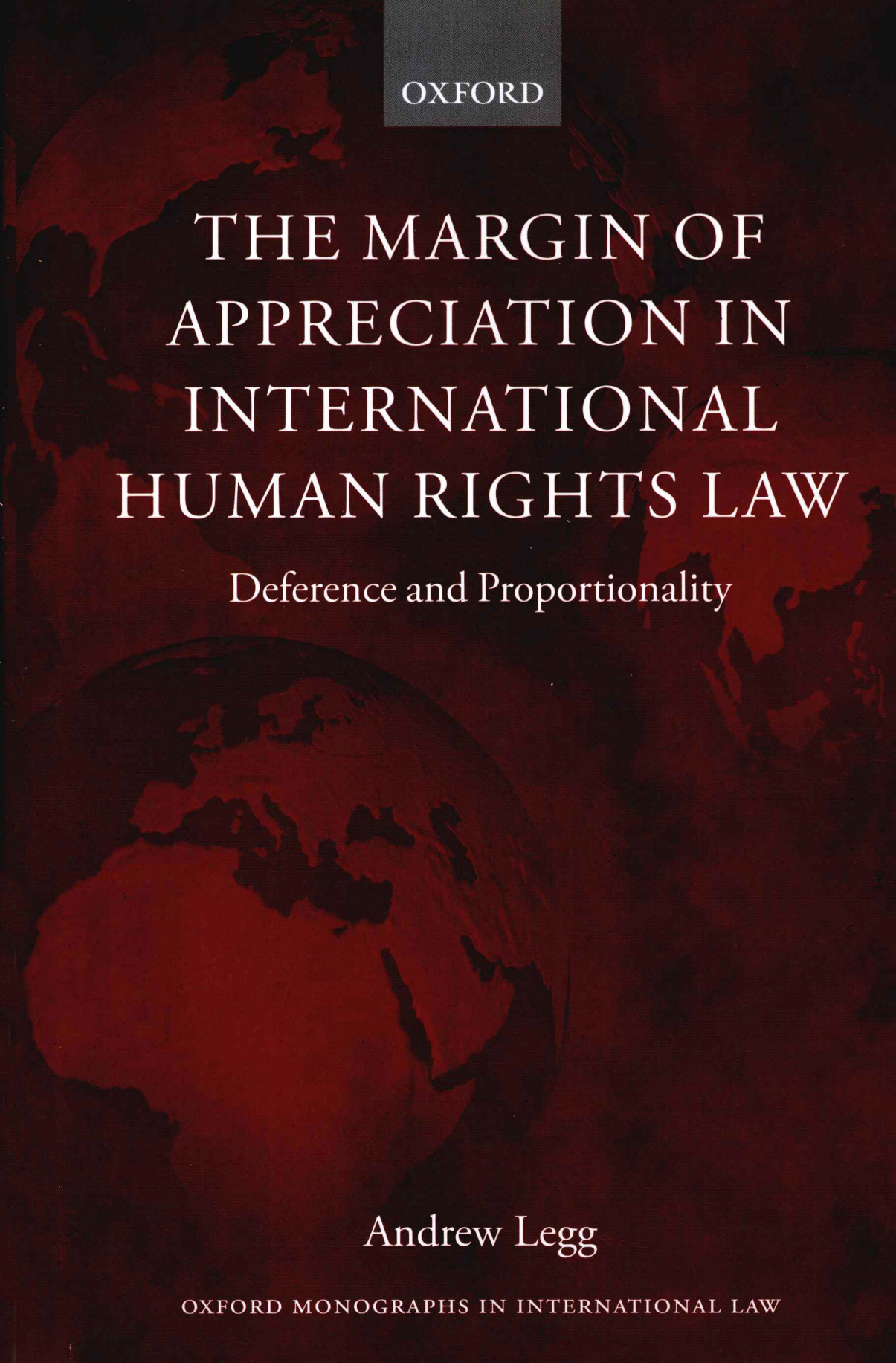




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THE MARGIN OF
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HUMAN RIGHTS LAW

Deference and Proportionality

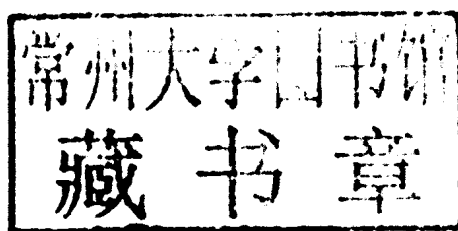
Andrew Legg

OXFORD MONOGRAPHS IN INTERNATIONAL LAW

The Margin of Appreciation in International Human Rights Law

Deference and Proportionality

ANDREW LEGG



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For Hannah

Preface

The margin of appreciation doctrine is controversial and somewhat difficult to grasp. Notwithstanding this, it lies at the heart of many of the most important international human rights cases. Its use sometimes leads to calls for greater judicial restraint by international human rights courts, or, in other words, a broader margin of appreciation to the state. This call for judicial restraint was demonstrated, for example, by the outcry¹ in the UK as the deadline approached for the authorities to amend the blanket ban on prisoner voting, in accordance with the European Court of Human Rights' decision in *Hirst v UK (No. 2)* No. 74025/01 (2005) (ECtHR (GC)). Calls for judicial restraint have been articulated at the intergovernmental level, most notably in the Brighton Declaration, which concludes that a reference to the margin of appreciation should be expressly included in the Preamble to the Convention and invites the Committee of Ministers to adopt the necessary amending instrument by the end of 2013.² Academic criticism has tended in the other direction, arguing for greater judicial activism by international human rights courts, and at its most severe a banishing of the concept of the margin of appreciation from their reasoning altogether.

This book seeks both to provide an explanation of what the margin of appreciation is, and to respond to criticisms of it. Uniquely, the book addresses the concept of the margin of appreciation in three international human rights tribunals: the European Court of Human Rights; the Inter-American Court of Human Rights; and the United Nations Human Rights Committee.

Part One of the book provides a conceptual explanation of what the margin of appreciation is, arguing that it is a doctrine of judicial deference, and supporting this contention by reference to the philosophy of practical reasoning. Part One also provides the foundation for a justification of the margin of appreciation on the basis of three main factors: (i) democratic legitimacy; (ii) the current practice of states (the 'consensus' factor); and (iii) expertise. Part Two explores these factors in greater depth, explaining how each factor provides normative support for the margin of appreciation, and expounding relevant case law of the three tribunals, thereby providing a doctrinal account of how the margin of appreciation operates in practice. Part Three of the book looks at how the factors for a margin of appreciation interact with other factors in a case, such as 'the nature of the right', as part of the proportionality assessment. These chapters consequently explore the structure of reasoning in international human rights adjudication. Each part of the book is

¹ F Gibbs, 'Human Rights: Is it Time to Sever Ties with the European Court?' (2011) *The Times* 23 February, 55.

² Brighton Declaration, 19 April 2012, paragraph 12(b). The Declaration is a political document agreed by delegates of the High Level Conference on the Future of the European Court of Human Rights that met in Brighton on 19–20 April 2012.

likely to be of interest to academics and students of international human rights law, as well as those working with international human rights law. Practitioners are likely to find the categorization of case law in Chapters 4–6 of most use.

The book began as a doctoral thesis at the University of Oxford entitled *Deference in International Human Rights Law*. I am grateful to my supervisors, Professors John Finnis and Dan Sarooshi, for their support during this project, and to my examiners Professors Timothy Endicott and Dominic McGoldrick. Professors Chris McCrudden and John Merrills, who examined my MPhil thesis, also helped to shape the project's direction. Professors Vaughan Lowe and Guy Goodwin-Gill coordinated and chaired international law research seminars at All Souls College, Oxford, where I had the privilege of presenting aspects of my research on a variety of occasions. I profited from their, and my peers', astute and helpful questions.

I am thankful for the valuable research assistance provided by Gonzalo Candia, who helped me to update the case law from the Inter-American Court of Human Rights as the book neared completion. I am grateful to the Arts and Humanities Research Council for funding my doctoral research, and for the support of the Harvey Fellowship.

Above all, I would like to thank my wife Hannah, whose companionship, advice, patience, kindness, and joy have inspired me from the project's inception to its conclusion. The book is dedicated to her.

Andrew Legg

Lincoln's Inn Fields, London
April 2012

General Editors' Preface

Whether it is a sign of the maturity of the international legal system, or simply a reflection of the preoccupations of our times, the increasing focus on public law conceptions such as proportionality and legitimate expectations as tools for the judicial control and adjustment of exercises of power is a salient characteristic of contemporary law. The idea of a 'margin of appreciation' is of particular utility in regulating relations between different centres of power. Its operation in relation to related concepts such as justiciability gives it enormous potential in the development of the law, but also gives rise to important questions of principle concerning the relationship between judicial, executive, and legislative power.

In this important book Andrew Legg explores these issues in the context of human rights law with admirable clarity. His trenchant analysis will, however, be of great interest and value across a much wider field. It provides a principled account, firmly rooted in legal practice, of one of the most potent and interesting legal concepts to have emerged in international law in recent decades. Academics and practitioners alike will value it for its careful articulation of the basis and the contours of this fascinating doctrine.

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List of Abbreviations

ACHR	American Convention on Human Rights
AJIL	American Journal of International Law
BIICL	British Institute of International and Comparative Law
CAT	Committee against Torture (United Nations)
CEDAW	Committee on the Elimination of Discrimination against Women (United Nations)
CERD	Committee on the Elimination of Racial Discrimination (United Nations)
CLJ	Cambridge Law Journal
Cornell Intl LJ	Cornell International Law Journal
CUP	Cambridge University Press
EC Regulation	European Community Regulation
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
ECtHR (GC)	European Court of Human Rights (Grand Chamber)
EHRLR	European Human Rights Law Review
ELJ	European Law Journal
EJIL	European Journal of International Law
Emory Intl LRev	Emory International Law Review
ESA	European Space Agency
EU	European Union
Harv LRev	Harvard Law Review
Harv UP	Harvard University Press
HRC	<i>See</i> UN HRC
HRLJ	Human Rights Law Journal
HRQ	Human Rights Quarterly
IACtHR	Inter-American Court of Human Rights
ICAO	International Civil Aviation Organization
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ICTY	International Criminal Tribunal for the former Yugoslavia
IJRL	International Journal of Refugee Law
IRA	Irish Republican Army
IVF	in vitro fertilization
KFOR	Kosovo Force (NATO)
LQR	Law Quarterly Review
Manchester UP	Manchester University Press
MIT Press	Massachusetts Institute of Technology Press
MLR	Modern Law Review
NATO	North Atlantic Treaty Organization
Northwestern ULRev	Northwestern University Law Review