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1. Introduction

In its Report (Koskenniemi 2006) on the fragmentation in international law, the International Law Commission decided not to deal with the issue of institutional fragmentation – the fragmentation of international law brought on by the existence of different institutions dealing with norms that are “normatively equivalent” (Broude and Shany 2011). Nowhere is this more apparent than in the field of international human rights since while it aspires to global relevance it is populated by judicial or quasi-judicial institutions¹ that have not only limited geographical but sometimes different substantive scope. In terms of normatively equivalent norms, the norms that these courts are tasked with applying find their roots in the Universal Declaration on Human Rights² and their respective founding instruments dedicate themselves in enforcing them. Yet in terms of human rights institutions, the multiplication of human rights courts, in effect, increases the fears of fragmentation exponentially since every human rights court can, even unwittingly, challenge the other institutions’ interpretations of human rights. Consequently, the aim of this paper is to ascertain the extent to which these fears are justifiable and to determine to what extent is there fragmentation (albeit in a very narrow scope) in international human rights.

The narrow scope of this study is the following: it covers the freedom of speech as related to journalists and the media in three jurisdictions: the European Court of Human Rights (ECtHR), the Inter-American Court of Human Rights (IACtHR) and the United Nations Human Rights Committee (HRC). It takes a particular comparative perspective by comparing the texts, scope, tests, justifications, and to a limited extent, outcomes within these three jurisdictions as they are related to journalists and the media. The reason for choosing this field is that it is one of the core understandings of the freedom of expression and, due to the media’s constant use of this right, brushed with a high number of instances where the right is invoked. This, in turn, produces a high number of cases and, therefore, a mature doctrine of free speech related to the media. The analysis presented in this study will be structured around the comparison of texts, scope, and tests and justifications.

There are some limitations to this study, the obvious one being its narrow scope of freedom of speech as related to journalists and media. This bias in selection runs the possibility of missing issues that can be quite salient in other rights and, as the saying goes, missing the forest by looking at the tree. Other limitations are somewhat more prosaic but, nevertheless, also relevant. One limitation that stands out is the lack of accessibility and usability in the jurisprudence of some of the courts, namely the HRC. It lacks any systematized data-base of jurisprudence, not all of the cases are available online, and there is hardly any way of systematically searching them. The situation is somewhat better with the IACtHR which judgments, at least as related to free speech are publicly available and translated into English. The easiest database to work with is the ECtHR’s, however, the sheer number of cases makes it a daunting task to research it. The consequence of this is that not all of the cases may be covered in this study; however there are enough cases and secondary

¹ For the sake of expedience in the continuation of the paper all of these institutions will be called courts.

² General Assembly resolution 217 A (III), 10 December 1948.

literature (Dijk, Hoof et al. 2006, Hanski, Scheinin et al. 2007, Burgorgue-Larsen, Úbeda de Torres et al. 2011, Casadevali, Myjer et al. 2012) to give a degree of confidence in the comparison. Another limitation to the study is that, to the extent that any findings are generalizable, they would only pertain to the other qualified rights in the three conventions in question. This is due to a large extent to the fact that the structure through which the reasoning process in freedom of expression is put is the proportionality test which is not a factor when dealing with unqualified or absolute rights such as the prohibitions of torture and slavery.

The argument in the paper is structured as follows. I start with the comparison of the convention texts (2) as presented in the conventions and continue with the comparison of scope (3), tests (4) and justifications (5) as they are practiced and interpreted by the courts. I will then continue with an analysis of the role that tests and justifications have in stabilizing the jurisprudential outcomes of these courts and argue that it precisely the shared techniques as well as substantive notions of the role and purpose of human rights in democracy that these courts use is what accounts for most of the overlapping jurisprudential outcomes.

2. The Convention Texts

The texts of the conventions differ to some extent, either in the statement of their principles in the preamble or in the text of the articles covering freedom of speech. Due to their historical development, some are far shorter than others, namely the European Convention, which only has two paragraphs in the article covering the freedom of speech while the American convention and the Covenant have five and three, respectively. The preambles also show the particularities of the conventions themselves, for instance the European Convention³ and the American Convention⁴ reference their regional character, while the Covenant⁵ emphasises its attachment to the United Nations as a global organization. However, all three⁶ show a firm commitment to the Universal Declaration of Human Rights⁷ and partially present themselves as its enforcement mechanism.

³ “[...] Considering that the aim of the Council of Europe is the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of human rights and fundamental freedoms;

Reaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights upon which they depend;

Being resolved, as the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration, [...]

⁴ “Reaffirming their intention to consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man; [...]

⁵ Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, [...]

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

⁶ For the European Convention “[...]Considering the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10th December 1948;

Considering that this Declaration aims at securing the universal and effective recognition and observance of the Rights therein declared;[...]

One other textual difference comes into view regarding the preambles that is relevant to the discussion regarding the justifications and tests later in the paper and that is that while the European and American Conventions prominently state that they represent a commitment of democratic nations to democracy⁸, the Covenant almost shies away from the word, and mentions it only 3 times in Articles 14, 21 and 22 but not in Article 19. On quick inspection there seems to be no logical reason why the term “necessary in a democratic society” would not be included in Article 19 while also being included in articles 21 and 22 (Freedom of Assembly and Association respectively). It is not as if the articles themselves deal with unrelated matters, nor is it that they are so structurally dissimilar that the phrase could not be easily inserted. For example article 21 states that “[n]o restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society” (listing the legitimating grounds) which is not unlike the wording of article 19 which says that the freedom of expression “may [...] be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:” (listing very similar legitimating grounds). Likewise, while the word democracy or democratic is found liberally in the preamble and the different articles in the American Convention, it is not present in Article 13 on freedom of expression, while it is prominent especially in Articles 6-11 in the European Convention.

The HRC and the IACtHR have dealt with this ambiguity in different ways, the IACtHR more openly than the HRC but both have managed to read-in the qualifier “in a democratic society” into their jurisprudence. Given the fact of its Cold War creation, the HRC has had a more difficult time of including this qualifier – it could well have been “necessary in a Marxist/theocratic/Confucian society” – and has only managed to do so more recently. While the absence of the now all too familiar phrase maybe difficult to explain, its later inclusion in the jurisprudence might be a bit easier for the substantive concept of rights in a democracy offers an anchor in an interpretative quandary. The significance in this will be discussed a bit later in the paper suffice it to say that this word and the guide that it represents has managed to find its way in different ways in the jurisprudence of all of the Courts.

The texts of the articles themselves show a recurring structure since even though they have different lengths they, nevertheless, follow a specific pattern by first outlying the components of the right (to hold opinions and to receive and impart ideas)⁹ which is followed

For the Covenant “[...]Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights.[...]”

For the American Convention “[...]Considering that these principles have been set forth in the Charter of the Organization of American States, in the American Declaration of the Rights and Duties of Man, and in the Universal Declaration of Human Rights, and that they have been reaffirmed and refined in other international instruments, worldwide as well as regional in scope;

Reiterating that, in accordance with the Universal Declaration of Human Rights, the ideal of free men enjoying freedom from fear and want can be achieved only if conditions are created whereby everyone may enjoy his economic, social, and cultural rights, as well as his civil and political rights; and [...]

⁷ Universal Declaration of Human Rights, General Assembly Resolution 217 A (III), 10 December 1948.

⁸ For the European Convention “[...]Reaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights upon which they depend;[...]” and for the American Convention “[...]”

⁹ For the European Convention: “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”, for the Covenant: “Everyone shall have the right to hold opinions without interference. 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print,

by a list of basis for restrictions (legitimizing grounds) which provide the limit of the right, which are, chief among them, the rights and reputation of others and the interests of public order and public morality.

3. The Scope

The scope of Freedom of Expression in all three courts seems remarkably similar covering most forms of what can be considered speech or expression. For instance, the IACtHR has defined the scope of article 13 thusly

30. Article 13 indicates that freedom of thought and expression “includes freedom to seek, receive, and impart information and ideas of all kinds...” This language establishes that those to whom the Convention applies not only have the right and freedom to express their own thoughts but also the right and freedom to seek, receive and impart information and ideas of all kinds. [...] It requires, on the one hand, that no one be arbitrarily limited or impeded in expressing his own thoughts. In that sense, it is a right that belongs to each individual. Its second aspect, on the other hand, implies a collective right to receive any information whatsoever and to have access to the thoughts expressed by others.

31. [...] It also includes and cannot be separated from the right *to use whatever medium is deemed appropriate* to impart ideas and to have them reach as wide an audience as possible. [...] When the Convention proclaims that freedom of thought and expression includes the right to impart information and ideas through “any... medium,” it emphasizes the fact that the expression and dissemination of ideas and information are indivisible concepts. This means that restrictions that are imposed on dissemination represent, in equal measure, a direct limitation on the right to express oneself freely.¹⁰ (emphasis is mine).

Correspondingly, the Human Rights Committee in its Commentary to Article 19¹¹ has the following explanation regarding scope

Paragraph 2 requires States parties to guarantee the right to freedom of expression, including the right to seek, receive and impart information and ideas of all kinds regardless of frontiers. This right includes the expression and receipt of communications of every form of idea and opinion capable of transmission to others, subject to the provisions in article 19, paragraph 3, and article 20. It includes political discourse, commentary on one’s own and on public affairs, canvassing, discussion of human rights, journalism, cultural and artistic expression, teaching, and religious discourse. It may also include commercial advertising. The scope of paragraph 2 embraces even expression that may be regarded as deeply offensive, although such expression may be restricted in accordance with the provisions of article 19, paragraph 3 and article 20.

in the form of art, or through any other media of his choice” and for the American Convention: “1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.”

¹⁰ *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, IACtHR, 13 November 1985, para. 30-31.

¹¹ *General Comment No. 34, Article 19, Freedoms of Opinion and Expression*, United Nations Human Rights Committee, 102nd Session, UN Doc. CCPR/C/GC/34, 12 September 2011.

Paragraph 2 protects all forms of expression and the means of their dissemination. Such forms include spoken, written and sign language and such non-verbal expression as images and objects of art. Means of expression include books, newspapers, pamphlets, posters, banners, dress and legal submissions. They include all forms of audio-visual as well as electronic and internet-based modes of expression. (footnotes omitted).¹²

The ECtHR likewise follows this broad inclusion of the notion of expression in its scope of protection, where Article 10 protects the freedom to hold opinions as well as the right to impart information and ideas, subject to limitations found in para. 2. This includes all forms of expression delivered through any medium which in the past has included “paintings, books, cartoons, films, video-recordings, statements in radio interviews, information pamphlets and the internet” (Ovey, White et al. 2010 p. 426) that

[...] is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no ‘democratic’ society.¹³

There is however a difference in scope that can prove quite significant when it comes to the protection of expression between the IACtHR and the other two courts, namely in the IACtHR’s exclusion of the possibility of so called prior restraint (an action where a state can limit an expression before it is transmitted). Due to the specific choice of the drafters of the American Convention, Article 13 explicitly states that “[t]he exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability,” with the exception of “public entertainments [which] may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.”¹⁴ The IACtHR has elaborated upon this *inter alia* in the case of *Palamara-Iribarne v. Chile*¹⁵ where the Court had to review the seizure and destruction, followed by an imposition of a fine and a ban on future publication of a book by Chilean authorities written by a former Naval officer regarding the ethics of the intelligence services. The Court said that

[...] a violation of Article 13 of the Convention may take different forms, depending on whether the violation results in the denial of the freedom of expression or whether it entails a restriction beyond permissible limits. Not every breach of Article 13 of the Convention entails an outright denial of the right to freedom of expression, which occurs when government power is used to establish means to prevent the free flow of information, ideas, opinions or news. Examples of this type of violation are prior censorship, seizure or banning of publications and, in general, any measures that subject expression or dissemination of information to State control. [...]¹⁶

Moreover,

¹² *General Comment No. 34, Article 19, Freedoms of Opinion and Expression*, United Nations Human Rights Committee, 102nd Session, UN Doc. CCPR/C/GC/34, 12 September 2011, para. 11-12

¹³ *Handyside v United Kingdom*, (Application No. 5493/72), Section judgment, ECtHR, 7 December 1976, para. 48.

¹⁴ Article 13, para. 2 and 4, American Convention on Human Rights

¹⁵ *Case of Palamara-Iribarne v. Chile*, (Merits, Reparations, and Costs), Judgment, IACtHR, November 22, 2005.

¹⁶ *Ibid* para. 68.

in order to ensure the effective exercise of Mr. Palamara-Iribarne's right to freedom of thought and expression, it was not enough for the State to allow him to write his ideas and opinions. The protection of such right implied the duty of the State not to restrict their dissemination, enabling him to distribute his book by any appropriate means to make his ideas and opinions reach the maximum number of people and, in turn, allowing these people to receive this information.¹⁷

On the other hand, there is nothing in the wording of the convention or in the jurisprudence of the ECtHR regarding *a priori* prevention of media from publishing controversial content and it has specifically said in its jurisprudence¹⁸ that

For the avoidance of doubt [...] the Court would only add to the foregoing that Article 10 (art. 10) of the Convention does not in terms prohibit the imposition of prior restraints on publication, as such. This is evidenced not only by the words "conditions", "restrictions", "preventing" and "prevention" which appear in that provision, but also by the Court's [jurisprudence]. On the other hand, the dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the Court. This is especially so as far as the press is concerned, *for news is a perishable commodity* and to delay its publication, even for a short period, may well deprive it of all its value and interest. (emphasis is not in the original)¹⁹ [also see (Ovey, White et al. 2010 p. 69-70).

Consequently, when the issue of prior restraint reaches the Court it takes on a standard proportionality analysis albeit with a much more stringent requirements within the test. For instance, when a prior restraint issue arose in the case of *Gawęda v. Poland*²⁰ the ECtHR found Poland to be in violation of the European Convention regarding the impreciseness of its media law which allowed for the refusal of a registration of a periodical under the grounds that it was not compatible (as the Polish media law put it) "with the real state of affairs." The Court found that

one of the requirements flowing from the expression "prescribed by law" is the foreseeability of the measure concerned. A norm cannot be regarded as a "law" unless it 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.

The Court considers that, although Article 10 of the Convention does not in terms prohibit the imposition of prior restraints on publications [...], the relevant law must provide a clear indication of the circumstances when such restraints are permissible and, *a fortiori*, when the consequences of the restraint are to block publication of a periodical completely, as in the present case. This is so because of the potential threat that such prior restraints, by their very nature, pose to the freedom of expression guaranteed by Article 10.²¹

However, some judges, notably in the dissent camp though, also think that the exercise of prior restraint by a state would trigger an automatic violation of article 10 save for times

¹⁷ *Ibid* para. 71.

¹⁸ *Observer and Guardian v UK (Application no. 13585/88)*, Plenary session, ECtHR, 26 November 1991 (hereafter the *Spycatcher* case).

¹⁹ *Ibid* para. 60.

²⁰ *Gawęda v. Poland, (Application no. 26229/95)*, Section Judgment, ECtHR, 14 March 2002 but also *see* *ibid*. p. 61-63.

²¹ *Ibid* para. 59-60.

provided for in Article 15 derogations. In the *Spycatcher* case the dissenting judges have noted, quoting Justice Black from the US Supreme Court in the *Pentagon Papers*²² case, that

"the press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraint": in a free and democratic society there can be no room, in time of peace, for restrictions of that kind, and particularly not if these are resorted to, as they were in the present case, for "governmental suppression of embarrassing information" or ideas. [...]

Under no circumstances, however, can prior restraint, even in the form of judicial injunctions, either temporary or permanent, be accepted, except in what the Convention describes as a "time of war or other public emergency threatening the life of the nation" and, even then, only "to the extent strictly required by the exigencies of the situation"²³

While this view has remained in the minority²⁴ it is still a potent view. Nevertheless, the Court has even quite recently²⁵ confirmed its stance on prior restraint as a possible measure under the convention, albeit with a heavy burden of proof as to the necessity of the measure that is to be provided by the state.²⁶

The HRC has been quite ambiguous about the issue of prior restraint. In its comments it has noted that "a free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression and the enjoyment of other Covenant rights", and that "[t]he free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential" which implies, consequently, that the "free press and other media [are] able to comment on public issues without censorship or restraint and to inform public opinion."²⁷ However, the HRC has not had the opportunity to rule on this issue and, therefore, it is unclear whether prior restraint would be considered as outright breach of the convention (like in the IACtHR) or whether the HRC would use its standard proportionality analysis (like the ECtHR).

In addition reference to the scope of the conventions, it is worth noting that under all three conventions, as they are interpreted, the members states have both negative (not to unduly interfere with the right) and positive obligations. In the IACtHR, two cases against Venezuela highlight the extended scope of freedom of expression protection by the Court for it found that Venezuela has violated the convention regarding Article 13 when it: 1) made certain statements that "amount to a form of interference with or pressure impairing the rights

²² *New York Times v United States* (1971) 403 US 713.

²³ *Partially Dissenting Opinion by Judge de Meyer (Concerning Prior Restraint) joined by Judges Pettiti, Russo, Foighel and Bigi, Observer and Guardian v UK* (Application no. 13585/88), Plenary session, ECtHR, 26 November 1991.

²⁴ See the dissenting opinions in *Open Door and Dublin Well Woman v Ireland* (Application no. 14234/88; 14235/88), ECtHR, 29 October 1992.

²⁵ *Yildırım v. Turkey* (Application no. 3111/10,) ECHR, 18 December 2012.

²⁶ "The Court reiterates that Article 10 does not prohibit prior restraints on publication as such. This is borne out not only by the words "conditions", "restrictions", "preventing" and "prevention" which appear in that provision, but also by the Court's judgment[s] [...]. On the other hand, the dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the Court. This is especially so as far as the press is concerned, for news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest. This danger also applies to publications other than periodicals that deal with a topical issue." *Ibid* para. 47

²⁷ *General Comment No. 34, Article 19, Freedoms of Opinion and Expression*, United Nations Human Rights Committee, 102nd Session, UN Doc. CCPR/C/GC/34, 12 September 2011, para. 13.

of those who intend to contribute to public deliberation”²⁸ and when 2) it did not take sufficient steps to investigate threats against and protect journalist critical to the government from attacks, regardless that those threats and attacks originated from private persons.²⁹

In a similar case in the ECtHR regarding the member states positive obligation of protecting journalist and media from attacks by private persons the Court has said that

Genuine, effective exercise of [the] freedom [of expression] does not depend merely on the State's duty not to interfere, but may require positive measures of protection, even in the sphere of relations between individuals [...] In determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which is inherent throughout the Convention. The scope of this obligation will inevitably vary, having regard to the diversity of situations obtaining in Contracting States, the difficulties involved in policing modern societies and the choices which must be made in terms of priorities and resources. Nor must such an obligation be interpreted in such a way as to impose an impossible or disproportionate burden on the authorities ...³⁰

The CHR, has not explicitly used, at least in its article 19 jurisprudence, the term positive obligations of member states, but it has however clearly stated in its Commentary on article 19³¹ and in its Commentary on obligations of states (No. 31)³² that the “obligation to respect freedoms of opinion and expression [...] also requires States parties to ensure that persons are protected from any acts by private persons or entities that would impair the enjoyment of the freedoms of opinion and expression to the extent that these Covenant rights are amenable to application between private persons or entities.”³³ The case of *Gauthier v Canada*³⁴ could well be said that was settled on the grounds of the positive obligation of to ensure that a system of access to its parliamentary deliberations by journalists be “specific, fair and reasonable, and [its] application should be transparent”³⁵ even though it is operated under the control of a private entity, in this case the Canadian Press Gallery Association.

4. Tests

There seems to be, at least on the surface, an almost complete overlap between the three jurisdictions when it comes to the tests they use to determine whether there has been a violation of the freedom of expression i.e. the proportionality test. The ECtHR, given its early start in dealing with cases, is the natural leader in its elaboration and it would seem that, at least when it comes to the IACtHR, the source of inspiration since the European Court is cited

²⁸ *Case of Perozo et al. v. Venezuela (Preliminary Objections, Merits, Reparations, and Costs)*, Judgment IACtHR, January 28, 2009, para. 151.

²⁹ *Ibid* para. 151-161.

³⁰ *Özgür Gündem v. Turkey (Application no. 23144/93)*, ECtHR, 16 March 2000, para. 43.

³¹ *General Comment No. 34, Article 19, Freedoms of Opinion and Expression*, United Nations Human Rights Committee, 102nd Session, UN Doc. CCPR/C/GC/34, 12 September 2011 para. 7.

³² The Committee’s general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40*, vol. I (A/59/40 (Vol. I)), annex III.

³³ *General Comment No. 34, Article 19, Freedoms of Opinion and Expression*, United Nations Human Rights Committee, 102nd Session, UN Doc. CCPR/C/GC/34, 12 September 2011, para. 7.

³⁴ *Gauthier v. Canada, Communication No 633/1995*, U.N. Doc. CCPR/C/65/D/633/1995 (5 May 1999).

³⁵ *Ibid* para. 13.6

very prominently and is given high regards in the IACtHR's earlier opinions. For instance, whole passages of judgements of the ECtHR were quoted in the IACtHR's first case dealing with freedom of expression, the *Advisory Opinion on Compulsory Membership*³⁶ as well as in *Last Temptation of Christ*³⁷, while later the reference to the ECtHR is put into footnotes.

The proportionality test has its origins in German constitutional law which has later spread to the ECtHR and the European Court of Justice (as well as other national courts) and from there to other international courts (Sweet and Mathews 2008 p. 97-104). The test is composed of four parts, each part structured around a seemingly commonsensical questions: whether there was an interference; whether it was prescribed by law; whether it pursued a legitimate aim; and whether it is necessary/proportionate to achieve that aim (or necessary in a democratic society). In some instances there are prior issues that the Courts need to address before starting to go through the test, most notably the issue whether the interest at stake or the nature of the complaint falls within the scope of the convention right in question.

A. Was There an Interference?

The first prong of the test is often omitted since in most cases it is clear that there was an interference with the right. The IACtHR often, in this part of the test, has a discussion about the nature of the freedom of expression by discussing the individual and social dimension of opinion and speech as well as the negative and positive duties of the state to provide fertile ground for expression and not to discriminate and create a plural media environment.³⁸ Similarly the ECtHR starts with an affirmation of general principles that govern the law of a specific topic including the freedom of expression which is then followed, if necessary, by a discussion of the issue whether there was an interference with the right. The HRC, on the other hand, has the habit of only mentioning those prongs of the test that seem pertinent to the decision and can sometimes go straight directly to the last prong of the test, the balancing phase.

B. Prescribed by Law?

The second prong of the test looks at whether the action or the public authority that interfered with the right has a legal basis to do so. All of the courts in question have certain substantive requirements regarding the law's quality or origin that can generally fall under the understanding of rule of law requirements: the public character and availability of the norm in question, its coherence and its predictability. For instance, HRC's Commentary states, in relation to the prescribed by law requirement, that

³⁶ *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, IACtHR, 13 November 1985, para. 42-51.

³⁷ *Case of "The Last Temptation of Christ" (Olmedo-Bustos et al.) v. Chile (Merits, Reparations and Costs)*, Judgment, IACtHR, February 5, 2001.

³⁸ *See cases Case of Perozo et al. v. Venezuela (Preliminary Objections, Merits, Reparations, and Costs)*, Judgment, IACtHR, January 28, 2009 and *Case of Ríos et al. v. Venezuela (Preliminary Objections, Merits, Reparations, and Costs)*, Judgment, IACtHR, January 28, 2009.

[...][s]ince any restriction on freedom of expression constitutes a serious curtailment of human rights, it is not compatible with the Covenant for a restriction to be enshrined in traditional, religious or other such customary law.

For the purposes of paragraph 3, a norm, to be characterized as a “law”, must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly and it must be made accessible to the public. A law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution. Laws must provide sufficient guidance to those charged with their execution to enable them to ascertain what sorts of expression are properly restricted and what sorts are not.³⁹

The IACtHR has similar substantive requirements of the law prescribing the interference into the right in question. It has said, for instance, that

In relation to the requirements with which a restriction in this regard should comply, first, they must have been established by law to ensure that they are not at the discretion of public authorities. Such laws should be enacted “for reasons of general interest and in accordance with the purpose for which such restrictions have been established.” In this respect, the Court has emphasized that:

From that perspective, one cannot interpret the word "laws," used in Article 30, as a synonym for just any legal norm, since that would be tantamount to admitting that fundamental rights can be restricted at the sole discretion of governmental authorities with no other formal limitation than that such restrictions be set out in provisions of a general nature.

[...]

The requirement that the laws be enacted for reasons of general interest means they must have been adopted for the "general welfare" (Art. 32(2)), a concept that must be interpreted as an integral element of public order (*ordre public*) in democratic States [...]. (footnotes omitted.)⁴⁰

Moreover, it has also said in relation to the imposition of criminal punishment that

any limitation or restriction must be both formally and materially provided for by law. Now, should the restrictions or limitations be of a criminal nature, it is also necessary to strictly meet the requirements of the criminal definition in order to adhere to the *nullum crimen nulla poena sine lege praevia* principle. Thus, they must be formulated previously, in an express, accurate, and restrictive manner. The legal system must afford legal certainty to the individuals.⁴¹

The ECtHR early on has settled the issue on the substantive requirements that the term “law” is supposed to have. In the *Sunday Times* case it said that

The Court observes that the word "law" in the expression "prescribed by law" covers not only statute but also unwritten law. Accordingly, the Court does not attach importance here to the fact that contempt of court is a creature of the common law and not of legislation. It would clearly be contrary to the intention of

³⁹ *General Comment No. 34, Article 19, Freedoms of Opinion and Expression*, United Nations Human Rights Committee, 102nd Session, UN Doc. CCPR/C/GC/34, 12 September 2011, para. 24-26.

⁴⁰ *Case of Claude-Reyes et al. v. Chile (Merits, Reparations and Costs)*, Judgment, IACtHR, September 19, 2006 para. 89.

⁴¹ *Case of Kimel v. Argentina (Merits, Reparations and Costs)*, Judgment, IACtHR, May 2, 2008.

the drafters of the Convention to hold that a restriction imposed by virtue of the common law is not "prescribed by law" on the sole ground that it is not enunciated in legislation: this would deprive a common-law State which is Party to the Convention of the protection of Article 10 (2) (art. 10-2) and strike at the very roots of that State's legal system.[...]

In the Court's opinion, the following are two of the requirements that flow from the expression "prescribed by law". Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a "law" unless it 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. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.⁴²

This paragraph is in essence outlines the ECtHR three part test assessing whether an interference was prescribed by law, in short, 1) whether the interference has some legal basis either in statute or case law, 2) whether it was accessible to the public 3) whether it was foreseeable even if the individual may need professional assistance to understand the law's requirements (Ovey, White et al. 2010 p. 312-315). When it comes to the extent of the law's ambiguity the Court has noted that laws and regulations need be "laid down with reasonable precision in accessible legal rules that sufficiently indicated the scope and manner of exercise of the discretion conferred on the relevant authorities"⁴³ [also *see* (Ovey, White et al. 2010 p. 313-314)]

Some of the particularities of the three systems can be seen by contrasting these three substantive notions of the "prescribed by law" standard. For example, the HRC has ruled out "traditional, religious or any such customary law"⁴⁴ for reasons that it has to deal with states that have religious or local customary law as law in the sense that it is allowed or mandated for use in private or public relations (like customary or Sharia law in certain parts in Africa and Asia). However, the HRC certainly does not have in mind Anglo/Saxon Common Law as customary law even though the later can be a source of the former (Slapper and Kelly 2012). On the other hand, when the ECtHR speaks about unwritten law it talks about the British/Anglo Saxon common law system in particular and it is far from its mind to consider that this type of law would be un-precise or un-accessible. Regardless of the idiosyncrasies of the three systems, they, nevertheless, have a similar notion of what attributes make something fall under the category of law and it is firmly based in the liberal rule of law tradition.

C. A Legitimate Aim?

⁴² *Sunday Times v. UK*, A.30 (1979) 2 HERR 245, para. 47-49.

⁴³ *Malone v United Kingdom (Application no. 8691/79)*, Section judgment, ECtHR, 2 August 1984.

⁴⁴ *General Comment No. 34, Article 19, Freedoms of Opinion and Expression*, United Nations Human Rights Committee, 102nd Session, UN Doc. CCPR/C/GC/34, 12 September 2011, para. 24

The third prong of the test is quite similar for the three courts, the legitimating aim, which has slight variations depending on the wording of the articles in question discussed above. There is also a difference in the strictness of the approach towards the matching of the state's action to the legitimating ground. The ECtHR, for example has a very relaxed attitude towards the states' claims of following a legitimate aim and for not asking for a very strict connection between the state action and the legitimate aim pursued.

The issue is a bit more ambiguous when it comes to the IACtHR, however. On one occasion IACtHR has had to struggle with an argument presented by Venezuela in the *Uson Ramirez* case,⁴⁵ which revolved around the applicant's conviction for the crime of slander of the Venezuelan Armed Forces. The issue of relevance here is the question as to whether the honour and reputation of the Armed Forces as an institution can be a legitimate aim under the Convention. The IACtHR had to distinguish two questions: whether institutions could be said to be entitled to have the right to honour and reputation under the Convention from the question as to whether the reputation and honour of an institution can be a legitimating ground for which the Convention wording was ambiguous.⁴⁶ It drew inspiration from the ECtHR, which has recognized companies as entities that have reputation interests and consequently decided to accept that the meaning of the phrase the reputation of others also includes institutions like the Venezuelan Armed Forces.⁴⁷

The HRC on the other hand has some strict guidelines regarding the states connection between the restriction and the legitimate aim pursued. For instance, in its Article 19 Commentary it has stated that

When a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.

The Committee reserves to itself an assessment of whether, in a given situation, there may have been circumstances which made a restriction of freedom of expression necessary. [...] in order for the Committee to carry out this function, a State party, in any given case, must demonstrate in specific fashion the precise nature of the threat to any of the enumerated grounds listed in paragraph 3 that has caused it to restrict freedom of expression. (footnotes omitted).⁴⁸

D. Necessity – Proportionality in the Narrow Sense

The fourth prong of the test, the necessity prong, is arguably the most important part of the proportionality test and it is where the most of the cases get decided. Because this part

⁴⁵ *Case of Usón Ramírez v. Venezuela (Preliminary Objections, Merits, Reparations, and Costs)* Judgment, IACtHR, November 20, 2009.

⁴⁶ *Ibid* para. 63; the IACtHR did not question the fact that only individuals are the beneficiaries of the rights in the Convention and therefore, institutions do not have the right to honour, individuals do.

⁴⁷ *Ibid* para. 65.

⁴⁸ *General Comment No. 34, Article 19, Freedoms of Opinion and Expression*, United Nations Human Rights Committee, 102nd Session, UN Doc. CCPR/C/GC/34, 12 September 2011, para. 35-36.

of the test is so frequently used, the ECtHR has even set up a test within a test that it specified in the *Silver*⁴⁹ case saying that

On a number of occasions, the Court has stated its understanding of the phrase ‘necessary in a democratic society’, the nature of its functions in the examination of issues turning on that phrase and the manner in which it will perform those functions. It suffices here to summarise certain principles:

(a) the adjective ‘necessary’ is not synonymous with ‘indispensable’, neither has it the flexibility of such expressions as ‘admissible’, ‘ordinary’, ‘useful’, ‘reasonable’ or ‘desirable’ [...];

(b) the Contracting States enjoy a certain but not unlimited margin of appreciation in the matter of the imposition of restrictions, but it is for the Court to give the final ruling on whether they are compatible with the Convention [...];

(c) the phrase ‘necessary in a democratic society’ means that, to be compatible with the Convention, the interference must, inter alia, correspond to a ‘pressing social need’ and be ‘proportionate to the legitimate aim pursued’ [...];

(d) those paragraphs of Articles of the Convention which provide for an exception to a right guaranteed are to be narrowly interpreted [...].⁵⁰

In general what is required by this test is for a state to show that for a measure to be necessary in a democratic society it has to be undertaken as a “response to a pressing social need, and that the interference with the rights protected is no greater than is necessary to address that pressing social need” (Ovey, White et al. 2010 p. 325). Moreover, as it is related to the ECtHR, it is where the crucial margin of appreciation doctrine comes into play and where some of the uncertainty as to specific case by case application is the strongest.⁵¹ Nevertheless, it seems that some of the uncertainty is alleviated when the freedom of expression is put in context of who writes what, for what audience and, in case of post-facto sanctions, the nature of the punishment. For instance, the ECtHR has said that criticism of the government enjoys greater leeway especially if it is uttered by politicians or journalists and that a heavy penalty like a prison sentence is greatly discouraged. (Dijk, Hoof et al. 2006 p. 340-342).⁵²

The IACtHR has a very similar approach when it comes to the balancing aspect of the proportionality test, however, first let us look at how standard of necessary in *a democratic society* came to be present at the Court. In its first opinion dealing with Article 13 and elaborating on the test that it needed to apply the IACtHR said that

The Court must also take account of the Preamble of the Convention in which the signatory states reaffirm "their intention to consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man." These articles define the context within which the restrictions permitted under Article 13(2) must be interpreted. It follows from the repeated reference to "democratic institutions", "representative democracy" and "democratic society" that the question whether a restriction on freedom of expression imposed by a state is "necessary to ensure" one

⁴⁹ *Silver and others v UK* (Applications no. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75), ECtHR, Section Judgment, 25 March 1983.

⁵⁰ *Ibid* para. 97.

⁵¹ *Ibid*. p. 326-327.

⁵² See for instance *Ceylan v. Turkey* (Application no. 23556/94), ECtHR, Section Judgment, 8 July 1999; *Incal v. Turkey* (Application no. 41/1997/825/1031), ECtHR, Section Judgment, 9 June 1998; *Arslan v Turkey* (Application no. 23462/94) ECtHR, Section Judgment, 8 July 1999.

of the objectives listed in subparagraphs (a) or (b) must be judged by reference to the legitimate needs of democratic societies and institutions.

In relation to this point, the Court believes that it is useful to compare Article 13 of the Convention with Article 10 of the (European) Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "the European Convention") and with Article 19 of the International Covenant on Civil and Political Rights (hereinafter "the Covenant"), which read as follows:

It is true that the European Convention uses the expression "necessary in a democratic society," while Article 13 of the American Convention omits that phrase. This difference in wording loses its significance, however, once it is recognized that the European Convention contains no clause comparable to Article 29 of the American Convention, which lays down guidelines for the interpretation of the Convention and prohibits the interpretation of any provision of the treaty "precluding other rights and guarantees... derived from representative democracy as a form of government." The Court wishes to emphasize, furthermore, that Article 29(d) bars interpretations of the Convention "excluding or limiting the effect that the American Declaration of the Rights and Duties of Man... may have," which instrument is recognized as forming part of the normative system for the OAS Member States in Article 1(2) of the Commission's Statute. Article XXVIII of the American Declaration of the Rights and Duties of Man reads as follows:

The rights of man are limited by the rights of others, by the security of all, and by the just demands of the general welfare and the advancement of democracy.

The just demands of democracy must consequently guide the interpretation of the Convention and, in particular, the interpretation of those provisions that bear a critical relationship to the preservation and functioning of democratic institutions.⁵³

When it comes to necessity, the IACtHR has adopted a similar wording to the one used by the ECtHR using its jurisprudence as an inspiration (Burgorgue-Larsen, Úbeda de Torres et al. 2011 p. 541).⁵⁴ While it has not elaborated a separate test within a test as the ECtHR has it has on several occasions said that

The Court has written the following with regard to these requirements:

the 'necessity' and, hence, the legality of restrictions imposed under Article 13(2) on freedom of expression, depend upon a showing that the restrictions are required by a compelling governmental interest. Hence if there are various options to achieve this objective, that which least restricts the right protected must be selected. Given this standard, it is not enough to demonstrate, for example, that a law performs a useful or desirable purpose; to be compatible with the Convention, the restrictions must be justified by reference to governmental objectives which, because of their importance, clearly outweigh the social need for the full enjoyment of the right Article 13 guarantees. Implicit in this standard, furthermore, is the notion that the restriction, even if justified by compelling governmental interests, must be so framed as not to limit the right protected by Article 13 more than is

⁵³ *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, IACtHR, 13 November 1985, para. 42-44.

⁵⁴ But also *see* the many references to the ECtHR in the *Compulsory Membership in Journalist Organizations* *ibid.*

necessary. That is, the restriction must be proportionate and closely tailored to the accomplishment of the legitimate governmental objective necessitating it.

In its interpretation of Article 10 of the European Convention, the European Court of Human Rights ruled that ‘necessary,’ while not synonymous with ‘indispensable,’ implies ‘the existence of a ‘pressing social need’ and that for a restriction to be "necessary" it is not enough to show that it is ‘useful,’ ‘reasonable’ or ‘desirable.’ The Court espoused this concept of ‘pressing social need’ in its Advisory Opinion OC-5/85.

Hence, the restriction must be proportionate to the legitimate interest that justifies it and must be limited to what is strictly necessary to achieve that objective. It should interfere as little as possible with effective exercise of the right to freedom of expression. (footnotes omitted).⁵⁵

Despite the fact that the IACtHR has been inspired by the ECtHR in its proportionality test, it has, nevertheless, not adopted the controversial doctrine of the margin of appreciation and, to my knowledge, has remained ambivalent to it. Some claim (Legg 2012 p. 3-4) that the IACtHR is on the path of developing a doctrine of the margin of appreciation or something similar since the states in the American system are becoming stable democracies and the cases coming to the IACtHR become more complicated and with far less of clear cut issue of a violation of rights and consequently, the IACtHR will be forced to develop, if it has not already developed, a deference doctrine. Because this may turn out to be a crucial question in assessing the dangers of fragmentation between the ECtHR and the rest it is important to give some overview of the margin of appreciation doctrine.

The margin of appreciation doctrine has been around as part of the ECtHR for the past 4 decades. It was first used by the former European Commission on Human Rights and was used by the court in a *Ireland v UK* judgment⁵⁶ for the first time (Spielmann 2012, p. 4-5). The doctrine has its origins in French administrative law (Yutaka 2002) and as such it is a deference doctrine of courts given to other branches of government, most notably the administration but also the regulators as well in deciding the scope and means of implementing legislation on the grounds that the administrators or regulators are better placed to make a judgment within their discretion on the balance of facts. In this instance a reviewing court would then scrutinise whether the body has stayed within the margins of its discretion and whether it has taken the proper things into account when making its decision. In this sense, one could say that a deference doctrine is part of the understanding of what a normal rights reviewing court is supposed to do either through a standard of review of reasonableness or something similar.

Throughout its use at the ECtHR, however, it has developed into two concepts (Letsas 2006) substantive, which “address[es] the relationship between individual freedoms and collective goals” (ibid p. 706) and is the one originally imported from domestic law and the structural which “is to address the limits or intensity of the review of the [ECtHR] in view of its status as an international tribunal” (ibid). The two concepts and the ECtHR’s lack of a clear distinction of which concept is used when and under which circumstances creates an unpredictable jurisprudence to the extent that some commentators have called the margin of appreciation doctrine “as slippery and elusive as an eel [and that] [a]gain and again the Court now appears to use the margin of appreciation as a substitute for coherent legal analysis of the

⁵⁵ *Case of Herrera-Ulloa v. Costa Rica (Preliminary Objections, Merits, Reparations and Costs)*, Judgment IACtHR, 2 July 2004 para. 121.

⁵⁶ *Ireland v UK (Application No. 5310/71)*, ECtHR, Judgment, Plenary, 18 January 1978.

issues at stake” (Hill 1998, p. 75).⁵⁷ Judge De Meyer has said that “it is high time for the Court to banish that [margin of appreciation] concept from its reasoning”⁵⁸ back in 1997, albeit citing not only its circumlocution, which was evident at the time, but also the stench of relativism that it brought with it. Recently it has been said that the margin possess “a variable geometry”, (Yutaka 2013)⁵⁹ that it is a “threat to the rule of law” (Brauch 2005)⁶⁰ and that is a doctrine that has no more and no less than 7 factors that determine its width (Spielmann 2012). The shape of the doctrine is widely discussed both in ECtHR judgments⁶¹ as well as in academic literature (for a more detailed list *see* Spielman 2012, p. 3 footnote 8) with no definite conclusion on its shape and scope or even its utility.

When it comes to the IACtHR there is, to some extent some reference to a margin in at least two cases of the IACtHR, most notably the *Ricardo Canese* case⁶² and even more importantly in a paragraph that follows a discussion of the proportionality test, which in the ECtHR is where one of the prongs of the necessity test is. What the court says is that

Owing to the circumstance of the instant case, the Court considers it necessary to examine in detail whether, in order to impose subsequent liability on Mr. Canese for his statements, the requirement of necessity in a democratic society is met. The Court has indicated that the “necessity” and, hence, the legality of restrictions imposed on freedom of expression under Article 13(2) of the American Convention, depend upon showing that the restrictions are required by a compelling public interest. If there are various options to achieve this objective, the one which least restricts the protected right should be selected. Given this standard, it is not enough, for example, to demonstrate that a law performs a useful or desirable purpose; to be compatible with the Convention, the restrictions must be justified by reference to collective purposes which, owing to their importance, clearly outweigh the social need for the full enjoyment of the right that Article 13 guarantees and do not limit the right established in this Article more than is strictly necessary. In other words, the restriction must be proportionate to the interest that justifies it and closely tailored to accomplishing this legitimate objective, interfering as little as possible with the effective exercise of the right to freedom of expression.

Democratic 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 interest. (footnotes omitted)⁶³

The IACtHR here seems to argue for a margin on a sliding scale depending on factors which are similar to Letsas’ substantive notion, finding the proper balance between individual freedoms and collective goals. However, as of yet, the IACtHR has not elaborated any further

⁵⁷ Horne Lord Lester Hill, ‘Universality Versus Subsidiarity: A Reply’ (1998) 1 *European Human Rights Law Review* 73, p. 75.

⁵⁸ Dissenting Opinion of Judge De Meyer, *Z v. Finland* (Application no. 22009/93), ECtHR, Section Judgment, 25 February 1997.

⁵⁹ Yutaka. Arai-Takahashi, ‘The Margin of Appreciation Doctrine: A Theoretical Analysis of Strasbourg’s Variable Geometry’ in Andreas Føllesdal, Geir Ulfstein and Birgit Peters (eds), (Cambridge University Press 2013)

⁶⁰ Jeffrey Brauch, ‘The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law’ (2005) 11 *Columbia Journal of European Law* 113.

⁶¹ *See* for instance the separate and dissenting opinions of the *Lautsi* judgment, *Lautsi and ors. v Italy*, Application no. 30814/06, ECtHR, Grand Chamber, 18 March 2011.

⁶² *Case of Ricardo Canese v Paraguay (Merits, Reparations and Costs)*, Judgment IACtHR, 31 August 2004.

⁶³ *Ibid* para. 96-97.

on what this margin, if it exists, is and what does it entail. I may very well signal the introduction of margin of appreciation doctrine, yet, given the fact that this case was decided in 2004, almost 10 years ago, and given that there has not been much development on that front regarding a discussion on any type of margin for states (something that is shaping to be a crucial doctrine in the ECtHR) I am hesitant to say that there is such a thing as a margin of appreciation type doctrine at the IACtHR, at least not in the structural sense that Letsas has defined.⁶⁴ As I have argued earlier, some sort of deference doctrine is ingrained in rights review, simply because judicial review in most cases comes after other branches have decided on certain issues touching on the rights of individuals, which, in most instances, involves some sort of discretion in the creation or application of the rules – a margin if you will. Consequently a part of a reviewing court's (any court, national or international) task, when it does rights review, is to afford such deference. In that sense, not having a deference doctrine (whether it is called reasonableness review, strict scrutiny or proportionality *stricto sensu*) would be the surprise not the other way around. But whether that doctrine of deference takes the shape of the margin of appreciation doctrine in its structural sense as currently is in growing importance at the ECtHR is far from clear and as of yet I am not convinced by Legg's argument of its existence in the IACtHR.

The HRC is a different story, however. It has not remained silent on the issue of the margin of appreciation and it has specifically rejected it. It has said as early as 1994⁶⁵ that a state's "scope of its freedom to [...] [take a certain action] is not to be assessed by reference to a margin of appreciation, but by reference to the obligations it has undertaken"⁶⁶ under the Covenant (in this case the HRC was talking about economic regulation and obligations under Article 27). Finland in that case specifically argued for the inclusion of the margin of appreciation doctrine in the HRC's deliberation process citing the ECtHR as its example. In that sense, the HRC has reject the margin of appreciation doctrine as practiced by the ECtHR, a rejection which it has reiterated with the recent Commentary on Article 19 where it said that "the Committee recalls that the scope of this freedom [i.e. freedom of expression] is not to be assessed by reference to a 'margin of appreciation.'" Given the discussion in the previous paragraph it is reasonable to assume that what the HRC means what it rejects the margin of appreciation it means that the obligations of states would be decided based on the meaning of the relevant article in questions, which would include the type of deference that is normal under rights review – Letsas' substantive concept. In a sense the rejection of the HRC is the rejection of the margin of appreciation as deference given to states simply because they are states while it might be open because they are the ones who have to conduct a first instance balancing and because they have to weigh-in individual rights with public interest.

When it comes to the proportionality test, the three jurisdictions have an astonishing overlap not only in the formal features of the test, (i.e. four prongs with similar question that need to be answered) but the substantive requirements within the test as well at least as far as the freedom of expression goes. There is however, a significant difference between the ECtHR and the other two courts and that is in the doctrine of the margin of appreciation. While the ECtHR is not only fully committed⁶⁷ to the doctrine but it also has two competing concepts of it, the two other courts are either ambivalent about (IACtHR) or in outright

⁶⁴ For a contrary opinion *see* Legg 2012.

⁶⁵ *Länsman et al. v. Finland, Communication No. 511/1992*, U.N. Doc. CCPR/C/52/D/511/1992, 8 November 1994.

⁶⁶ *Ibid* para. 9.4

⁶⁷ *See* for instance the Brighton declaration and its urging of the inclusion of the phrase margin of appreciation in the preamble to the Convention, Section B – Interaction Between the Court and National Authorities, High Level Conference on the Future of the European Court of Human Rights, Brighton Declaration, 20 April 2012 (available at <http://hub.coe.int/20120419-brighton-declaration> last visited 23 Sep. 13).

rejection of it (HRC). When it comes to fragmentation, and given the rising importance of the margin of appreciation doctrine in the ECtHR, the lack or rejection of such a crucial doctrine for one court but not for the others may result in a wider discrepancy of outcomes. This, in the end may not be the case, at least when it comes to journalists and the media since even the ECtHR acknowledges the narrowness of the margin in these instances. However, taken as a whole, the margin of appreciation doctrine may be a too important of a piece to be left out of any considerations of fragmentation for it certainly may lead to some quite surprising and divergent outcomes especially given the doctrine's unpredictability (Hill 1998, Brauch 2005, Arai-Takahashi 2013) at the moment.

5. Justifications

When it comes to the justifications of the wide protection of the freedom of expression of journalists and media, especially regarding public officials, again the overlap is quite considerable. In order to understand the context of justifications, of why the journalists and media and generally freedom of expression is given such a high regard is its connection to the notion of democratic society understood not just as a system of governing. In this sense it is society that must be democratic not just government. The ECtHR for instance sees the characteristics of a democratic society to be “pluralism, tolerance and broadmindedness without which there is no ‘democratic society.’”⁶⁸ Democratic societies are, therefore, plural and, as such, must exhibit tolerance and broadmindedness “not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population.”⁶⁹ Consequently, “[f]reedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man.”⁷⁰

In this last sentence we have another type of justification for why having a wide ranging freedom of expression that goes parallel to but can sometimes conflict with a democratic society and that is that the freedom of expression is one of the basic conditions for the personal development of every person. While the previous conception of rights sees their purpose in fostering the existence of a democratic society (rights as enablers of democracy, a political conception of rights) the second one sees rights in a deontic light where human rights are owed to each individual because every human being is endowed with reason and moral agency (Tasioulas 2013). It is in this sense that rights are a necessary condition of the development of every person because, as creatures of reason, we require a bubble of autonomy expressed and secured by rights. In this sense rights are pre-political; they exist even in a so called state of nature. Most of the time the proponents of these two views on rights agree on the outcome, but they can sometimes produce conflicting results.

The IACtHR has a similar line of justification regarding its Article 13 jurisprudence. When deciding of the proportionality of a state action to the legitimate aim it said that

[...] it shall be reiterated that in the test of proportionality it should be taken into account that the expressions about the exercise of the functions of the State Institutions have a greater protection, in the sense that they can promote a democratic debate in society. That is the case because it is supposed that in a

⁶⁸ *Handyside v United Kingdom*, (Application No. 5493/72), Section judgment, ECtHR, 7 December 1976, para. 49.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

democratic society the state institutions or entities as such are exposed to public scrutiny and criticism, and their activities are inserted in the domain of public debate. This threshold is not based on the quality of the subject but on the public interest of the activities carried out. Hence larger tolerance should face the affirmations and considerations made by citizens when exercising their democratic right. Such are the demands for pluralism of a truly democratic society, requiring a more significant circulation of reports and opinions about matters of public interest.⁷¹

Moreover,

Freedom of expression is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion. It is also a *conditio sine qua non* for the development of political parties, trade unions, scientific and cultural societies and, in general, those who wish to influence the public. It represents, in short, the means that enable the community, when exercising its options, to be sufficiently informed. Consequently, it can be said that a society that is not well informed is not a society that is truly free.

Within this context, journalism is the primary and principal manifestation of freedom of expression of thought. For that reason, because it is linked with freedom of expression, which is an inherent right of each individual, journalism cannot be equated to a profession that is merely granting a service to the public through the application of some knowledge or training acquired in a university or through those who are enrolled in a certain professional 'colegio.'⁷²

Furthermore, the IACtHR took pains to highlight the identity of its approach of its concept of the freedom of expression and its ties to democracy with the ones taken by other international courts and bodies

Thus, the different regional systems for the protection of human rights and the universal system agree on the essential role played by freedom of expression in the consolidation and dynamics of a democratic society. Without effective freedom of expression, exercised in all its forms, democracy is enervated, pluralism and tolerance start to deteriorate, the mechanisms for control and complaint by the individual become ineffectual and, above all, a fertile ground is created for authoritarian systems to take root in society.⁷³

Again the mix of justifications is noticeable, on the one hand the freedom of expression protects the democratic nature of a society, highlighting the freedom's political nature, but on the other hand it is an inherent right of each individual existing regardless of whether it protects democracy or not. The outcomes in practice may be quite similar under both conceptions, nevertheless, the IACtHR, as the ECtHR, are not particularly concerned with possible contradictions that the different grounding of rights can deliver.

⁷¹ *Case of Usón Ramírez v. Venezuela (Preliminary Objections, Merits, Reparations, and Costs)*, Judgment IACtHR, 20 November 2009, para. 83.

⁷² *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, IACtHR, 13 November, 1985, para. 70-71.

⁷³ *Case of Herrera-Ulloa v. Costa Rica (Preliminary Objections, Merits, Reparations and Costs)*, Judgment IACtHR, 2 July 2004 para. 116.

The HRC is not far behind the ECtHR and the IACtHR in the type of justifications offered for the freedom of expression. The opening paragraphs of General Comment No. 34 attest to that thusly:

Freedom of opinion and freedom of expression are indispensable conditions for the full development of the person. They are essential for any society. They constitute the foundation stone for every free and democratic society. The two freedoms are closely related, with freedom of expression providing the vehicle for the exchange and development of opinions.

Freedom of expression is a necessary condition for the realization of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights.⁷⁴

It is interesting how the HRC layers its justification of Article 19. It first starts with the two rights that come under Article 19, freedom of opinion, which it deems non-derogable,⁷⁵ and freedom of expression, which is a qualified right due to the fact that it is “the vehicle for the exchange and development of opinions”⁷⁶ meaning that while a state cannot and should not stop a person from holding opinions, from reasoning (a hallmark of a human being as a thinking animal), their outward expression as well as their exchange can be limited since the voicing of some opinions is preferred to others. You may hate as many groups as you wish, the expression of that hatred (your outward voicing of it), however, can very well be limited. While a state cannot and should not try to stop you from thinking it can certainly limit what you think out loud. Furthermore, it sees both the freedom to hold opinions and the freedom of expression as “indispensable to the development of any person”⁷⁷ and that they “are essential for any society.”⁷⁸ They are, however, “the foundation stone for every free and democratic society.”⁷⁹ In a single paragraph the HRC seems to manage to ground the freedom of expression and the freedom to hold opinions in two doctrines, since they are essential for any society and therefore any single human being (how can a society exist if a) humans cannot reason and therefore hold opinions about anything and everything and, b) if they cannot communicate). They are not bound to a single political ideal, they are wherever society exists,⁸⁰ but are at the same time the foundation stone of a free and democratic society. In order for a democratic society to exist the freedom of expression and, by extension, the freedom of the press must exist with Article 19 presenting the maximum amount of limitation that a state can deploy and still be considered democratic.

6. Conclusions

While reading through judgments of the three Courts, I cannot but be startled by their similarity. Yes they are different in many ways, the length of the written opinion being one prominent example. Yet when one looks at them at their entirety they have a remarkably

⁷⁴ *General Comment No. 34, Article 19, Freedoms of Opinion and Expression*, United Nations Human Rights Committee, 102nd Session, UN Doc. CCPR/C/GC/34, 12 September 2011, para. 2-3.

⁷⁵ *Ibid*, para. 5.

⁷⁶ *Ibid*, para 2

⁷⁷ *Ibid*.

⁷⁸ *Ibid*.

⁷⁹ *Ibid*.

⁸⁰ One question that I would like to pose that is not relevant to the task of this paper, is the question that while certainly reasoning is one of the hallmarks of a human being, one can think of societies where the expression of ideas is anything but free and those societies can still exist.

similar structure. The opinions open with an exposition of the legally relevant facts or like in the situation with the IACtHR with the facts that were presented during the hearing and in writing and the assessment of their veracity. The facts can and often do include the judgments or decisions of local authorities, statements from public officials which are relevant and in the case of the IACtHR, witness testimonies. The courts then continue with summarizing the arguments that the states and the applicants make and finish with their own assessment. Ultimately, the assessment of the arguments, in all three courts, is done through the steps of the proportionality analysis which is more or less formalized and formulaic (depending on the court in question, as I mentioned earlier the HRC may skip steps).

It is not only that the structure of the written opinions follow a similar pattern, but the substance in those parts follow a similar wording as well. Moreover, the identity of justifications or the understanding of what rights are for and what is their purpose offers a further stabilizing element which allows for an exchange of influences between the courts. To put it in another way, if there was not a shared understanding regarding the substantive requirements of the rights and their purpose there would hardly be any reason for looking at and being influenced by the jurisprudence of the other courts. It is only if there is an understanding that the courts themselves are involved in a similar enterprise, that they share similar values and purposes that they will find that the other courts' reasoning persuasive or authoritative.

There are at least two great outliers in the system when it comes to the protection of the freedom of expression and in relation to journalism, and those are the issue or prior restraint and the margin of appreciation doctrine. While the way that prior restraint is formulated in the IACtHR gives a high level of predictability (prior restraint is excluded except for the protection of minors) the other two systems put acts of prior restraint through their normal channels of analysis, albeit with an increasing threshold of proportionality for the state to pass. While in practice this might result in a significant conversion of outcomes, i.e. most instances of prior restraint would be found as a violation, nevertheless, the fact remains that if the *Spycatcher* case⁸¹ was argued before the IACtHR, it would have found a violation of Article 13 for the whole duration of the publication ban and not just after the content of the book became public outside of the UK.⁸²

A bigger outlier, however, is the doctrine of the margin of appreciation since this doctrine plays an increasingly crucial role in the ECtHR reasoning, while it has been rejected by the HRC and the IACtHR has been mostly silent on the matter. It might be the case, at least for the IACtHR, that the fact that that court is faced with mostly clear cut cases of rights violations that it has not yet had the need to develop any deference doctrine like the margin of appreciation. On the other hand, the HRC's rejection of the doctrine can be explained with the environment in which it operates and the extreme inter-regional diversity that is very different from the relative intra-regional homogeneity⁸³ of the other two systems. Moreover, the charges of relativism that have been levied against the doctrine may have influenced the HRC's rejection of it. In such an environment the HRC may be more concerned with having a common standard for all rather than allowing for a margin of appreciation based on local conceptions of morals and national security, for example. Regardless of the reasons, and to a large extent due to the unpredictability of the doctrine itself, there might very well be a difficulty of synchronising the jurisprudence between the courts especially if the ECtHR

⁸¹ *Observer and Guardian v UK* (Application no. 13585/88), Section Judgment, ECtHR, 26 November 1991.

⁸² *Ibid* para. 61-70.

⁸³ Just as an example, the ICCPR has been signed and ratified by diverse nations as all of the EU nations, United States of America, as well as Iran, Iraq, Egypt, India while China is a signatory but has not ratified it.

continues to rely on it to do the “heavy lifting” in controversial issues. Let us not forget that part of the doctrine requires for the ECtHR to follow national trends when interpreting the convention and determining the extent of the margin. This doctrinal divergence can to a large extent frustrate the trend of the courts looking at each other’s jurisprudence for at least two reasons a) the practical problem of following the national trends of the Council of Europe members in order to anticipate the development of the ECtHR’s margin of appreciation in specific fields, and b) the wider conceptual issue of why pegging the development of rights to the national trends of the members of the Council of Europe given the difference in the needs of systems that the other courts operate. If the ECtHR keeps basing its rights protection on the national trends of the Council of Europe members then it is moving further and further away from the concept of “normative equivalence” for it will see the rights not as rights stemming from the common understanding found in the Universal Declaration but in the common understanding of European states. To the extent that the two differ, the ECtHR may be signalling to the other courts that it may wish to disassociate itself with the Universal Declaration and therefore with the rest of the world.

Regardless of this trend, one conclusion cannot be avoided, and that is that given the structure through which the reasoning process is carried out coupled with the high level of shared understanding of the concept of rights and their place in a democratic society, it is not difficult to imagine that most of the cases coming before these courts will be settled in a similar manner. It seems that the shared values and identity of these courts makes them highly motivated towards looking at what their peer institutions are doing and following their insights. There is much more that these courts share than what divides them and that is what will, ultimately, keep these courts in roughly the same normative box with very little competition between each other, at least when the freedom of expression and journalism is concerned.

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