities. It constitutes the only decision that, without using a MOA doctrine, recognizes international deference in the regulation of electoral systems.

It is possible to conceive that more cases requiring a careful proportionality review would provide new degrees of discretion to States. Take for instance the case pending before the Inter-American Court regarding Costa Rica's prohibition of *in vitro* fertilization.[341] This case requires interpreting two key provisions of the American Convention: on the one hand, the polemic phrase that prescribes the protection of the right to life "by law and, in general, *from the moment of conception*"[342] and, on the other, the right to privacy (Article 11) and the right to raise a family (Article 17). The Commission has submitted the case to the Court and developed a proportionality review on the ban, concluding that less restrictive alternatives were available.[343]

The *In Vitro Case* is unique, because it will provide a Court's interpretation on the right to life not specifically confined to cases of forced disappearances and extrajudicial killings. It also will require interpreting the phrase "from the moment of conception" established in Article 4. The Inter-American Commission on Human Rights has

[340] *Id*., at ¶204 (emphasis added).

[341] Inter-American Commission of Human Rights, Case No. 12.361, *Gretel Artavia Murillo et al. ("In Vitro Fertilization") v. Costa Rica*, Report No. 85/10, Jul. 14, 2010.

[342] American Convention, *supra* note 2, Article 4(1) (emphasis added).

[343] *Gretel Artavia Murillo et al. ("In Vitro Fertilization") v. Costa Rica*, *supra* note 340, at ¶¶97-117.

interpreted this provision in a way that allows States Parties to decriminalize the interruption of a pregnancy.[344] But the Inter-American Court will have now the final word on this. The question inevitably arises: What degree of discretion should States Parties have in these matters? Should there be a regional rule governing these issues or should the Court leave it to domestic authorities to decide upon them? Would the Inter-American Court adopt a restrained approach in the interpretation of the moment when life begins, like the one assumed by the European Court?[345]

As the Inter-American Court faces more cases of a less egregious character than forced disappearances or torture, its jurisprudence may parallel more closely that of the European Court, allowing more national discretion whether or not the concept of the MOA is used. New cases and new challenges may force the Inter-American Court to develop a theory of international deference to address them.

## IV. Conclusion

National discretion and international supervision are two concepts that will be in permanent tension in the work of human rights regional courts. The case law of the European and the Inter-American courts shows how both international bodies have dealt

[344] Baby Boy v. United States, Case 2141, Inter-Am. Comm'n H.R., Report No. 23/81, OEA/Ser.L/V/II.54, doc. 9 rev. 1 (1981) (affirming that the abortion of a fetus is compatible with Article 4 of the American Convention).

[345] *See* European Court of Human Rights, *Vo v. France*, App. No. 53924/00, Jul. 8, 2004 (stating that fetus are not considered persons protected by the right to life established under Article 2 of the European Convention).

with issues showing this tension. Similarities and differences in the case law of both courts can be underlined here.

On the similarities, both courts have strongly scrutinized violations of fundamental rights and political speech cases. On the differences, the Inter-American Court exercises a more intensive international review of State actions than its European counterpart. While the European Court has developed a complex theory of deference under the MOA doctrine, the Inter-American Court has imposed positive duties under the American Convention, conditioning the discretion of domestic authorities.

The MOA doctrine will continue to play a role in the European Court's new human rights challenges. The lack of such a doctrine in the Inter-American system makes it impossible to know how the Inter-American Court will decide contentious issues, which may require deferring to domestic authorities. The systematization and comparison of both Court's case law will guide the solution to these new challenges.