Subsidiarity in inter-American human rights law

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One of the basic principles of international human rights law is subsidiarity.1 Subsidiarity allows us to make sense of the existence of “supra-regional” legal regimes with the power to mandate that States adopt certain legislation, train judges a particular way or even amend their constitutions, all while claiming to respect domestic decision-making. It lays the groundwork for other doctrines such as the margin of appreciation—particularly in the European human rights context—and deference. Because international human rights law implicates problems of democratic legitimacy, it requires complementary tools that safeguard, at least to some degree, the autonomy of participant states. Subsidiarity accomplishes just that.

In this paper, I address two separate but related questions concerning subsidiarity and the inter-American human rights system (IAHRS): first, how does the subsidiarity principle operate in the particular context of the IAHRS? Second, are there any particular features of Latin American law that affect the current understanding of subsidiarity?

I address the problem of the system’s expansive doctrines of judicial interpretation and in doing so critique judicial activism. I then offer a reformulation of the subsidiarity principle in light of IAHRS law.

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I. Introduction

A considerable amount has been written about the history of the inter-American human rights system (the “IAHRS”), comprised of the Inter-American Commission on Human Rights (the “Inter-American Commission”), a quasi-judicial body that issues recommendations for member states of the Organization of American States (the “OAS”), and the Inter-American Court of Human Rights (the “Inter-American Court” or the “Court”), an international tribunal with compulsory jurisdiction over member states that have ratified the American Convention on Human Rights (the “ACHR”). Scholars have reflected on the history of the IAHRS as well as its accomplishments and the challenges it faces, such as the proper response to State Parties that fail to comply with the Inter-American Commission’s recommendations and the Inter-American Court’s decisions. Others have studied the influence of the IAHRS on domestic courts and whether such influence actually enhances the protection of fundamental rights in the Americas. The existing

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2 For the purposes of this paper, both OAS member states and states that have ratified the American Convention on Human Rights are referred to as member states.


accounts of the IAHRS, however, do not fully describe the Court’s attitude regarding its own authority and the authority of member states in cases brought before it. That the Inter-American Court renders decisions against states is somehow taken for granted: since states violate human rights and there is a regional mechanism for redress, individuals and groups should have a way to seek remedies.

This extremely simplified version of the IAHRS rests upon the assumption that Latin American states have historically harbored regimes that violate human rights more or less pervasively. Of course, this was true in the early years of the Inter-American Court, when throughout Latin America military dictatorships persecuted political dissidents through massive, large-scale, human rights violations.6

Today, the situation is different. Several recent cases, discussed infra, demonstrate a shift in the region’s political and social landscape and in the nature of rights being violated. The current IAHRS often addresses claims of human rights infringement by democratic—rather than authoritarian—governments, with the violations alleged therein of a less extreme and less obvious nature. In prior work, I examined the approach of the IAHRS when faced with such cases, focusing on the Inter-American Court’s articulation of the “conventionality control” doctrine.7

http://www.utexas.edu/law/clinics/humanrights/work/Maximizing_Justice_Minimizing_Delay_at_the_IACHR.pdf


7 According to the the “conventionality control” doctrine, all judges from countries that have ratified the American Convention on Human Rights have an obligation to contrast domestic legislation not only against the national constitutions, but also against the American Convention and the Court’s interpretation of the Convention. I have argued that the doctrine is poorly founded and
How does the IAHRS, and particularly, the Inter-American Court, understand its role as arbitrator of human rights cases within its jurisdiction? Specifically, does the Inter-American Court embrace a maximalist approach to human rights adjudication, or does it grant State Parties some autonomy in the regulation of human rights affairs? From a normative perspective, how should the Inter-American Court approach its cases? Should it act as a tribunal with expansive fact-finding powers, or instead limit its reach to legal questions of interpretation? If the latter, what model of adjudication should the Inter-American Court embrace? Is the system’s understanding of subsidiarity correct? More generally, should the political context in which the Inter-American Court operates have any import to its attitude towards State Parties, petitioners, and in general the cases under its consideration?

This paper examines the dynamics of subsidiarity in the context of the IAHRS and finds that the Inter-American Court embraces a maximalist model of adjudication—one that leaves very little, if any, room for states to reach their own decisions. I explain the Court’s current approach to supra-national adjudication as largely resting upon the historical context. I then suggest avenues for reform, arguing that if the IAHRS is to retain or better yet enhance its legal and political legitimacy, the Inter-American Court should consider articulating some form of subsidiarity, so that states do not see the Inter-American Court’s decisions as a threat to their sovereignty—sovereignty instrumental in creating the IAHRS in the first place.

See Jorge Contesse, The final word? (SELA 2013 paper).
II. Subsidiarity in international law

Who should decide—or, alternatively, who has the final word? This is arguably one of the most relevant questions for any legal and political regime, and a coherent answer will both explain and allow us to scrutinize the allocation of authority in any given regime. In the United States, at least since *Marbury v. Madison*, scholars have debated on whether the judiciary’s authority should extend as far as encompassing the ability to strike down legislation. In the European context, the creation of constitutional courts at the beginning of the twentieth century also raised key questions on who should be “the guardian of the Constitution.” In the area of international law, particularly international human rights law, these questions continue to receive significant attention, especially in Europe, where debates on the European Court of Human Rights’ scope of authority are unceasingly raised by member states, petitioners and even the Inter-American Court itself.

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The doctrine of subsidiarity can provide one framework for the allocation of authority. Andreas Follesdal has articulated the notion of subsidiarity in international law as a “rebuttable presumption for the local,” that is, the idea that states should have “prima facie prioritization” when deciding issues of international law.10 This normative theory of subsidiarity presupposes that local units should have first right to decide matters of law.11 Notably, most of the scholarly work on the subject, particularly in Europe, endorses this normative theory of subsidiarity.

Others have proposed a merely descriptive theory of subsidiarity.12 Gerald Neuman has observed that subsidiarity “describes a relationship between two institutions or norms, by which one supplements the other in appropriate circumstances.”13 Here, subsidiarity does not import any preference—either for the local, the peripherical or the central. It merely describes the relationship that exists between two (or more) institutions with the power to adjudicate. Endorsing this theory of subsidiarity gives parties room to articulate a defense of center-controlled decision-making, whereas endorsing the normative view presupposes that individual states have the first word. Since most accounts of subsidiarity in

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10 "Mattias Kumm, Subsidiarity and the proper domain of the consent requirement in international law [complete cite] at 1. Kumm observes that subsidiarity “amounts to the proposition that the relatively more local unit should have jurisdiction to regulate the issue, unless there are god reasons for the relatively more central level to step in."

11 Follesdal offers at least four different normative justifications for the principle of subsidiarity: arguments from liberty; arguments from efficiency; a Catholic argument based on personalism, and liberal contractualism. Follesdal orders the different arguments decreasingly in terms of the autonomy granted to sub-units. See Follesdal, supra note ___, at ___.

12 Some commentators label these two versions of the principle of subsidiarity as “positive” and “negative” subsidiarity. See Ken Endo, The principle of subsidiarity: from Johannes Althusius to Jack Delors 44:6 HOKKAIDO L. REV. 553 (1994).

13 Neuman, supra note ___, at 361.
international law give preference to sub-units ("the rebuttable presumption for the local"), the descriptive theory of subsidiarity has the burden to articulate arguments against giving such preference. In other words, the descriptive theory of subsidiarity leaves room for the argument that the center decides in lieu, and not just in subsidio, of the local units.

The importance of choosing a theory of subsidiarity is highlighted in the arena of international human rights law, where differing facts and circumstances may require either of the two approaches. Subsidiarity in international human rights law, it is said, is a “paradoxical” principle.14 Human rights courts deal with flexible, subjective norms, subject to great contestation, and with politically sensitive issues ranging from the validity of self-amnesty laws to the rights of cultural or religious minorities or other disadvantaged groups. Therefore, it is not surprising that international human rights organs, whether full-scale tribunals or human rights treaty-bodies, must confront the subsidiarity principle in form and scope.

In the following sections I examine the specific case of the IAHRS, with an emphasis on the Inter-American Court, and illustrate how this regional system addresses the normative and practical challenges raised by the concept of subsidiarity.

14 See Carozza, supra note ___, at ___. Carozza notes that “the canon of international human rights, like the idea of subsidiarity, combines intervention with noninterference” at 49).
III. Reluctance towards subsidiarity

The IAHRS was initially conceived as a collection of tools designed to promote, investigate and repair violations of the rights recognized by the ACHR.\textsuperscript{15} It has generated substantial case law concerning fundamental rights, and it is widely cited and regarded as the main source of authority for human rights in the Americas.\textsuperscript{16} Both the Inter-American Commission and the Inter-American Court have established legal doctrine relating to rights that are commonly labeled “first generation rights,” i.e., freedom of expression, due process, the right to be free from inhuman treatment, and the right to protection against arbitrary discrimination, among others.\textsuperscript{17} With respect to these rights, the Inter-American Commission and


\textsuperscript{16} See LAURENCE BURGORGUE-LARSEN & AMAYA UBEDA DE TORRES, THE INTER-AMERICAN COURT OF HUMAN RIGHTS: CASE-LAW AND COMMENTARY (2011); Claudio Grossman, The Inter-American System of Human Rights: Challenges for the Future, 83 IND. L.J. 1267, 1268 (2008) (“The Commission and the Court’s case law has been significant in advancing the protection of fundamental rights and contributing to such protections throughout the different phases of the system’s development.”).

the Inter-American Court have issued reports, precautionary measures and advisory opinions to protect persons whose rights have not been recognized by the state parties.18 Today the system addresses many different human rights issues. However, it tends to do so without granting deference to domestic states, a policy that, as I will show, creates both practical and normative problems.

18 With respect to the so-called “second-generation rights” or social rights, the inter-American system has been less prone to protect them. For example, in the Five Pensioners vs. Perú case, the Inter-American Court Judge Sergio García Ramírez, in his concurring opinion, signals that “the issue [of economic, social, and cultural rights] is not reduced to the mere existence of a State duty that should orient its tasks as established by this obligation, considering individuals as mere witnesses waiting for the State to comply with its obligation under the Convention. The Convention is a body of rules on human rights precisely, and not just on general State obligations. The existence of an individual dimension to the rights supports the so-called “justiciable nature” of the latter, which has advanced at the national level and has a broad horizon at the international level. See Judge Sergio García Ramírez’s concurring opinion (March 5, 2003) in the judgment of the Case of the “Five Pensioners” vs. Peru, judgment of February 28, 2003. Also in the case Girls Yean and Bosico v. Dominican Republic, judgment of September 8, 2005, the Inter-American Court had the opportunity to argue about the right to education and the right to nationality as prerequisite for the recognition of other rights. More than a decade ago, Inter-American Court Judge Cançado Trindade noted with purpose that in the future of the inter-American system, “[O]ne must ... move on to address economic, social, and cultural rights as the true rights that they are.” See Antonio Cançado Trindade, Reflexiones sobre el futuro del sistema interamericano de protección de los derechos humanos, in El Futuro del Sistema Interamericano de Derechos Humanos 578 (Juan Méndez & Francisco Cox eds, 1998). In circumstances of scarce and poorly distributed fiscal resources, the system’s main bodies —the Commission and the Court— will have to face the critical necessities of social and economic rights.


A. The Velásquez Rodríguez ethos

Scholars have identified three distinct periods in the development of the IAHRS.19 The first began in 1978, with the entry into force of the ACHR, and ended around 1990, as the authoritarian regimes of member states lost power. This period is defined by the IAHRS’ responses to authoritarian regimes in the region executing massive and systematic human rights violations in the form of state policy. This period largely determined the system’s original ethos, in which the Inter-American Court was not merely a “higher” legal tribunal, but ultimately a moral superior with the power to prescribe the actions of States Parties and functioning as a last resort to remedy massive human rights violation.20 Addressing non-democratic member states, the Inter-American Court established itself as a locus for rights protection and political integrity.

In 1988, the Inter-American Court handed down its very first decision in the Velásquez Rodríguez vs. Honduras.21 The Court found that Honduras had violated several provisions of the American Convention in relation to the forced disappearance of Angel Manfredo Velásquez Rodríguez, a student at the National

19 See Grossman, supra note [__], at 1268. See also Victor Abramovich, From massive violations to structural patterns: new approaches and classic tensions in the inter-American human rights system, 11 SUR—INT’L. J. HUM. RTS. 6 (2009); Felipe González, La OEA y los derechos humanos después del advenimiento de los gobiernos civiles: expectativas (in)satisfechas, in DERECHOS HUMANOS E INTERÉS PÚBLICO 147 (Felipe González ed., 2001)

20 See Makau Mutua, Savages, victims and saviors... (2001).

Autonomous University of Honduras, at the hands of the state’s security forces.\footnote{Around the same time, the Inter-American Court decided other cases against Honduras dealing with the same issue of forced disappearance. \textit{Cfr. Godínez Cruz} and \textit{Fairén Garbi and Solís Corrales} cases.}

The Court found that the state had violated the right to life, the right to humane treatment and the right to personal liberty and ordered monetary compensation to the victim’s family and continued investigation into the disappearance.

The state objected to the Inter-American Court hearing the case on the grounds that the victims had not exhausted domestic remedies—a requirement in any case brought before a supplementary supra-national system like the IAHRS. The Court rejected this argument (although it agreed with the state that normally a state should first address a human rights claim) with the following understanding of subsidiarity:

\footnote{\textit{Velásquez Rodríguez}, paras. 91-93.}

The requirement of exhaustion of domestic remedies exists to allow the State to resolve the problem under its internal law before being confronted with an international proceeding . . . . The Court agreed with the State that this requirement is necessary because domestic law precedes the international system in the protection of human rights . . . [H]owever, the international protection of human rights is founded on the very need to protect victims from arbitrary exercises of governmental authority. For that reason, when a petitioner alleges a lack of adequate domestic remedy, international protection is not only justified, but necessary and urgent.\footnote{In carving out an exception to the exhaustion of domestic remedies rule, the Court embraced a more aggressive approach for intervention in domestic affairs. Further, by acknowledging the preference for local rule but quickly rebutting that preference in favor of its own authority, the Court established itself as a moral superior—a task}
made easier by employment of the language of human rights and the fact that the Court was addressing a country with an underdeveloped rule of law. Together, these assertions marked the early governing ethos of the Inter-American Court.

The weak form of subsidiarity articulated by the Inter-American Court is confirmed by its judgment on reparations. As previously explained, the Velásquez court ordered monetary compensation to the victim’s family—a form of reparation that would become the standard in inter-American human rights law. However, the judges disagreed on how such remedy should be implemented. While the Court ordered that the Inter-American Commission—the quasi-judicial body that submits the cases before the Court—should play the primary role in determining “the form and amount” of the victims’ compensation, the minority opinion argued that the victims’ family should be able to participate in the damages process. The dissent declared that the Commission should act only as a type of “inter-American public prosecutor” that participates in the case, but leaves it to the victims and the state “with the intervention of the Commission” to determine the form and amount of compensation. In this view, the Court’s decisions concerning damages ruled against the local and retained for the IAHRS the authority to determine the details of reparations.

In the second phase of the IAHRS development, the system accommodated itself to a changing political environment in which member states were

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24 Michael Ignatieff, Human Rights as Politics and Idolatry 53 (2003) (noting that human rights has become “the lingua franca of global moral thought, as English has become the lingua franca of the global economy.”)

transitioning from authoritarianism to democracy. It faced a new breed of cases addressing human rights questions much subtler than those raised by the atrocities of the earlier period, namely, freedom of expression, access to information and transparency. The IAHRS responded with a broader, more political approach to human rights issues, with diplomacy and flexible standards taking the center stage. Still, most of the Inter-American Court’s work continued to address the mass atrocities committed in earlier years.

Besides “protecting” human rights in the Americas, the OAS reinforced its mission to “promote” them, a function which by its nature allows for greater deference to states. The Aylwin Azocar et al. v. Chile case provides one example. In that case, a group of individuals challenged Chile’s electoral system as infringing several provisions of the ACHR. The Commission found that Chile had in fact violated the rights of several individuals and ordered the country to adopt the measures necessary to bring its domestic legal order into line with the provisions of the American Convention, so as to guarantee fully, for all Chilean citizens, including the victims in this case, the exercise of the right to vote and to be elected in general conditions of equality, as set forth in Articles 23 and 24 of the American Convention, in respect of the composition of the Chilean Senate, as a bicameral legislative organ of popular representation of the Chilean Congress.

In a dissenting opinion, commissioner Robert Goldman criticized the Commission’s position. Goldman embraced a deferential approach based on the Commission’s duty to promote human rights. Goldman observed:

27 Id., para 161.
Even though Article 23 assumes the existence of a government structure that is democratic and representative in nature, it does not stipulate a definitive model concerning how the state should be organized to institutionalize representative democracy in an ideal fashion, much less how the seats in the legislative branch should be distributed. Therefore, claims alleging the incompatibility of a particular institutional model with the principles underlying Article 23 should be analyzed with special deference to the state parties, and the Commission must carefully consider whether it is appropriate to take a position regarding the advisability of a particular model. I believe that unless the institutional structure established by the state impedes the effective expression of the will of the citizens in a manifestly arbitrary manner, the Commission should in principle refrain from passing judgment on that structure's proximity to an ideal model, at least in the context of examining an individual case. In this regard, issues concerning the advisability of particular models of political participation more appropriately fall within the mandate of the Commission to promote human rights.28

Goldman, however, was alone in this position. As explained, the Commission did find that, by enacting a particular electoral system, Chile had violated the American Convention.

The third period of the IAHRS began around 1996 with the system's response to pressure from the transnational civil society to shift its focus from the “promotion” of human rights and the establishment of the rule of law in emerging democracies to the “protection” of the rights of individuals and groups within these newly established democracies.29 Human rights advocates demanded that supranational bodies take steps to protect the rights of specific vulnerable groups,

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28 Id., dissenting opinion by Robert K. Goldman.

29 It is understood that education through conferences, lectures, and other activities to spread the word correspond to the scope of promotion, while monitoring State compliance with international human rights standards belongs to the field of protection. Almost two decades ago, in fact, human rights lawyers convened experts to debate the future of the inter-American system, which, according to them, was experiencing “an identity crisis” due to “the fundamental lack of agreement among the key players about the legal and political character of the system and its future direction.” See Juan Méndez & Francisco Cox, El Futuro del Sistema Interamericano de Derechos Humanos 9 (1998).
such as women, LGBTI individuals and indigenous peoples. As a result, in 2001, new procedural rules were ease the process of bringing a claim before the system, a shift which successfully increased the number of cases submitted before both the Inter-American Commission and the Inter-American Court. At the same time, the OAS allowed non-governmental organizations to formally participate in its assemblies, thereby fostering dialogue regarding the protection of human rights and the rule of law in the Americas. The language of rights would no longer be the sole province of the Court. Human rights advocates and state officials could now interact through channels provided by the IAHRS.

Since the early 2000s, due largely to the newly established procedural rules, the IAHRS has received more cases per year and in an array of subject matters more diverse than in prior decades. We now face a new phase in the historical development of the system—one in which the Inter-American Court has explicitly established itself as a final interpreter of the ACHR and asserts that domestic judges have an obligation to directly enforce the ACHR. These are not trivial developments. In a context of more democratic regimes and more diverse areas of human rights issues, the IAHRS—particularly through the Inter-American Court’s case law—has become markedly less deferential towards member states. It is not surprising that the system today faces resistance from states that see it as an unwelcome intervention in their domestic affairs.30

30 In 2013, Venezuela denounced the American Convention on Human Rights and currently the Dominican Republic is considering doing the same, See infra Part III.C.
Furthermore, the Velásquez ethos is still very much present, at least in some of the leading voices of the IAHRS. Former President of the Inter-American Court and current judge at the International Court of Justice, Antonio Cançado Trindade, recently reiterated his strong opposition to the potential adoption by the IAHRS of the “margin of appreciation” doctrine, a well-established doctrine in European human rights law. The margin of appreciation doctrine prescribes that a regional human rights court should grant member states relatively wide berth in the regulation of human rights affairs given that they are closer to the case at hand, in time and geography, than are international bodies. The traditional understanding is that the margin of appreciation refers to cases where fundamental rights may conflict with public morals, typically defended by the State. Thus the doctrine often arises in the case of highly contested moral issues, such as freedom of expression, freedom of religion or sexuality rights. In the landmark 1976 case of Handyside v. United Kingdom, the European Court of Human Rights accorded for the first time a margin of appreciation to the European States. In this decision, the Court found that the censoring restrictions imposed on a book publisher were both prescribed by law and in pursuit of a legitimate aim, pursuant the norms of the

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31 See Marisa Iglesias, “A margin of appreciation doctrine for the European Convention of Human Rights: in search for a balance between democracy and rights in the international sphere” (Sela 2013 paper); Andrew Legg, The Margin of Appreciation in International Human Rights Law: Defen

European Convention on Human Rights. Therefore, the Court denied the publisher's petition and ruled in favor of the State, upholding the U.K.'s prohibition of a publication. The margin of appreciation doctrine was born and, with it, the idea that the doctrine served States' purpose to limit fundamental liberties.

As recently as 2008, Cançado Trindade still rejects the adoption of the margin of appreciation as inappropriate in the socio-political context of the IAHRS's jurisdiction. In his own words:

How could we apply [the margin of appreciation doctrine] in the context of a regional human rights system where many countries’ judges are subject to intimidation and pressure? How could we apply it in a region where the judicial function does not distinguish between military jurisdiction and ordinary jurisdiction? How could we apply it in the context of national legal systems that are heavily questioned for the failure to combat impunity? ... We have no alternative but to strengthen the international mechanisms for protection ... Fortunately, such doctrine has not been developed within the inter-American human rights system.33

One could understand such statement from an Inter-American Court's judge in the late 1980s. But after two decades of case law and significant political and legal developments in the region, one could also expect a more nuanced approach to the relationship between the Court and States Parties.

**B. Current manifestations: the maximalist court**

In recent years, the IAHRS's reluctance towards normative subsidiarity has taken new shape. The Inter-American Court's articulation of the doctrine of conventionality control ("CC") and the maximalist approach found in certain

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33 See Antonio Cançado Trindade, El Derecho Internacional de los Derechos Humanos en el Siglo XX 390 (2008).
decisions, such as the Gelman case against Uruguay (discussed infra), illustrate this shift.

As the CC doctrine and Gelman were the subject of a SELA panel two years ago, I will provide only a cursory review of each.

The CC doctrine prescribes that all domestic judges have a duty to directly apply the ACHR as interpreted by the Inter-American Court. This presents several theoretical and practical problems: first, it fails to distinguish between countries where judges have the authority to strike down legislation and countries where judges do not have such authority; second, it is grounded on poor normative arguments, such as states’ general duty to fulfill their international obligations. Despite these issues, the Inter-American Court has given no indication that it might reconsider using such doctrine.

Gelman vs. Uruguay (2011) is a fine example of the Inter-American Court’s expansive approach towards the protection of human rights and generally of “the human rights movement’s attachment to the fight against impunity and its uses of criminal law in the process.” In Gelman, the Inter-American Court found that, by adopting an amnesty law for the crimes committed by security forces during the military dictatorship, Uruguay had violated the ACHR and the Inter-American

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34 See Roberto Gargarella’s paper on Gelman and the problema of democratic legitimacy and my paper on conventionality control, presented at SELA 2013.


Convention on Forced Disappearance of Persons. The Court reasoned that the Uruguayan law in question, despite popular support domestically, lacked any validity because it prevented authorities from investigating and punishing those responsible for gross and massive human rights violations. Such a law, the Court reasoned, had no place in the law of human rights in the Americas. In reaching this decision, the Court expanded its well-established case law on the incompatibility of self-amnesty legislation.

As Roberto Gargarella observes, Gelman raises a fundamental question in the confrontation between international human rights law and democratic legitimacy: may a regional human rights court overrule the will of the people manifested in a formal vote? It is a question about deference and contestation that can be addressed only if the regional human rights system embraces some theory of subsidiarity.

In the next and final section I offer suggestions to remedy the IAHRS’s current reluctance to embrace normative subsidiarity, as well as analyzing the justification for such a principle in the context of the IAHRS.

III. Reassessing inter-American subsidiarity

Is it possible to articulate a principle of subsidiarity for use in the IAHRS? I believe it is. To do so, however, we must consider scenarios in which the system has

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37 Gelman vs. Uruguay, 2011, relating to the forced disappearance of an Argentinean national at the hands of the Uruguayan security forces.
38 [cite to the two referenda]
39 See, e.g., Barrios Altos vs. Peru, Almonacid Arellano vs. Chile.
embraced normative subsidiarity (in some form) as a strong normative basis for a more deferential approach in international human rights adjudication.

A. Margin of appreciation in the IAHRS

As previously explained, most scholars believe that the margin of appreciation doctrine is almost entirely foreign to the IAHRS. This is not entirely accurate. Both the Inter-American Commission and the Inter-American Court have made reference to and employed the margin of appreciation doctrine in several decisions—albeit inconsistently.

First, the IAHRS has made use of the margin of appreciation doctrine in discussions concerning political participation, particularly the kind described in Article 23 of the ACHR. For example, in a case against Guatemala, the Inter-American Commission found that

the context of Guatemalan and international constitutional law in which this condition of ineligibility is placed is the appropriate dimension for analysis of the applicability of the Convention in general, and of the applicability of its Arts. 23 and 32 [of the ACHR] to the instant case, and from which the margin of appreciation allowed by international law can emerge.40

In other decisions and reports, both the Inter-American Commission and the Inter-American Court have interpreted Article 23 in line with the margin of appreciation doctrine.41 Both bodies, however, have failed to explain why—and


41 See also the dissenting opinion by former commissioner Robert K. Goldman (supra), and Report N° 98/03, Case 11.204 Statehood Solidarity Committee United States, December 29, 2003: “the Commission has recognized that a degree of autonomy must be afforded to states in organizing their political institutions so as to give effect to these rights, as the right to political participation leaves room for a wide variety of forms of government. As the Commission has
how—the doctrine should be used. Reconstructing these decisions, one may note that the subject matter at hand allowed for an even more deferential approach from the Inter-American Commission and the Inter-American Court.

It is notable that in these cases the system was dealing with procedural human rights issues, as opposed to substantive matters such as sexuality rights. The Court could articulate a version of the margin of appreciation doctrine that distinguishes “structural” or “procedural” issues (for instance, cases on political participation), on the one hand, and “substantive” issues, such as cases related to the recognition of equal protection rights.42

B. The Court as fact-finder

Lengthy decisions are a trademark of the Inter-American Court, with rulings often spanning several hundred pages. Some criticize this trend, arguing that the Court’s decisions are too difficult and time-consuming for ordinary citizens to appreciate, its role or objective is not to create a uniform model of representative democracy for all states, but rather is to determine whether a state’s laws infringe fundamental human rights. The Commission has similarly recognized that not all differences in treatment are prohibited under international human rights law, and this applies equally to the right to participate in government.” See also Inter-Am. Ct. H.R., Castañeda Gutman v. Mexico, Aug. 6, 2008: “Article 23(2) of the American Convention establishes that the law may regulate the exercise and opportunities of such rights only on the basis of ‘age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings.’ The provision that limits the reasons for which it is possible to restrict the use of the rights of paragraph 1 has only one purpose — in light of the Convention as a whole and of its essential principles — to avoid the possibility of discrimination against individuals in the exercise of their political rights. It is evident that the inclusion of these reasons refers to the enabling conditions that the law can impose to exercise political rights. Restrictions based on these criteria are common in national electoral laws, which provide for the establishment of the minimum age to vote and to be elected, and some connection to the electoral district where the right is exercised, among other regulations. Provided that they are not disproportionate or unreasonable, these are limits that the States may legitimately establish to regulate the exercise and enjoyment of political rights and that, it should be repeated, they refer to certain requirements that the titleholders of political rights must comply with so as to be able to exercise them” (para 155).

understand. An additional issue, however, is the fact that the length of these decisions is symptomatic of the Inter-American Court’s decision to fact-find—a task better left to individual states.

The role of the Inter-American Court is to examine whether or not the state has violated a right protected by the ACHR. In several instances the Court has explicitly adhered to the “fourth instance” doctrine, which states that international courts should not act as fact-finders, but rather are limited to a determination of questions of law.43 When a court ignores this doctrine and reviews witness testimonies, expert testimonies and other evidence, it trespasses into the territory of domestic courts, which are better positioned, in time and geography, to assess evidence. If a state’s authorities, say the judiciary or the prosecutor’s office, fail to conduct investigations and adjudicate, there are better reasons for a regional court to intervene. Even then, in the case of due process violations, the regional court could still remand the case to domestic courts for additional fact finding.

In relation to the expansive investigative function that the Inter-American Court sometimes plays, it has also been very aggressive in providing remedies.44 The Inter-American Court not only orders monetary compensations: it orders legal (or even constitutional) reforms, judicial training, the erection of monuments or memorials for the victims, the publication of the decisions it hands down, among other remedies. Moreover, the Court usually establishes timeframes for compliance

and issues periodic reports that monitor whether or not states enforce the Court’s decisions (thus creating a new problem, namely, lack of enforcement). Commentators usually praise the Court’s “creative” approach to remedies, which contrasts with the European Court’s more restrained approach.\footnote{See Nino Tsereteli, *The relevance of the principle of subsidiarity for the evolvement of remedial regimes of regional human rights courts (ECtHR and IACtHR)* (2014) (on file with author).} However, the Court’s willingness to craft expansive remedies itself, rather than to defer to domestic law and domestic courts, is yet another example of its rejection of normative subsidiarity.

For this reason, I argue that the Court could adopt a less aggressive approach to remedies. It could declare that there has been a violation and that compensation is in order, but leave it to the state to offer a path for repair. The Court could retain the authority to review state compliance but it would do it in a less aggressive manner, giving an enhanced role to the state which violated the American Convention. Additionally, this could improve enforcement, as it would be the state, not the Court, who defines the reparations it must provide.

\textit{C. Authority and context}

In recent years, the IAHRS has fallen under scrutiny and criticism. Countries as politically distinct as Venezuela, Colombia and Brazil have found themselves working together to denounce the system’s expansive and, as they argue, illegitimate powers. In 2013, some states successfully pushed for a so-called “strengthening process” of the IAHRS, what some advocates and scholars described as a deliberate strategy to undermine some of the Inter-American Commission’s
powers.\textsuperscript{46} I agree with these scholars that the Inter-American Court cannot function effectively when barraged with politically motivated attacks or when operating in a politically hostile environment. The solution is for the Court to garner greater political legitimacy, such that it may speak with authority on the matters before it.

In sum, the IAHRS need the support of its member states.\textsuperscript{47} By embracing normative subsidiarity, the Inter-American Court—and the Inter-American Commission—can foster, as a less aggressive and interventionist approach, a more collaborationist model for the enforcement of international human rights law. It is important that member states see the IAHRS as an opportunity, rather than as a threat. It would thus be wise for the Court to abandon its maximalist approach and embrace instead a theory of subsidiarity that grants to member states some say regarding the protection of human rights.

\textbf{IV. Conclusion}

It is traditionally held that international human rights regimes are supplementary to the law of individual states. International bodies act whenever domestic authorities fail to provide adequate remedies to victims of human rights violations. The principle of subsidiarity provides both a theoretical and practical foundation to determine how much authority a state should be granted in the regulation of human rights affairs. In the specific context of the IAHRS, normative subsidiarity is not a salient feature. The system established a strong moral and legal

\textsuperscript{46} See Santiago A Canton, \textit{To Strengthen Human Rights, Change the OAS (Not the Commission)}, 20 HUMAN RIGHTS BRIEF 5 (2013).

\textsuperscript{47} See Karen J. Alter, Laurence R. Helfer and Mikael Rask Madsen, \textit{How context shapes the authority of international courts} 79:1 LAW \& CONTEMP. PROBLEMS (2016).
Contesse

voice through its early decisions on gross and massive human rights violations committed by authoritarian regimes. In such a context, deference is not a pressing need for regional courts.

Today, however, the situation is different. States are mostly well-functioning democracies, with cases moving away from claims of mass atrocity to such current issues as the right to same-sex marriage. In such a changing legal and political landscape, it may be time to reconsider the system’s reluctance towards normative subsidiarity as a principle for international adjudication. By reviewing instances where both the Inter-American Commission and the Inter-American Court have used notions of subsidiarity, I favor a consistent adoption of such principle—one that could enhance the system’s authority and acknowledge states’ position as fundamental actors for the enforcement of international human rights norms.

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