

THE UNIVERSITY OF HULL

“Margins of appreciation, cultural relativity
and the European Court of Human Rights”

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Summary of a Thesis submitted for PhD degree

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on

“Margins of appreciation, cultural relativity and the European Court of Human Rights”

This thesis is about establishing a balance between universal human rights and particular cultures or local conditions. It examines the universality debate with reference to the “margin of appreciation” in the jurisprudence of the European Court of Human Rights, in particular from the end of the Cold War when new Contracting Parties from central and eastern Europe came under the Court’s jurisdiction.

The thesis considers that analysis of these issues must not be parochial. In Part One the universality debate in international human rights law is therefore examined in detail. It is argued that universal human rights do not require absolute uniformity in their protection - even universal human rights are necessarily and defensibly qualified. In order to link the margin of appreciation to this universality debate its evolution, operation and the factors which underpin it are also clarified in Part Two. It is demonstrated that the margin of appreciation has evolved from a concession to states into a methodology for demanding ever greater justifications for their limitations upon human rights. In doing so the margin permitted accords with the defensible level of local qualification to human rights already identified.

Part Three tests these conclusions against original analysis of recent case law, showing that the Court has been responsive to the differing needs of the new Contracting Parties. The Court had evolved a coherent and defensible approach to cases that have raised complex localised issues, and has maintained this even since its jurisdiction expanded. Whilst allowing modulation of European human rights protection according to local characteristics, use of the margin of appreciation does not amount to cultural relativism even in the expanded Council of Europe.

For Ruth Sweeney

My sister

In loving memory

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Naturally the opinions expressed in this thesis are my own, and I take responsibility for any of its shortcomings or errors.

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Margins of appreciation, Cultural relativity and the European Court of

Human Rights

Chapter One

Introduction

This thesis is about establishing a balance between universal human rights and particular cultures or local conditions. It examines the universality debate with reference to the “margin of appreciation” in the jurisprudence of the European Court of Human Rights, in particular since states from central and eastern Europe came under the Court’s jurisdiction. It is argued that the Court evolved a coherent and defensible approach to cases that have raised complex localised issues, and has maintained this even since its jurisdiction expanded. Whilst allowing modulation of European human rights protection according to local characteristics, use of the margin of appreciation does not amount to cultural relativism.

There are two main arguments to which these opinions are opposed. Firstly, it could be argued that the margin of appreciation is simply flawed in principle because it permits too much in the way of deference to local conditions.

Secondly, the expansion of the Council of Europe could have undermined an otherwise defensible concept because of the increased heterogeneity of Contracting Parties. It is said that the ECHR envisages participation by states with a “common heritage”,¹ but that the newer members of the Council from the former Eastern bloc do not share this heritage. The arguments employed in this thesis are based upon a particular understanding of how both these issues should be addressed.

There has been a great deal of academic work about the universality or otherwise of human rights. Likewise, at least recently, there have been numerous studies of the margin of appreciation in European jurisprudence. However the two debates are rarely linked together in any great detail. In the context of the universality debate oblique references to the margin of appreciation have been made, but they tend not to fully understand how the margin actually operates. Similarly, examinations into the defensibility of the margin of appreciation tend to only dimly perceive the universality debate, even where lip-service is paid to it. These tendencies are elaborated upon below. The defensibility of the MoA in principle and in recent practice can only be demonstrated once this imbalance of knowledge is rectified. Thus it is

¹ Preamble, European Convention on Human Rights, *European Treaty Series*, No. 5

necessary to embark upon a thorough analysis of the universality debate and the operation of the margin of appreciation.

The goals of the thesis are therefore wider than simply analysing the recent case law of the European Court.² Conclusions about local conditions and the margin of appreciation in recent cases from central and eastern Europe can only be reached within adequately constructed terms of reference about both universality and the margin itself. This thesis is therefore divided into three distinct parts. Part One examines the universality debate, and Part Two analyses the margin of appreciation. Part Three weaves these together to examine the recent jurisprudence of the European Court. The remainder of this chapter provides a further introduction to the margin of appreciation and the criticisms that have been made of it. Finally, the approach taken in this thesis to those criticisms is clarified and justified.

1 Introduction to the margin of appreciation

² Throughout this thesis the term “European Court” is used to refer to the European Court of Human Rights in Strasbourg. This should not be confused with the Court of Justice of the European Communities (European Court of Justice) or the Court of First Instance. These latter two bodies are judicial organs of the European Union.

Most textbooks on the European Convention on Human Rights recognise that the margin of appreciation (MoA) plays a role in a huge number of European human rights cases.³ It is a “key concept”⁴ in determining whether limitations upon human rights are necessary in a democratic society. Such questions involve balancing between the often competing interests of the state and the individual, and the margin of appreciation is “at the heart”⁵ of these considerations. It has therefore also been the subject of considerable academic study.⁶ Despite such study and its frequent invocation by the European

³ See e.g. Janis, Kay & Bradley, European Human Rights Law (2000), (2nd Ed), OUP: Oxford p146 *et seq*; Rehman, International Human Rights Law (2003), Pearson: Harlow p167; Steiner & Alston, International Human Rights in Context (2000), (2nd Ed), OUP: Oxford p854 *et seq*

⁴ Merrills & Robertson, Human rights in Europe (2001), (4th Ed), MUP: Manchester

⁵ Ovey & White, Jacobs & White, European Convention on Human Rights (2002), (3rd Ed.), OUP: Oxford

⁶ On the margin of appreciation, see generally the collection of articles in 19 *Human Rights Law Journal* (1998). See also Benvenisti, “Margin of Appreciation, Consensus and Universal Standards”, (1999) 31 *New York University Journal of International Law* 843; Brems, “The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights”, (1996) 56 *Zeitschrift für Ausländisches öffentliches recht und volkerrecht* 240; Hutchinson, “The Margin of Appreciation Doctrine in the European Court of Human Rights” (1999) 48

enforcement mechanisms, references to the idea of a “margin of appreciation doctrine” by non-specialists are often imprecise.

To begin clarifying the concept, according to Steven Greer the MoA "refers to the room for manoeuvre the Strasbourg institutions are prepared to accord to national authorities in fulfilling their obligations under the European Convention on Human Rights".⁷ Timothy H. Jones has stated that, "in essence, [the MoA] refers to the latitude that signatory states are permitted in their observance of the Convention".⁸ Howard Charles Yourow has given a more precise definition:

"The national margin of appreciation or discretion can be defined in the European Human Rights Convention context as the freedom to act; manoeuvring, breathing or 'elbow' room; or the latitude of deference or error which the Strasbourg organs will

ICLQ 638; Lavender, "The Problem of the Margin of Appreciation", (1997) EHRLR 380;

Yourow, The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence, (1996) The Hague: Kluwer

⁷ Greer, The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights, (2000), *Human Rights Files No. 17*, Strasbourg: Council of Europe Publishing, p5

⁸ Jones, "The devaluation of human rights under the European Convention", (1995) *Public Law* 430, pp430-431

allow to national legislative, executive or judicial bodies before it is prepared to declare a national derogation from the Convention, or restriction or limitation upon a right guaranteed by the Convention, to constitute a violation of one of the Convention's substantive guarantees."⁹

Yourouw's definition thus recognises the distinction between the operation of the MoA in regard to Article 15 ECHR on derogation from human rights obligations in times of public emergency, and its use with respect to the permissible limitation of human rights in peace-time. The importance of this distinction is further examined below in the relation to the factors that guide the MoA's width.¹⁰ Both Greer and Jones saw the MoA as allowing discretion in the way that human rights are protected (obligations "fulfilled" and Convention "observed" respectively). Whilst it is true that such discretion exists under the Convention, the MoA is actually concerned with discretion of a different order. It is concerned not with the implementation of human rights generally, but with their limitation in specific circumstances.

⁹ Yourouw (1996) *op. cit. supra* p13 (references omitted)

¹⁰ See Chapter 6

The MoA is therefore an often loosely-defined tool presently used by the European Court of Human Rights to allow Contracting Parties some discretion in the way that they go about balancing human rights against other identifiable public or collective interests. It is derived from the case law of the Court and Commission, not from the text of the Convention itself. Its relevance can be raised by the Court on its own initiative, or by the Contracting Parties themselves, by way of a "defence" to the allegation that they have violated a Convention right.

2 Criticisms of the MoA

In the 1976 case of *Handyside*¹¹ the Court was called upon to discuss to what extent free expression could be limited in order to protect morals. The Court stated that:

"[...] It is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals *varies from time to time and from place to place* which is characterised by a rapid and far-reaching evolution of opinions on the subject. [...]"

¹¹ *Handyside v UK* (1979-80) 1 EHRR 737 (Decided 7.12.1976). See below for further discussion of this case.

Consequently, Article 10 para. 2 leaves to the Contracting States a margin of appreciation."¹² [emphasis added]

The Court thus appeared to recognise some form of inter-temporal, European, moral diversity. It is such comments that have provoked hostile reactions. Criticism of the MoA has mounted because it is not universally accepted that the MoA maintains an adequately universal standard of human rights protection in the face various competing European moralities. For example Lord Lester has expressed deep concern about the use of the MoA in the following terms:

"The danger of continuing to use the standardless doctrine of the margin of appreciation is that, especially in the enlarged Council of Europe,^[13] it will become the source of a pernicious 'variable' geometry of human rights, eroding the *acquis* of existing jurisprudence and giving undue deference to local conditions, traditions, and practices".¹⁴

¹² *Handyside v UK* op. cit., supra para. 48

¹³ Chapter 9 of this thesis examines the continued defensibility of the MoA in an enlarged Council of Europe.

¹⁴ Lester, in Proceedings of the 8th International Colloquy on the European Convention on Human Rights, 227-240, p236-237. An abbreviated version of the Report was published as Lester (1996) *Public Law* 5, containing similar language at p6. A later incantation, in full, of the quoted section is contained in Lester, "Universality versus subsidiarity: a reply" (1998) 1 EHRLR 73, p76

Whether or not the doctrine is indeed "standardless" is examined further in Chapter 6. At this stage it is important that the doctrine was said to preserve local particularities over European human rights, because it demonstrates that the nature of the MoA has considerable potential to lower Convention standards. This has also been recognised by Eyal Benvenisti:

"The juridical output of the [European Court of Human Rights] and other international bodies carries the promise of setting universal standards for the protection and promotion of human rights. These universal aspirations are, to a large extent, compromised by the doctrine of the margin of appreciation. [...] Margin of appreciation, with its principled recognition of moral relativism is at odds with the concept of the universality of human rights".¹⁵

Judge De Meyer, in his partly dissenting Opinion in *Z v Finland*, was particularly critical of the doctrine:

"In the present judgment the Court once again relies on the national authorities' "margin of appreciation". I believe that it is high time for the Court to banish that

¹⁵ Benvenisti (1999), op. cit., supra pp843-844

concept from its reasoning. It has already delayed too long in abandoning this hackneyed phrase and recanting the relativism it implies."¹⁶

3 Answering the critics

The argument employed in this thesis is that the criticisms identified above are misconceived on two grounds; their understanding of the universality debate and their understanding of the MoA itself.

A The universality debate

Work conducted on the MoA has tended to remain aloof from the detail of the universality debate, which has been conducted between those who believe human rights are universal, should become universal, or are not universal. The main philosophical argument against the universality of human rights is the relativist position that the idea of “human rights” is essentially western and should not be used to criticise non-western states. Since it is assumed that

¹⁶ *Z v Finland*, (1998) 25 EHRR 371 (Decided 25.2.1997), Partly dissenting Opinion of Judge De Meyer, Part III. See also Judge De Meyer's similar comments in the footnote to his separate concurring opinion in *Ahmed & Others v UK*, (2000) 29 EHRR 1, (Decided 2.9.1998)

Europe is western and relatively homogenous, admissions of cultural variety with Europe have been treated with hostility.

This approach is too parochial and leads to misunderstandings of the relationship between universal human rights and local values. Part One of this thesis therefore examines the universality debate in its global context, clarifying what is meant by the terms “universality” and “relativism”. Chapter Two examines the threat of relativism to universal human rights but Chapters Three and Four demonstrate that universality is not the same as uniformity, and that respect for cultural differences or local conditions is not synonymous with cultural relativism. The criticisms identified above are therefore significant inasmuch as they recognise that the European Court should not slide into relativity, but they overestimate the level of homogeneity required in the protection of universal human rights. Part One refers to the work of Michael Walzer¹⁷ in particular to conclude that the universality of human rights is necessarily but defensibly qualified.

B Misconceptions about the MoA

¹⁷ See Walzer, Thick and Thin: Moral Argument at Home and Abroad (1994), University of

Notre Dame Press: Notre Dame

The second misconception that critics of the MoA tend to hold is about how the MoA actually relates to cultural variety and local conditions. This is often true of those who briefly refer to the MoA in the wider context of the universality debate. For example Joseph Chan identified the MoA as a tool for allowing cultural difference and stated that,

"If even a relatively well-developed regional framework of human rights like the European one has to make room for a good degree of margin of appreciation, it is only natural to expect that the ideological differences in the interpretation of human rights at the international level are greater and more permanent".¹⁸

Similarly Yash Ghai used the term "margin of appreciation" when he argued that most lawyers conceive of rights being capable of some qualification without losing their essence.¹⁹

It is submitted that such references to the MoA risk obscuring its nature. By applying the analysis constructed in Part One, Part Two of this thesis embarks

¹⁸ Chan, "Thick and Thin Accounts of Human Rights: Lessons from the Asian Values Debate", in Jacobsen & Bruun (eds.), Human Rights and Asian Values (2000), Curzon: Richmond, p68

¹⁹ Ghai, "Universalism and relativism: Human rights as a framework for negotiating interethnic claims", (2000) 21 *Cardozo Law Review* 1095, p1102

upon a thorough analysis of the MoA's evolution and operation, the factors that actually govern its width and principles that underpin it. This goes far beyond the working definitions supplied above. It can only then be demonstrated clearly that the amount of deference to local conditions permitted by use of the MoA does not amount to relativism. The MoA simply acknowledges that human rights protection must accommodate local conditions. Such a view would lead to a radically different interpretation of arguments such as Chan's above because if the extent of variation permitted by the MoA was minor and detailed rather than substantial and generalised, the existence of the MoA in Europe could not be used to argue against the universality of human rights globally.

4 Central and Eastern Europe

The importance of this examination into the MoA and the universality debate is that it represents a fresh look at the issue, commenced a decade since the Council of Europe's expansion began. Only now are cases from central and eastern Europe filtering into the jurisprudence of the European Court of Human Rights. Even for those who have been reluctant to acknowledge a plurality of local conditions in the Council of Europe, it is now a fact that cases from an

increasingly diverse collection of states have contributed to the European Court's workload.

It has in the past been suggested that the expansion of the Council of Europe will have negative implications for the defensibility of the MoA.²⁰ In particular it has been argued that the MoA will expand to such an extent that European human rights standards will be fundamentally lowered. To this it can be added that the MoA would become problematic if the Court narrowed it in such a way as to ignore the increased diversity of the Contracting Parties to the European Convention, adopting a "one size fits all" model which rode roughshod over the customs and history of the new members. Neither of these positions would be satisfactory.

Now that there is a substantial body of case law emanating from the newer Contracting Parties an examination of whether the Court has adopted either of these positions can be undertaken. However in the absence of a clearly conceptualised view about the universality debate and the MoA there would be no standard against which to judge the Court's recent activity, and any conclusions would be doomed to superficiality. Thus the conclusions of Part

²⁰ See the introduction to Part Three of the thesis for more details.

One and Part Two are used to examine the Court's recent jurisprudence in Part Three.

5 Summary

This thesis defends the MoA in principle and in the recent practice of the European Court. In so doing it addresses two principal concerns with the MoA; that it concedes too much to cultural relativism in principle; or secondly that the MoA has become less defensible since the Council of Europe expanded. In respect of the first concern it is demonstrated in Part One and Part Two of the thesis that the MoA is capable in principle of mediating between human rights and local conditions. In respect of the second concern Part Three of the thesis builds upon Parts One and Two to demonstrate that in practice the Council of Europe's expansion has not eroded the MoA's defensibility. The conclusion to Part Three offers a conclusion to the thesis as a whole.

Part One - The Theoretical Context of the Universality Debate

In the introductory chapter it was suggested that many critics of the margin of appreciation have failed to engage fully with the universality debate. In the expanded Council of Europe it must be acknowledged that the term “human rights” does not mean the same to everyone. Its meaning, origins, contemporary relevance and legitimacy are hotly disputed internationally. The key question is whether and to what extent human rights are universal.

In order to fully comprehend the universality debate and draw conclusions from it, it is necessary to explore the issue in its international context. This avoids the parochialism that tends to permeate discussion of local or cultural conditions in the Council of Europe. Much of the material therefore discussed in Part One relates to examples from international human rights law. In this way European human rights law can be seen as an element of international human rights law, rather than a subset to which the universality debate has no relevance.

By reference to international human rights it is argued in Part One that human rights are universal, but that societies have found different ways of embedding them into their own moralities. A difference in the local conceptualisation or crystallisation of human rights is not the same as

challenging the overall applicability of human rights to a particular society. Such local variation is thereby distinguished from outright cultural relativism. Chapter 2 concentrates on the problems presented by a relativistic view of human rights. Chapter 3 proposes means of more clearly understanding the interaction between local cultures and human rights standards from the perspective of “qualified universality”. Chapter 4 then applies those means to some important sources of tension in the context of human rights, and finds support in state practice for the conclusions reached.

Chapter Two

The Threat of Cultural Relativism to International Human Rights

Introduction

This chapter examines whether the culturally relativist stance proves that the human rights project is indefensible, and that the project should therefore be abandoned. Section A introduces the idea of cultural relativism in its historical context. Before examining some theoretical inconsistencies within cultural relativism in Section C, some further practical concerns are introduced in Section B. Taken together, these concerns and inconsistencies demonstrate that the price of unlimited cultural tolerance (inability to protect human rights) is too high, given the malleable nature of “culture” and the multitude of uses to which it is put. It is concluded in Section D that cultural relativism is rightly discredited.

A The basis of cultural relativism

The philosophical foundation for the Universal Declaration of Human Rights (UDHR)¹ is that, given all humans are essentially the same, the rights

¹ Adopted on 10 December 1948 by UN General Assembly Resolution 217A(III), UN Doc. A/810, at 71. See Eide *et al* (eds.). The Universal Declaration of Human Rights : A

that they hold as a result of being human are the same regardless of the culture into which the individual is born.² Human rights are universal. This is the fundamental justification for the ideal of universal human rights protection and for the attempts at realising this in international law both universally and in the Council of Europe.

Subsequent members of the United Nations (UN) have had to take the UDHR as they find it, regardless of the effect they might have had on its normative content had they been members when the UN General Assembly adopted it in 1948. This can lead to suspicion from the newer Member States of the UN that the UDHR is not relevant to their culture. For example in 1997 Tun Daim Zainuddin, Economic Advisor to the Malaysian Government, advocated review of the UDHR in order to “make it relevant for present times and to make it acceptable to all nations and peoples”.³ The

Commentary (1992), Scandinavian University Press: Oslo; Danieli, Stamatopoulou, Dias (eds.), The Universal Declaration of Human Rights : Fifty Years and Beyond, (1999) Baywood Pub. Co. for the United Nations: New York; Morsink, The Universal Declaration of Human Rights : Origins, Drafting, and Intent, (1999) University of Pennsylvania Press: Pennsylvania

² For an introduction to this justification for human rights, and to alternative justifications, see Shestack, “The philosophical foundations of human rights” in Symonides (ed.), Human Rights: Concepts and Standards, (2000) Ashgate / Dartmouth: Aldershot

³ Quoted in Cumaraswamy, “The Universal Declaration of Human Rights : Is it

implication of his statement was that it was at present “acceptable” only to certain sections of the international community. Thus while the UDHR is universal in its aims, some would argue that the norms implicit in it are only neutral to the extent that the drafters so considered them at the time of its drafting. These concerns are grounded in the theories of “cultural relativism”.⁴

Cultural relativists have argued that the concept of human rights is a western liberal construct and has no value outside of the western context. They contend that those who argue for universality fail to understand the unconscious bias of their position. Any system of social justice grounded in a given culture is a manifestation of the protection of human rights as conceptualised by that system, regardless of its substantive content. The rights protected by the system are *relative* only to the society from which they are derived and are incapable of universality. It is unjustifiable to impose upon one society a system of social justice deriving from another.

Universal?”, (1997) 18 HRLJ 476

⁴ Cultural relativism is itself not a single theory, but has proponents of various intricate versions of it. Strands of cultural relativism will be examined here as their differing implications arise, but in general this thesis takes the idea of relativism primarily as simply a philosophical opposition to universality.

The imposed system would be culturally alien and thus adherence to it could not be guaranteed.⁵

For many relativists, their scepticism of the neutrality of human rights derives from anti-colonialism. They see human rights as an unjustified extension of the “civilising” mission of the colonial era. In other words, for some relativists the idea of promoting universal human rights suggests the conversion of other cultures to a western orientation. The American Anthropological Association (AAA) warned against drafting a human rights declaration that perpetuated this in its influential 1947 “Statement on Human Rights”.⁶ In the history of western Europe and America, “economic expansion, control of armaments, and an evangelical religious tradition have translated the recognition of cultural differences into a summons to action”.⁷ This summons, otherwise known as “the white man’s burden” served as a justification for the West to dominate other societies in the name of “civilisation”.

⁵ see An-Na’im, “Human Rights in the Muslim World”, (1990) 3 *Harvard Human Rights Journal* 13

⁶ American Anthropological Association (AAA), “Statement on Human Rights”, (1947) 49(4) *American Anthropologist* 539.

⁷ AAA (1947), op. cit., supra p. 540

The origins of cultural relativism⁸ can be traced back to a response to Charles Darwin's theory of evolution. Anthropologists and others in Victorian England had eventually adopted Darwin's controversial challenge to religious orthodoxy on the origin of species. From this, they extrapolated the thesis that that cultures, as well as species, could evolve. The human race had gradually evolved to its position of superiority over other species, and was improving in its development. The culture of the West was the furthest along the scale of cultural evolution, and thus western man was superior to non-western man. In this way, human life had an inexorable progressive logic where the society of today is always an improvement on the society of yesterday. This can be termed “cultural evolutionism”.

In the 1890s and early 20th century, poor working conditions for the majority of people and vastly increased wealth of the few in the USA and UK gave rise to scepticism of human life's natural progression towards true enlightenment. Writers in the USA were beginning to suggest that the creation of man was more or less accidental, and that the Earth was but a tiny speck in an infinite universe. Rather than the developed West being

⁸ Hatch, Culture and Morality, (1983) Columbia University Press: New York; Kuper, Culture: The Anthropologists' Account (1999) Harvard University Press: Cambridge (Mass)

inherently superior to other "less evolved" societies, it seemed that all societies in fact were equal.

As the American study of anthropology evolved into an academic profession, scepticism of the West's superiority became cultural relativism. In particular, the work of Franz Boas of Columbia University is singled out as the strongest advocacy of cultural relativism. Elvin Hatch described Boas as chiefly responsible for developing cultural relativism in American anthropology.⁹ Boas was instrumental in promulgating such then controversial views as, for example, that different races were not naturally different in mental ability.

The development of, for example, a legal system so that one does not have to take the law into one's own hands was seen by cultural evolutionists as the inevitable result of intellectual development. The Boasians argued that most local traits, including systems of social justice, were not independently created on a continuous line of progression, but were for the most part a result of exchanges between cultures in response to local problems. This not only challenged the inferiority of non-western society, but undermined the claims to the innate superiority of the West and its cultural predilections. Once this argument is made, is not a large step to discern the principle that

⁹ Hatch (1983), *op. cit.*, supra p38

since no culture is more or less developed, no culture has the inherent capacity to evaluate the worth of any other. Thus it was the Boasian intent to remove such terms as "savage" and "primitive" from anthropological language. The aftermath of World War I saw Boasian scepticism prevail over traditional doctrines of cultural evolutionism until cultural relativism was seen as the orthodox basis of anthropology.

Students of Boas, including Ruth Benedict and Melville Herskovits further elaborated upon these views. Herskovits is widely credited with authoring the anonymous "Statement on Human Rights" by the AAA, discussed above, and his formulation of cultural relativism is examined in detail below. Both Benedict and Herskovits examined the "selectivity" of cultures. They observed that some societies had developed more or less complex versions of the same aspect of human life, for example ceremonial art or hunting tools. The reasons for this difference were, once again, not to be found in nature but in the historical conditions to which each different society was exposed. The same may be said of the value judgements that people make. They too are dependent upon the social context in which they are formed. Moreover since the selectivity of cultures was seen as established by empirical data, cultural relativism too was seen as an empirically proven fact, and not a philosophical argument.

To the extent that cultural relativism has been instrumental in the normalisation of ideas such as racial equality, it has been a useful collection of arguments. Likewise, relativism may offer a warning against the replacement of actual colonialism with cultural colonialism disguised by the notion of human rights. It is understandable that there would be revolt against the West and against its ideas of human rights if it seemed the West was engaged in a project of moral, political and economic hegemony.¹⁰ However, the promotion of universal human rights does not require the homogenisation of every culture.¹¹ Human rights do not become universal by coercion; it is a matter of recognising that human rights values *are* universal, albeit expressed in a variety of ways. Furthermore, the negative implications of cultural relativism for the evolving concept of human rights must be clarified.

Wherever there is a plurality of possible meanings for a given human right, then without the philosophical means to make value judgments about the desirability of different meanings or approaches, the relativist is compelled to tolerate any permutation of the right in question.¹² The relativist is

¹⁰ Freeman, "Human rights and real cultures", (1998) 1 NQHR 25.

¹¹ This is further discussed in Chapter 3.

¹² This type of relativism is what Teson has referred to as "metaethical relativism". (Teson, "International Human Rights and Cultural Relativism", (1985) 25 *Virginia Journal of International Law* 869, p886). Note however that Alison Renteln has argued that the



incapable of moral criticism because each differing morality is equally valid. Thus in the name of respect for local culture, the international observer of human rights abuses is robbed of his or her critical faculties. These views, beginning with the untenability of the relativist's call for tolerance if it must include toleration of the atrocities perpetrated by the Nazis in World War II have all discredited relativism. Simultaneously, the post-war consensus on movements towards protecting human rights demonstrated precisely the sort of universal values that the relativists had striven to disprove.

B The Risks of Relativism

B1 Real Cultures and State Cultures

Cultural relativism is presented as a philosophical position or ethical stance that promotes and preserves cultural variety. It is allegedly a theory of the peoples, designed to enhance the international community by preserving cultural variety in the spirit of mutual respect. This section identifies that in the present day it is often states rather than people or peoples that espouse

premise of this type of relativism (labelled by her as “ethical relativism as descriptive (factual) hypothesis”) does not actually imply tolerance. (Renteln, International Human Rights – Universalism Versus Relativism, (1990) Sage Publications: New York)

cultural relativity. Moreover it is argued that, in explanation of this, the relativist argument is actually a very state-centred one. It is bound to the preservation of state sovereignty and non-interference in domestic affairs. Finally it is suggested that there are in practice important reasons why governments might present their state's culture at the international level in a manner that differs from many of their peoples' views of their own culture.

According to Rosalyn Higgins, the relativist point is one that is,

“[...]advanced mostly by states, and by liberal scholars anxious not to impose the Western view of things on others. It is rarely advanced by the oppressed, who are only too anxious to benefit from perceived universal standards. The non-universal, relativist view of human rights is in fact a very state-centred view...”¹³

Exemplary of this point is the difference in the extent to which Non Governmental Organisations (NGOs) and states valued cultural and historical specificity over human rights during the preparations for the Vienna Conference on Human Rights. This very significant UN conference, held in 1993, was designed to re-affirm the principles of the UDHR and ensure the continued protection of human rights. The extent to which it achieved its overall aim is discussed in Chapter 3.

¹³ Higgins, Problems and Processes in International Law (1994) Oxford University Press: Oxford, p96

During the process leading to the conference, and at the conference itself, the Asian states adopted a position of tacit relativism whereas the Asian NGOs, as alternative representatives of the people, were decidedly universalist. The Asian states demonstrated their formal commitment to the universality of human rights,¹⁴ but also emphasised that human rights were socially and historically contingent. Each of the three regional groupings¹⁵ that had been established as part of the Conference's preparation had issued a declaration prior to the Conference. Paragraph 8 of the Asian Declaration stated the following:

“[Human rights] must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds”.¹⁶

This followed the statement in Paragraph 5 of the Declaration that asserted the need for continued respect of “the principles of respect for national sovereignty and territorial integrity as well as non-interference in the

¹⁴ 1993 Final Declaration of the Regional Meeting for Asia of the World Conference on Human Rights (Bangkok Declaration) UN Doc. A/CONF.157/ASRM/8 and A/CONF.157/PC/59, (7.4.1993)

¹⁵ The other regional groupings were Africa and Latin America & Caribbean. See Chapter 4 for further discussion of these regional declarations.

¹⁶ Bangkok Declaration (1993), Para. 8 (op. cit., supra)

internal affairs of other states”.¹⁷ Taken together, these show the potential for relativist concerns to be linked not to human rights concerns (i.e. respect for the cultures of others) but to the rights of the state *qua* state.

The NGOs, on the other hand, in the 1993 Bangkok NGO Declaration on Human Rights,¹⁸ appeared more comfortable with the notion of universal human rights, stating that:

“[A]s human rights are of universal concern and are universal in value, the advocacy of human rights cannot be considered to be an encroachment upon national sovereignty”.¹⁹

Using relativist rhetoric to recommend non-intervention in case of human rights abuses may result in the repression of the culture to which state policies are purportedly relative, in the pursuit of aims such as economic development. A similar split difference the views of states and of NGOs can be discerned over the respective priority of human rights and development as with human rights and culture. The NGOs supported the approach taken in the Conference’s final document, the Vienna Declaration and Programme of Action,²⁰ which by paragraph 10 declared *inter alia*:

¹⁷ Bangkok Declaration (1993), Para. 5 (op. cit., supra)

¹⁸ A summary is reproduced in (1997) 18 HRLJ 478

¹⁹ Bangkok NGO Declaration on Human Rights, Ibid, Section II

²⁰ UN Doc A/49/668 adopted June 25 1993

“While development facilitates the enjoyment of all human rights, the lack of development may not be invoked to justify the abridgement of internationally recognised human rights”.

China, on the contrary, declared two years later that:

“Though great achievements have been made in the last four years in promoting the development of human rights in China, some human rights situations are not so satisfactory *because of the limitations of history and level of development.*”
[emphasis added]²¹

The difference between the approaches of NGOs and states is instructive because it highlights the importance of recognising that the interests of states and people(s) sometimes diverge. One explanation for this is that what the state and the people mean by “culture” may be entirely different. When the state acts as a gateway to the culture of the people, what the state argues *is* the culture may not in fact be what the people would recognise as their own. The aspects of “culture” that the government choose to revive are sometimes either inauthentic or have been selected to further the interests of the ruling elite. A government’s reference to cultural renaissance is an easy way of encouraging the masses to acquiesce to

²¹ “Human Rights in China”, Information Office of the State Council of the People's

Republic of China, December 1995, Beijing,

<<http://english.peopledaily.com.cn/whitepaper/12forward.html>> (Accessed 10.12.2002)

situations to which they would otherwise object.²² Other inconvenient aspects of culture are ignored, yet in international relations the same governments give great weight to culture and attempt to use it as an untouchable reason for their failure to comply with human rights norms.²³

Michael Freeman²⁴ adduced two less controversial reasons why suspicion should be shown of “official” or state-described cultures, and why they might not be the same as “real cultures”. Firstly, governments are not actually in a good position to empirically identify the real culture - this is not one of government’s normal roles. Secondly the government is often socially distinct from many of the people it represents. This is simply the recognition that governments are often made of a certain elite. While this does not necessarily hamper representative democracy, it does suggest that in theory governments are not best placed to interpret culture.

In summary, despite cultural relativism’s foundations in anthropologists’ desire for the preservation of cultural diversity, it may become a state-centric theory – an excuse for the preservation of state sovereignty at the expense of human rights protection.

²² See Donnelly, Universal human rights in theory and practice (1989) Cornell University Press: New York, p120

²³ See Donnelly (1989) op. cit., supra

B2 Human rights abuses occur in all cultures

The notion and law of human rights are not simply used to criticise non-western states. That is, there are no cultures or societies that can lay claim to the natural and complete protection of unqualified human rights. Moreover many of the most heinous abuses of human rights are not culturally conditioned at all. Genocide for example is not a cultural practice, and has been perpetrated by a distressingly diverse collection of states, thus the practice of genocide does not appear to be linked to any particular political philosophy, culture or geographical region. While a specific instance of genocide may have its roots in cultural differences, genocide is not itself a substantive requirement of any given culture.²⁵

If the idea of human rights were truly a western one, then it could be expected that human rights be protected as a matter of course in the West. There would be no breaches of human rights in the West except where the society was, exceptionally, breaching its own rules. Some gross and exceptional violations of human rights can indeed be seen as violations of a western society's own standards, but something such as "institutional

²⁴ Freeman (1998), *op. cit.*, *supra* p27

²⁵ See Müllerson, Human rights diplomacy, (1997) Routledge: London, p80

racism” in the police force of the UK²⁶ is by its nature both widespread and in violation of international human rights standards. It would be optimistic at the very least to state that even racism itself is naturally and universally condemned in the UK.

Following the relativist argument, states in the West whose political and social priorities are accused of being forced on those countries with a different conception of human rights should not need another tier of human rights protection. This is because their domestic system of social justice (being an accurate representation of the values embodied in that society) should already afford the protection of human dignity needed. However this does not take into account the role that international human rights law can

²⁶ The use of this phrase in the UK can be traced to the report concerning the Metropolitan (i.e. London) Police Force’s mishandling of an investigation into the racist murder of a black teenager by white youths. See “The Stephen Lawrence Inquiry - Report of an inquiry by Sir William Macpherson of Cluny”, February 1999, Cm-4262-I. In its conclusion the report stated “The investigation was marred by a combination of professional incompetence, *institutional racism* and a failure of leadership by senior [police] officers.” [emphasis added] (para. 46.1). Para. 6.34 had previously defined “institutional racism” as, “[T]he collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture or ethnic origin. It can be seen or detected in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness, and racist stereotyping which disadvantage minority ethnic people.”

play in *promoting* certain societal goals that are not easily achievable (such as preventing racism). Secondly there *is* an overarching international system of human rights protection to which the West subscribes (and is held accountable to), therefore the link between western culture and automatic protection of human rights is proven to be somewhat tenuous. As Freeman has written,

“The defence of human rights, far from being a defence of the superiority of the West, implies severe criticism of many Western social practices and public policies”.²⁷

The European regional system for the protection of human rights is largely held to be the most advanced international mechanism for the protection of human rights, but the European Court of Human Rights still regularly finds against the Contracting Parties to it.

Closely allied to these observations is the oversimplification of western political philosophies. Rhoda Howard suggested that cultural relativists tend to associate one philosophy, liberalism, with the West, with scant regard for other western philosophies such as communism, corporatism and fascism that clearly contradict classic human rights norms.²⁸ Similarly,

²⁷ Freeman (1998), op. cit., supra p38

²⁸ Howard, "Cultural absolutism and the nostalgia for community" (1993) 15 HRQ 315

relativists may be too quick to contrast this simplified view of the West with an equally simplified view of the East. As Ghai has written,

“The notion that distinct “Western” and “Asian” perspectives exist is inaccurate, ahistorical, and leads to unhelpful polarities”.²⁹

Another inconsistency in the relativist argument is exposed here. Kausikan has made the following point:

“The self-congratulatory, simplistic, and sanctimonious tone of much Western commentary at the end of the Cold War and the current triumphalism of Western values grates on East and South-East Asians. It is, after all a West that launched two world wars, supported racism and colonialism, perpetrated the Holocaust and the Great Purge, and now suffers from serious social and economic deficiencies”.³⁰

The conditions that have given rise to the first part of this statement are regrettable - the dangers of over-stating human rights and the reaction this provokes against the human rights movement will be discussed in Chapter 3. For the purposes of this section, it is the second sentence of the quotation from Kausikan that is interesting, because the purpose of the article from which it is taken is to explain the origins of dissatisfaction within the Asian region of a purely western interpretation of human rights. Instead of agreeing that human rights abuses can exist today in all cultures, Kausikan

²⁹ Ghai, “Human Rights and Governance: The Asia Debate” (1994) *Australian Yearbook of International Law* 1, p21

raised these historic atrocities as a means to criticise the modern application of human rights protection. It is submitted that it is plainly inconsistent for relativists to point to the western nature or origin of human rights in the same breath as berating the West for its failure in the past to protect them. This is not an attempt to avoid the recognition of hypocrisy in contemporary human rights protection, but rather to show that those past abuses are actually evidence of the concept of human rights in the modern sense not existing fully at that time. The West indeed should not be “sanctimonious” about the protection of human rights in as much as it should be aware of its past and account for it. Nevertheless there has to be a point at which the instances raised by Kausikan should be seen as historical abuses rather than present hypocrisy.

Flowing from this is the recognition of some important distinctions between related activities. First is the acknowledgement that human rights abuses exist in all cultures and that therefore the international community should attempt to remedy this. Second is the recognition and criticism of hypocrisy in the present protection of human rights by states. Third is criticism of the historical conduct of states, groups of states, peoples or people. Fourth is the criticism of the notion of human rights by reference to the past misdeeds of the West (or any other group of states). Whilst the first three categories

³⁰ Kausikan, “Asia’s different standard”, (1993) 92 *Foreign Policy* 24, p34

are useful exercises, the last is an unhelpful result of their erroneous conflation.³¹

This section has shown that “culture” is too crude a tool by which to predict whether states are naturally attuned (or not) to the protection of human rights, because human rights abuses can be located in all cultures. As a result of this, the protection of human rights does not necessitate identifying one area or region of the world for particularly heightened scrutiny, because it is incumbent upon all states to protect human rights. The promotion of human rights thus does not amount to a sustained attack on any one culture.

B3 Conservatism and the idealisation of the *status quo*

Many opponents of universalism, or the UN’s efforts at human rights protection, idealise that which cultural relativism seeks to protect. Howard stated that relativists,

“[I]dealise the third world community, which exemplifies for Western culture the primitive Arcadia we have lost, even as the third world displays some of the worst human rights abuses of early modernisation.”³²

³¹ The article by Kausikan from which the quote discussed here is taken in fact did not conflate these issues, but directed its criticism towards the “selective, even cynical” promotion of human rights by all countries. See Kausikan (1993), op. cit., supra.

³² Howard (1993), op. cit., supra p329

This “wistfulness” and “idealisation” is all too often based upon anachronistic anthropology,³³ and therefore can be challenged empirically. The globalised international community is such that no one society is likely to be entirely isolated from all other societies. Advances in communications and transport technology have seen to that. Even the remotest society will be, whether the society attaches any significance to this, part of a state that deals with other states.

Two further points can be developed with relation to the idealisation of the third world. In preserving culture, relativism can result in the stifling of natural societal dynamics. In preserving the cultural *status quo* from alteration by human rights, relativism may result in the conservative preservation of anachronistic norms.³⁴ It is not only the protection of human rights that may influence traditions – they are inherently dynamic and subject to outside influences. Thus reference to the sanctity of culture may disguise political conservatism. This question of conservatism versus

³³ Howard (1993), op. cit., supra p326. See the remarks made about Alison Renten’s theory in Sections C2 and C3 infra.

³⁴ See Howard (1993), op. cit., supra p334

development is one for the political and social structures of every society, but should not be answered by hi-jacking the human rights debate.³⁵

At its most innocent, the preservation of traditional culture is naively nostalgic. In addition it exposes another dangerous political dimension to relativism: It serves the interest of the ruling elite to preserve the subservient politically under-represented “native” population. This is of course enjoined to the suspicion of “official cultures” and relativism as an excuse for states’ unrelated hostility to human rights. Donnelly has warned that,

“We must be alert to cynical manipulations of a dying, lost or even mythical past. We must not be misled by complaints of the inappropriateness of ‘Western’ human rights made by repressive regimes whose practices have at best only the most tenuous connection to the indigenous culture[...].”³⁶

Another point to be developed from Howard’s concern with the idealisation of the third world is that those actually living in this “primitive” and “peaceful” third world are for the most part only too ready to benefit from universal human rights standards. To elaborate on this theme, the individual being tortured would not, at least in rational utilitarian terms, have a difficult immediate choice between respect for the state’s “cultural” imposition of values causing the pain and the imposition of “western” human rights values

³⁵ See also Hatch (1983), op. cit., supra, Chapter 5

³⁶ Donnelly (1989) op. cit., supra p119

preventing it.³⁷ If human rights are seen as accruing to the individual purely and simply from the recognition of his or her humanity, and the locus of his or her culture is not divorced from the protection of human rights, then a state's intrusion upon his or her bodily integrity based on some form of cultural mandate is no more defensible than the enforced change of that culture by an external force. Human rights as an objective concept should be neither compromised by "western values" nor by "non-western cultural values". States must accept that human rights have their moral source in an individual's human dignity, and that while they are legally enshrined in international law and ought to be protected in domestic law, it is not for domestic law to limit them.³⁸ Higgins drew this to its logical conclusion in dismissing reliance on the doctrine of domestic jurisdiction as "unsustainable".³⁹ Cultural relativism is thus naïve, conservative, and presents an anachronistic view of the role of international law.

³⁷ Yash Ghai has argued however that even the simple avoidance of pain is not in itself a stable basis from which to derive a fundamental core of human rights because in some cultures forms of self-immolation or self-injury are practised as expressions of dissent or mourning (Ghai (1993), *op. cit.*, *supra*).

³⁸ This is not to say that in practice states do not pass domestic laws that actually purport to do this.

³⁹ Higgins (1994), *op. cit.*, *supra* p96

C Cultural Relativism and Theoretical Problems

It appears that for the human rights activist cultural relativism is problematic. It appeals to the very tolerance of diverse forms of life that supporters of human rights often claim to promote, but also discourages action actually being taken to protect human rights. It can lead to the politicisation of the human rights debate by elites keen to keep their power, it over-estimates culture's role in the commission of human rights abuses, and ultimately favours a Westphalian concept of state sovereignty. Furthermore it presents a static, nostalgic and uncritical view of culture. However cultural relativism contains critical flaws in its logic, so the conundrum presented by it can be avoided.

Reference to the AAA's "Statement on Human Rights" was made above. Driven by anti-colonialist feelings, the AAA argued that respect for individual human rights must include respect for and tolerance of cultural differences because the individual realises his or her personality through his or her culture. This proposition is validated, the AAA argued, because there is no technique for qualitatively evaluating cultures. Finally, these differing cultural values are self-evident to the societies in which they are held. The values that it might be tempting to enshrine in a "universal" human rights declaration therefore may only seem "eternal verities" because it has been

taught that we should regard them as such. The AAA thus advised the drafters of the UDHR that any declaration of human rights must “embrace and recognise the validity of many different ways of life”.⁴⁰

Alison Dundes Renteln has labelled the version of relativism formulated by the AAA “ethical relativism as prescriptive (value) hypothesis”.⁴¹ It begins with the observation that people in different societies may have different conceptions of right and wrong, or have different conceptions of human rights. However ethical relativism as prescriptive (value) hypothesis goes beyond this mere description of difference, and can be explained by reference to the idiomatic metaphor that “one man’s meat is another man’s poison”. For ethical relativism as *prescriptive* (value) hypothesis it is not simply that what one man *thinks* of as meat is *thought of* as another man’s poison, but that what *is* one man’s meat *is* another man’s poison. Thus it is prescribed that no man should be forced to eat his “poison”, and that one society’s morality should not be forced upon another’s. Each society’s morals (or conceptions of “meat”) are valid only for that society, therefore in preference to acting in accordance with alien morals (and risk eating “poison”) the individual is compelled to act in accordance with the morality of his or her own society.

⁴⁰ AAA (1947), op. cit., supra p542

⁴¹ Renteln (1990), op. cit., supra p72

Fernando Teson has instead used the label “normative relativism”, for this theory, where persons, “according to their cultural attachments, ought to do different things and have different rights”.⁴² Such versions of relativism can all be traced back to Boas, Herskovits, and the AAA’s “Statement on Human Rights”.⁴³

It is demonstrated in the following sections that there are significant logical inconsistencies in ethical relativism as prescriptive (value) hypothesis. Moreover, efforts to reconstitute cultural relativism in such a way as to avoid these inconsistencies are bound to fail.

C1 Cultural relativism and logical inconsistency

Having now more clearly defined cultural relativism, three potential theoretical problems with it are examined. Firstly, as Fernando Teson writes, “If it is true that no universal moral principles exist, then the relativist engages in self-contradiction by stating the universality of the relativist principle”.⁴⁴ Similarly Alison Dundes Renteln argued that ethical

⁴² Teson (1985), op. cit., supra p887

⁴³ See Section A, “The basis of cultural relativism” above

⁴⁴ Teson (1985), op. cit., supra p888

relativism as prescriptive (value) hypothesis is susceptible to the charge of self-refutation because, “it asserts the absolute prescription that all prescriptions are relative”.⁴⁵

Secondly, in rejecting universalism, relativists often actually retain for themselves another implied universal principle – that one ought to act in accordance with the principles of one’s *own* culture or group⁴⁶ (in the absence of any other guiding principles). In other words, the relativists have not accounted for the basis of their argument; that people are obedient to the content of their culture. The relativist argument can only be made if it is universally accepted that people do indeed act relative to their own culture – at which point the theory again contradicts itself. In order to avoid this second charge of logical inconsistency, the relativist must somehow justify why one ought to act in accordance with the principles of one’s own moral group.⁴⁷ This would permit the proposition that other than the one principle retained, there are no *other* universal moral principles (except relativism itself).

⁴⁵ Renteln, (1990), op. cit., supra p72

⁴⁶ Teson (1985), op. cit., supra p888, Howard (1993), op. cit., supra

⁴⁷ Teson (1985), op. cit., supra p 889

One way to begin the process of identifying a basis would be to employ philosophical techniques such as those based upon the Rawlsian “original position” and “reflective equilibrium”.⁴⁸ Stripped of any knowledge about his or her own condition (gender, age, racial background, and social status), the individual is in the “original position”. Unencumbered by such values, and wary of prejudicing any interests held by it, the individual would formulate a neutral concept of justice. In doing so the individual would adopt the Socratic method of testing and modifying each concept of justice until one was found that either accorded with its initial convictions, or was adopted precisely because his or her initial convictions have been proven wrong. To arrive at such a state would be to achieve reflective equilibrium.

It is not the place to discuss Rawls’ ideas or his critics in detail. It can however be asserted that the idea of the original position does not in truth rescue relativism. This is for the simple reason that it is unlikely that the only universal principle identified in reflective equilibrium would be that one must act in accordance with the rules of one’s own moral group. Thus in attempting to defend their one universal principle, the relativist may find

⁴⁸ Rawls, A Theory of Justice, (1972, 1978 reprint), Oxford University Press: Oxford, esp. pp48-51. For analysis see Schwartz, “Relativism, reflective equilibrium, and justice”, (1997) 17(1) *Legal Studies* 128

universal support for others.⁴⁹ Once the “original position” is adopted, the “relativist” could not prevent him or herself from arriving at a universal Rawlsian conception of justice.

The third theoretical criticism of relativism relates to the notion of tolerance. If it is conceded that there is no universal meaning to “human rights”, the existence in relative harmony of the varying conceptions of “human rights” necessitates their tolerance. Indeed this is the core argument of the relativists. It is not that humans are not somehow valued in some societies, but that the expression and content of that value differs. Thus we should respect the choices made by unfamiliar systems of social justice because they promote what is valued by that particular society. This reveals another fundamental logical inconsistency in the cultural relativist argument. It is the derivation of an “ought” from an “is”⁵⁰ in violation of the Humean dichotomy between normative and descriptive propositions.⁵¹ The observation that cultural values vary from society to society, and that therefore what is held worthy of protection also varies, is an observation of a factual situation. The “call for tolerance”, as Hatch termed it, is, on the other hand, a normative value judgment about what ought to be. A

⁴⁹ Teson (1985), op. cit., supra p889

⁵⁰ See Hatch, (1983), op. cit., supra p67

⁵¹ Hume, A Treatise of Human Nature (1740), Bk. III Ch.1, paragraph 36

normative proposition such as “we ought to tolerate diverse cultures” can not be inferred from a purely factual statement such as “there are diverse cultures”.

The difference between descriptive and normative statements can be explained as follows. Physical laws describe causal connections that can be empirically proven. Normative propositions, by contrast, indicate what ought to happen as a result of particular event. Take the following proposition: “When a gunman shoots his victim in the head at point-blank range, the victim will die.” An understanding of ballistics or medicine may uncover limited circumstances when this statement can be disproved, but such understanding will still be based upon empirically observable facts. The sentence therefore accurately described what happens in such situations, is as much as the cause (shooting someone in the head) leads directly to the effect (probable death of the victim).

The first proposition can be contrasted with the following: “When a man shoots another in the head he will face a lengthy prison sentence.” This second proposition is of a different order. Whereas it can be proven that in most circumstances, physical laws guarantee death from bullet wounds to the head, no physical law guarantees that the perpetrator of the crime will go to prison. In other words, the second statement prescribes what *ought* to

happen rather than describes what will happen. Conversely, it would be wrong to state that as a result of being shot in the head, the victim *ought* to die. The empirically calculated probability of the victim's death has nothing to do with its moral desirability.

John Tilley has amplified the logical inconsistency of relativism's call for tolerance.⁵² For Tilley, the essence of relativism was that it restrains the imposition of one culture onto another. Relativism's main attraction is thus its assumed promotion of tolerance. However, relativism is flawed because to refrain from *projecting* our views of morality on other people does not prevent us from actually morally *coercing* or morally *victimising* them. The theoretical or normative exercise of holding a value does not necessarily translate into physical action. It would be consistent for a slave-trading colonial power to accept relativism and grant that they cannot project their morality onto the peoples they enslave, whilst continuing to actually enslave the peoples of the areas colonised. To observe that the slaves and those who enslave them may disagree in their judgement of the morality of slavery only concedes that there are limits to moral judgments. According to Tilley, that observation would not compel the colonial power, either legally or morally, to discontinue its policy of slavery. As Hatch has put it, "The fact

⁵² Tilley, "Cultural Relativism" (2000) 22 HRQ 501, p542

of moral diversity no more compels our approval of other ways of life than the existence of cancer compels us to value ill health”.⁵³

In summary, relativism’s call for tolerance is its most attractive feature, yet the theory is self-refuting on two counts, and does not logically entail tolerance in any case. Without implying tolerance, cultural relativism appears to be a redundant concept, at least in the context of the human rights debate. The warning that not all apparently self-evident truths are in fact neutral is the most important lesson to learn from relativism. However if tolerance is not wedded to this observation, then there is no injunction to refrain from acting upon demonstrably partial considerations.

C2 Additive Universalism

Alison Dundes Renteln has partially addressed the issue of relativism and tolerance in the following way. Cultural relativism can still “serve as a vehicle for the dissemination of the idea [of tolerance]”.⁵⁴ The theory is, according to Renteln “undeniably a useful one to employ for the advancement of the cause of tolerance”.⁵⁵ Her implication was that

⁵³ Hatch (1983) op. cit., supra p68

⁵⁴ Renteln (1990), op. cit., supra p74

⁵⁵ Renteln (1990), op. cit., supra p73

somehow (and without justification) tolerance is a weak form of social good, notwithstanding that it is not required by relativism.

This tenuous link between relativism and tolerance was however not the central point of Renteln's thesis, which is now examined in some detail. It is a relatively modern attempt to extract a workable theory from the mire of competing conceptualisations of cultural relativism. In contrast to those who use relativism as a basis for undermining the protection of human rights, Renteln has sought to show that relativism can itself form the basis for protecting human rights. Renteln's aim has been to avoid the logical inconsistencies of cultural relativism identified above, and show that there is another important role that relativism can play, even if it does not imply tolerance. Importantly, this would address also the fundamental problem that it was suggested relativism poses for the human rights advocate – that even anti-human rights behaviour must be tolerated if it is culturally ingrained in a particular society.

Renteln would agree that some forms of cultural relativism, such as the AAA's "Statement on Human Rights", are indeed logically inconsistent in their implicit requirement of tolerance. Indeed reference to her critique of the AAA was made above. But, she has argued, the notion of tolerance is merely itself a value that the western relativists hold as a result of their own

enculturation. Renteln defined enculturation as “the idea that people unconsciously acquire the categories and standards of their culture”.⁵⁶

It is quite possible to be a relativist and reject tolerance if one’s own culture does not favour the tolerance of others.⁵⁷ Valuation of tolerance is merely another western idea presumed to be universal. Those who include tolerance in their conception of relativism do so because they are western, not because relativism actually demands it. In other words, the assumption that tolerance is meant to flow from relativism is incorrect, and therefore the logical inconsistency identified by Hatch and others does not arise.

Having thus avoided the logical problems associated with tolerance, Renteln has also demonstrated that relativists can engage in critique of anti-human rights behaviour. The core of her argument was that relativists can, she argued, engage in moral criticism because the theory should be seen as *descriptive* rather than *prescriptive*. It is descriptive of the differences that occur in each society, but does not prescribe their tolerance. It is merely a tool to allow the identification of strongly held beliefs that appear neutral to the believer but in fact derive from their particular cultural circumstances. Importantly, this does not preclude the identification of similar ideas in

⁵⁶ Renteln (1990), op. cit., supra p74

⁵⁷ Renteln (1990), op cit., supra pp74-76

different societies (“cross-cultural universals”), but these can only be identified empirically. If similar ideas about human rights could be located in different societies, they could legitimately be protected by international law without objection. Where those commonly identified cross-cultural universals are not protected by particular governments, the relativist may engage in criticism.

Renteln has applied her theory to the empirical identification of retributive justice tied to proportionality in various societies. She has used this as a basis for legitimating international prohibition of torture and genocide. Instead of referring to the practice of finding cross-cultural universals as part of the relativistic perspective *per se*, some call it “additive universalism”.⁵⁸

C3 The weakness of additive universalism

Renteln accepted that some societies sometimes contravene their own standards.⁵⁹ This is perfectly compatible with the recognition of a schism between “official” and “real” cultures, and the idea that often “cultural” human rights abuses find no legitimacy by reference to the culture that

⁵⁸ E.g. Howard (1993) *op. cit.*, *supra* p320

⁵⁹ Renteln (1990), *op. cit.*, *supra* p78

purports to condone them. These points were discussed above. However, given that (governments of) some societies regularly breach their own societal rules, it would be difficult to determine whether what is observed is in fact a “universal” or not. There may well be cross-cultural universals that cannot be identified empirically because in practice they are not observed.

As Theodore Meron⁶⁰ has argued, in the context of the formation of customary international law, violation of a norm does not detract from that norm’s binding nature. The crime of murder is no less a crime because it is frequently committed. Likewise it is where human rights protection is absent (and where therefore their existence cannot be identified empirically) that they should be most vigorously promoted. Rhoda Howard has suggested that to assume the irrelevance of that which is not being respected,

“[A]ssumes that those who are denied rights do not have the intellectual capacity to articulate their suffering and to grasp the fundamental principles of justice that human rights imply”.⁶¹

Additive universalism is fatally weakened because it cannot proactively

⁶⁰ Meron, Human Rights and Humanitarian Norms as Customary Law, (1989), Oxford University Press: Oxford

⁶¹ Howard (1993), op. cit., supra p318

promote human rights where they are not already observably protected. Like the more conventional formulation of cultural relativism discussed above, it preserves the *status quo* at the expense of both human rights and natural social dynamics. It is both conservative and naïve.

Related to this is Michael Freeman's argument that cultural relativism, or additive universality, favours the moral majority over the weak. Additive universality could not criticise a state's culturally justified anti-human rights practices if the consent of the victimised could be observed. The valuation of free assembly and fair elections could not be held out as a cross-cultural universal if sections of the population were shown to believe in the one-party state, for example in the name of national stability. This respect for anti-human rights practices however assumes that the oppressed are aware of alternatives to their position and have had the opportunity to express their preference for them.⁶² It is the people who are denied this opportunity by the moral majority who would benefit the most from the robust protection of human rights.

Fernando Teson has sought to explain why some would be satisfied with the apparent bias against the weak that relativism or additive universality contains. They hold the view that less developed states should be excused

⁶² Freeman (1998) op. cit., supra p31

from protecting human rights (including those of domestic minorities outsiders see as victimised). From a far right wing perspective, democracy and the protection of human rights are only tenable for superior cultures, and from the left it could be argued that the idea that respect for cultural identity abroad encompasses respect for any form of government.⁶³ Both these justifications for relativism are, Teson has argued, “elitist”. To deny that everyone is deserving of human rights, and to make the division as to the extent of that denial along the boundaries of national or ethnic groups “is fundamentally immoral and replete with racist overtones”.⁶⁴ Again, as with the formulations of relativism discussed already, additive universality presents naïve or paternalistic arguments for the preservation of anachronistic norms.

In addition to conservatism and elitism, a further weakness of the strand of relativism identified as additive universality is that it is only selectively relativistic. If the search for cross-cultural universals was to be a truly neutral or relativistic exercise, then nothing could guarantee against finding cross-cultural support for anti-human rights practices. For example Renteln

⁶³ Presumably these would not enquire whether the form of government is in fact grounded in culture, or is itself another type of imposition. As Teson has remarked, “It is seldom the people who choose to have dictators; more often the dictators decide for them” (Teson (1985), op. cit., supra p895)

⁶⁴ Teson (1985), op. cit., supra p895

used data from the British colonial period⁶⁵ to find support for the international prohibition of genocide. The examination of data from the same period concerning the colonial activities of Great Britain would find empirical support for a good deal of racial intolerance. The systemic flaw here is comparable to the problematic application of Rawlsian reflective equilibrium identified above. The flaw is not eradicated by limiting the empirical research to finding support (or not) for one particular right, as Renteln attempted, because the exclusion of other rights is itself a choice that is not self-evidently neutral.

In conclusion, even Renteln's admittedly elegant formulation of relativism is inadequate as a basis for the protection of human rights. It contains the same weaknesses as other forms of relativism, and gains little by detaching itself from the notion of tolerance. Renteln's additive universalism neither convincingly undermines attempts to protect human rights in international law, nor presents an alternative method to justify that protection.

⁶⁵ The first British Empire focussed on the Caribbean and North America, in the 17th and 18th centuries. India came under direct rule in 1858, though the Empire had had a presence there since the 17th century. The second British Empire was at its strongest in the late 19th and early 20th century, and was focussed primarily on Asia and Africa. (See e.g. "British Empire," Microsoft Encarta Online Encyclopaedia <<http://encarta.msn.com>> ; <<http://encarta.msn.com/encnet/refpages/RefArticle.aspx?refid=761566125>> (Accessed 8.1.2003)

C4 The reality of relativism and tolerance

It is important to realise that tolerance does not in practice follow from positions commonly identified as grounded in relativism. As can be seen in the contemporary human rights debate, this is not at all what many of the purported cultural relativists are proposing. Those who seek to stake out a particular alternative conception of human rights based on their own cultures often do so by criticising the foundations of the “western” traditional concept embodied by international human rights law. This frequently involves highlighting the excessive individualism of the West and exhibiting a preference for the communitarian traditions of the East. The suggestion is not only that the concept of human rights is of limited application in the East, but also that it is inherently inferior to the eastern concept.

Bilahari Kausikan⁶⁶ has argued that there is still room for debate in the meaning of human rights, identifying some sources of the problems that face the implementation of human rights in the East. For example, human rights flow from the western tradition, but “[M]any East and South-East Asians

⁶⁶ Kausikan (1993), *op. cit.*, *supra*

Isaac Nguema, a former President of the African Commission on Human Rights, has supported the call for greater collaboration on establishing the meaning of human rights. Faced with difficulties of reconciling the different systems for conceiving and protecting human rights, and the undesirability of imposing one system over all others, he suggested different human rights systems should be reconsidered,

“[I]n a spirit of fraternity, justice, love and enthusiasm, in the light of experience and the lessons of others, not with the intention of proposing that others adopt our vision of the world, but to expand this vision with the help of others[.]”⁷⁰

He made this proposition in relation to problems faced by the African Commission.⁷¹ To move forwards in the protection of human rights in Africa requires dialogue. However, in suggesting that there is room for

⁷⁰ Nguema, “Human Rights Perspectives in Africa - The Roots of a Constant Challenge”, (1990) 11 HRLJ 261, p270

⁷¹ Nguema ((1993), *op. cit.*, *supra*), has established that many of the provisions of the ACHPR stem from the UDHR. However, the latter document has not been “warmly received” by many African states. Most of the article cited is given to explaining the factors that contribute to this African hostility. Nguema's aim was to gain more support for ACHPR, through a partial redefinition of the meaning of the human rights contained in it. The article is not decisive as to whether, in order for the African Commission to be more successful, the human rights in the ACHPR should diverge in their interpretation from those in the UDHR, or whether instead the global vision of human rights needs to be re-oriented as a whole.

some variation in the meaning of human rights in a new independent Africa, Nguema asked rhetorically:

“Are not the elderly seen in the West as old wrecks better left on the margins of society, and babies seen as useless extra expenses? Is this the state to which Africa aspires, the Africa in which old people are respected and revered and children taken as a sign of the continuity and vitality of the group?”⁷²

Nguema’s call for a “new universality”, even apparently based on dialogue, contained unhelpful stigmatisation of alternatives to his proposition that do not have the appearance of tolerance. It is this very lack of tolerance or respect between different cultures and religions that the promotion of international human rights should address, and which relativism demonstrably does not.

D Conclusion

In order to set the scene for the later discussion of respect for local conditions in an expanded Council of Europe, it has been necessary to examine the challenges faced by the interaction of human rights and local cultural values. As noted in the Introduction the margin of appreciation has been criticised for signalling a retreat to cultural relativism both in principle and in the Court’s recent practice. It has therefore been necessary to

⁷² Nguema (1993), *op. cit.*, supra p268

examine the nature of relativism in order to begin answering these criticisms.

Cultural relativism can be seen as the main theoretical opposition to the universality of human rights. The cultural relativists' view that colonialism should not be replaced by cultural colonialism is well founded, but can be disassociated from relativism itself. For this thesis, supporting the notion that human rights are universal is a matter of *recognising* that human rights *are* universal, not of ensuring that human rights are exported eastwards from some vague notion of a civilised West. Stated as such, universal human rights protection does not amount to cultural colonialism.

The main threat of cultural relativism is that, starting from its assumption that human rights are alien to non-western cultures (and that therefore human rights are not, *de facto*, (yet) universal), the West and East have an equal right to promote their *own* conceptions of the good. For the West this might include protecting human rights. For other parts of the world it might not. Each side should refrain from foisting their set of ideas upon the other, and therefore the promotion of human rights is seen as a cultural invasion. Relativism thus constrains attempts to protect human rights by elevating culture above them, and by denying that cultures other than those in the West contain values similar to those expressed as human rights.

It has been demonstrated in this chapter that cultural relativism need not prevent the promotion of universal human rights because, as a theory, it is replete with dangers and inconsistencies. The dangers were shown to include the high-jacking of respect for cultural diversity by governments bent on preserving their own power and views of culture. Relativism tends to contrast stereotypical versions of the East and the West, and can be both conservative and naïve. Moreover cultural relativism is logically inconsistent; a blow from which even Renteln's formulation of additive universality fails to recover. A final inconsistency, linked to this, is that in practice those who espouse relativity tend to simultaneously promote their own conceptions of the good over others in a manner wholly inconsistent with the tolerance that relativism is deemed to imply. As such, cultural relativism should neither dissuade attempts to protect human rights, nor should additive universality form an alternative basis for their protection.

It can be concluded thus far that since relativism is so problematic, the margin of appreciation would be rightly criticised if it indeed amounted to a relativistic principle. However, only one half of the equation has been examined in this chapter. It is clear that relativism should not inform the practice of the European Court of Human Rights, but it is still not clear what constitutes universality. It is the purpose of the next two chapters to

demonstrate a theoretical framework within which universal human rights may be protected, without denying the evident and desirable diversity between cultures or tending towards unlimited tolerance of anti-human rights practices.

Chapter Three

The universality human rights: a reappraisal

Introduction

Chapter 2 introduced the debate about human rights' universality. It is a debate that human rights lawyers throughout the world must appreciate, including within the Council of Europe. It was demonstrated that cultural relativism neither successfully undermines the need to protect universal human rights in international law, nor should it form an alternative platform on which to re-constitute the protection of human rights.¹ The European Court of Human Rights would be rightly criticised if the diversity it acknowledged amounted to its adoption of a radically relativistic stance. This chapter demonstrates that it is possible to acknowledge local conditions and cultural diversity without being relativist.

This chapter reappraises what is meant by “universality”. A rejection of cultural relativism should not signal reversion to cultural evolutionism, which is what the criticisms of the margin of appreciation identified in the Introduction to this thesis seemed to suggest. It is argued that by rejecting

¹ E.g. In the manner suggested by Renteln. See Renteln, International Human Rights – Universalism Versus Relativism (1990), Sage Publications: New York

absolute or radical notions of universality and relativity, human rights can and should include the accommodation of not-unlimited regional and local characteristics. From the premise that human rights are universal it is still possible to allow specific “qualifications” that accommodate local or cultural conditions. It is this category of qualifications to universality that the margin of appreciation permits.

Section A of this chapter clarifies that the acceptance of universal human rights norms does not necessitate the enforced homogenisation of previously different cultures. Indeed many of the concerns felt by non-western states are derived from a misapprehension about the nature and extent of human rights. In order to illuminate the relationship between human rights and particular cultures the works of Jack Donnelly and Michael Walzer are examined in Sections B and C. It is here that the idea of “qualified universality” is clarified.

A Universality, not uniformity

Cultural relativists have argued that the concept of human rights is not only an historical product of the West, but that its philosophical foundations are located in idiosyncratically western beliefs. The exportation of those values at the expense of others should be discouraged because such moral

domination would be a replacement of, and every bit as unjust as, colonialism. Jack Donnelly has referred to such an exportation of Western views as “radical universalism”², and it clearly approaches the logic of cultural evolutionism. Radical universalism arrogantly assumes western authorship of the notion of human rights and thus, in their advocacy, the superiority of western views.³

In response to this it is submitted that, as argued in Chapter 2, the acceptance of human rights as a valid standard does not involve the importation of alien values, but rather a recognition that similar values exist in all societies.⁴ This process of recognition stretches only as far as the notion of human rights itself, and not to other values that may be promoted alongside them in the West. Thus the promotion and protection of universal human rights does not require the universal acceptance of every perceived western value. Even universal human rights are locally qualified. In this way, if human rights and cultural variety are demonstrably compatible, then

² Donnelly, Universal human rights in theory and practice (1989), Cornell University Press: New York, p109

³ See Dembour, “Following the movement of a pendulum: between universalism and relativism”, in Cowan, Dembour and Wilson (eds.), Culture and Rights: Anthropological Perspectives (2001), Cambridge University Press: Cambridge

⁴ This is distinct from additive universalism because it does not start from a relativistic premise.

a reaction against human rights based on a perceived threat to non-western culture is unjustified.

Failing to understand this, Raimundo Pannikar⁵ has argued that the concept of human rights is not *yet* universal, but there is nothing to prevent it from *becoming* so. Moreover the means by which Pannikar has argued this might transpire misunderstands the purpose of human rights. He has suggested that human rights could only become universal if the western culture that he believed gave birth to them became a universal culture.⁶ This, he argued, may be the cause of a “certain uneasiness”⁷ by non-westerners afraid of losing the identity of their own cultures.

The root cause of this “uneasiness” is not necessary to the protection of human rights. The idea of universal human rights is premised on the basis that human rights *are* universal, which is not the same as “western and *capable* of universalisation”. To protect human rights does not entail the importation of “western values” along with human rights because human rights are not exclusively western. International human rights law recognises minimum standards for the protection of universal human rights;

⁵ Pannikar, “Is the Notion of Human Rights a Western Concept?” (1992) 120 *Diogenes* 75

⁶ Pannikar (1992), *op. cit.*, *supra*, p84

⁷ Pannikar (1992), *op. cit.*, *supra*, p84

it is not a complete programme for the way humans should live their lives. Recognising that human rights are universal does not involve the displacement of such “comprehensive doctrines”⁸ as Islam or Hinduism,⁹ because human rights deal with only a tiny aspect of that covered by a comprehensive doctrine.¹⁰ Similarly there is more to western value systems, of which there are many kinds, than the protection of human rights.

Those who are suspicious of the cultural baggage of protecting human rights must not misunderstand this important point. Many aspects of culture, for example family ties, art or customs, have little to do with human rights, and the ability to practice them may even be enhanced if human rights are

⁸ Freeman “Human rights and real cultures” (1998) 1 NQHR 25, borrows this term from Rawls, Political Liberalism, (1993) Columbia University Press: New York. A comprehensive doctrine contains all the values needed within society, both ethical and political. This includes personal matters, relationships and the family. Rawls was concerned to distinguish his political conception of justice from a comprehensive doctrine because, by dealing only with political morality, it did not concern itself with all of what is needed to live life. See Rawls, (1993) op. cit pp11-15

⁹ Freeman (1998) op. cit., supra, p36

¹⁰ This is not to suggest that in a matter of detail there will never be a conflict between human rights and religion, but rather that such a conflict (even if resolved in favour of the protection of human rights) would not undermine other aspects of religion or any other comprehensive doctrine.

consciously protected.¹¹ By contrast, if those who seek to promote human rights do so without the recognising that universality does not require uniformity, then the reaction against the notion of human rights will be exacerbated.

A2 The wrong comparison?

The “uneasiness” that led to Pannikar regarding the protection of human rights as requiring a universal culture can be explained by what this thesis terms the “wrong comparison” fallacy. The “wrong” comparison is the comparison between the values of *certain societies or states* and the values of *other societies or states*. The “correct” comparison is between the values of certain societies and what *international human rights law* requires.¹² The following quotation of a Singaporean government official, writing in his personal capacity, is an example of the “wrong comparison”:

“[Some] of the demands of these human rights activists would be unacceptable under any conditions. Most Asian societies would be shocked by the sight of gay rights activists on their streets. And, in most of them, if popular referendums were

¹¹ Howard “Cultural Absolutism and the Nostalgia for Community” (1993) 15 HRQ 315, p337

¹² Müllerson, Human Rights Diplomacy (1997), Routledge: London p79

held, they would vote overwhelmingly in favour of the death penalty and censorship of pornography.”¹³

In truth, international human rights law does not prohibit the censorship of pornography *per se*¹⁴ and the core texts of all the main international *and* regional human rights treaties make exceptions in their provisions on the right to life for lawful execution.¹⁵ While the freedoms of association and assembly *are* protected by international human rights law,¹⁶ the diplomat

¹³ Speech made by Mr. Kishore Mahbubani, Deputy Secretary, Ministry of Foreign Affairs of the Republic of Singapore. The speech is quoted in full in a letter dated 29 April 1993 from the Permanent Representative of the Republic of Singapore to the Coordinator of the World Conference on Human Rights, (A/CONF.157/PC/63/Add.28). Whilst the Singaporean government requested that the speech be issued as a document of the fourth session of the Preparatory Committee of the World Conference on Human Rights, they also stressed the opinions given were done so in a personal capacity and “should not be read as a reflection of the Singapore government’s views”.

¹⁴ Naturally there are conflicts between freedom of expression and restraint by governments of the production and distribution of pornographic material, but it is the role of international human rights law to ensure a reasonable balance is achieved between these interests; there is no international human right to pornography! Note the 1923 Convention for the Suppression of the Circulation of and Traffic in Obscene Publications and its 1947 Protocol. These treaties are not, strictly speaking, human rights treaties.

¹⁵ See Art. 6 ICCPR, Art. 2 ECHR, Art. 4 AmCHR, Art. 4 ACHPR

¹⁶ Freedom of Association: Art. 22 ICCPR, Art. 11 ECHR, Art. 16 AmCHR, Art. 10 ACHPR. Freedom of Assembly: Art. 21 ICCPR, Art. 11 ECHR, Art. 15 AmCHR, Art. 11

appeared more concerned with the subject matter of the demonstrations (gay rights) than the demonstration itself. In international human rights law little has yet been agreed upon with regard to the free-standing rights of homosexuals. Even in Europe, where there is some social acceptance of homosexuality,¹⁷ the European Court and Commission of Human Rights have in the past left much discretion to the Contracting Parties in establishing the extent of legal restrictions on homosexual activity.¹⁸

The Singaporean diplomat was compelled to express his scepticism of the human rights project because he saw it as interfering with certain convictions strongly held by Asians. The relativist would take this as evidence of a schism existing between the values that underpin international

ACHPR.

¹⁷ In Europe some individual states have moved towards the recognition of gay marriage, or at least a “registered partnership” with a legal status similar to marriage e.g. Denmark, the Netherlands, France and Belgium. An interesting recent article that explores the lack of European consensus on gay marriage in the context of the EU is Scappucci, “Court of First Instance Refuses to Recognise Swedish ‘Registered Partnership’ Rights and Duties” (2000) 6 EPL 355

¹⁸ Indeed the European cases concerning homosexuality tend to involve use of the “margin of appreciation”. See *Dudgeon v UK* (1982) 4 EHRR 149 (Decided 22.10.1981); *Norris v Ireland* (1991) 13 EHRR 186 (Decided 26.10.1988); *Laskey, Jaggard & Brown v UK* (1997) 24 EHRR 39 (Decided 19.2.1997); *ADT v UK* (2001) EHRR 33 (Decided 31.7.2000)

human rights law and Asian values. However international human rights law need not be the cause of that particular scepticism. Not everything that (western) states advocate as social goods are actually required by international human rights law, thus disagreement with some policies or aspects of the “good life” that are typical in the West should not justify abstention in the protection of human rights by non-western states. Surya Subedi re-affirmed this in identifying that while the Netherlands recognises same-sex marriages, other nations are not by reference to *international human rights law* compelled to follow suit:¹⁹

“Only those rights that have been more or less universally accepted, and that have been recognised by the international community as part and parcel of human rights, are in fact human rights. Asian states are under no obligation to import every Western value, even if described in the rights language of the West”.²⁰

This statement does not suggest that Asian states are free to reject human “rights” as enshrined in international treaties, but that sometimes in conversation, advocacy or diplomacy, some western officials use “rights language” to describe matters that are not actually covered by international human rights law. This leads to a second aspect of this “wrong comparison

¹⁹ Subedi, “Are the principles of human rights ‘Western’ ideas? An analysis of the claim of the ‘Asian’ concept of human rights from the perspectives of Hinduism” (1999) 30

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²⁰ Subedi (1999) op. cit., supra p68

fallacy”, which is equally as important as first. The argument so far suggests that some states object to the human rights project by virtue of their misapprehension of the extent and content of international human rights law. In addition, as suggested above, some human rights advocates aggravate the misunderstanding by simply overstating the meaning and extent of human rights. Some *legal* rights recognised in the West, or in given countries, are couched as if they are part of the body of universal, internationally recognised, *human* rights. The standard for comparison between the conduct of states towards their peoples must be the content of international human rights law, not multifarious national constitutional principles. These limits to the statement of human rights merely qualify or clarify universalism rather than recommend relativism.

It seems that both the Pannikar’s “uneasiness” and the “wrong comparison” stem from the same misunderstanding of what is entailed by the protection of human rights. Many modern day relativists mistakenly assume that the prevailing ideology in international human rights law is much the same as cultural evolutionism, equating universal human rights with a new universal culture. In reality, the protection of human rights does not desire the homogeneity of all societies into a western model (even assuming there is such a thing as a single “western model”) because, realistically, universal human rights are to some extent defensibly qualified by their local

expression. Without going so far as relativism, international human rights are poised to accept and promote cultural diversity. In this sense, the universality of human rights does not prescribe the uniformity of cultures. There is a considerable margin left to states from different historical and cultural backgrounds within which their own interpretation of, or qualifications to, human rights may exist.

B Donnelly and the “Substance”, “Interpretation” and “Form” of Human Rights

Having stated the general principle that universality recognises some local qualifications, it is necessary now to clarify how universal human rights and particular cultures interact. Jack Donnelly has argued that three distinct levels of cultural relativism can be identified with respect to the human rights debate.²¹ These are relativity in the “substance” of rights, in the “interpretation” of rights, and in the “form” of rights. Each successive level of variation deals with a less fundamental type of variation, thus relativity of the “form” of a right’s protection concerns differences in its implementation at the most detailed level, whilst the “substance” of a right concerns differences about its general idea.

²¹ Donnelly (1989) op. cit., supra p110

The substance of a right could include such fundamental principles as "everyone has the right to life". The interpretation of that right might include questions as to whether right to life begins at birth or at conception. The form of that right might include the regulation of abortion clinics' advertising, opening hours and hygiene standards.

A "radical *universalist*" would seek the universalised and uniform protection of human rights, even down to their form. Clearly this would involve the modification of many locally, culturally and historically conditioned responses alongside the agreement to protect the substance of given human rights. It would necessitate homogeneity in the protection of human rights at a very detailed level (such as health regulations in abortion clinics, to use the same example). In other words it would be a wholly unqualified conception of universality. This position would imply the superiority of the imported approach over the local interpretation and form of human rights, and serves to replicate the faults of cultural evolutionism. It is a position that would engender the negative reaction to the concept of human rights discussed above, and confirm the fears of those who have made the "wrong comparison".

By contrast, a "radical *relativist*" would argue that there are permissible cultural variations even to the substance of rights. Even if this species of

relativism pre-supposed acceptance of the notion of human rights, the substance of those rights could be so various as to render the notion entirely useless. With no standard other than local culture to judge the validity of claims to a particular definition of a right's substance, all definitions must be permitted. This leads to indifference towards the fate of others.²² The radical universalist must abstain from criticising definitions of human rights that, for example, even concede too much respect to the sovereignty of states. Radical relativism goes far further than merely qualifying universality and is, for the reasons already discussed in Chapter 2, flawed.

The radical relativist would rely upon each observed society's *internal* evaluation of particular practice's validity. Only where the practice is internally condemned may the relativist outsider condemn it. It is here where the examination of a particular cultural practice's claims to authenticity may be useful in establishing the distinctions between "real" and "state" cultures.²³ However, where the practice is internally accepted, the radical relativist may not engage in criticism. The radical *universalist*, by contrast, would subject each practice to his or her own un-modified *external* evaluation, condemning each practice that did not accord with the

²² Dembour (2001), op. cit., supra

²³ See Chapter 2, Section B1 "Real cultures and state cultures"

values he sought to universalise, right down to the form of a particular right's implementation.

In opposition to both of these "radical" positions, Donnelly has defended what he has termed "*weak* cultural relativism", which not only allows but demands respect for the expression of cultural values in the form and interpretation of human rights – but not as to their substance (in the sense defined above). This does not undermine the universality of human rights because,

"Rights that vary in form and interpretation still may be 'universal' in an important sense if the substantive list of rights can be said to have considerable international normative universality".²⁴

Donnelly's attempts to fashion a route between radical universalism and radical relativism result in the advocacy of a conception of human rights where some differences (mainly in "form") are permitted. Human rights are universal, but this does not require absolute uniformity in the way that they are protected. Such a view conceives of a margin within which different cultural expressions of human rights exist. Donnelly's approach could avoid the "unnecessary reaction" discussed above, but does not fall into the tolerance trap of relativism.²⁵ It thus provides some guidance in

²⁴ Donnelly (1989) op. cit., supra p117

²⁵ This trap is discussed in Chapter 2. The relativist is compelled to tolerate (and therefore

determining which interferences with human rights defensibly qualify universality, and which amount to unjustifiable cultural relativism.

Donnelly further elaborated his views when he defined a hard case scenario as one where the impugned “cultural” practice was of great significance to both the insider and the outsider. He attempted to solve such hard cases using the following steps. Firstly, as suggested in Chapter 2 of this thesis, the "cultural claim" must be demonstrably true, rather than rooted in state interests.²⁶ If it is not, then human rights should prevail. Secondly, there is enough evidence of international normative consensus to form a presumption that human rights will normally prevail over generally anti-human rights practices. Whilst specific exceptions may exist,

"[O]ne would have to show that the underlying cultural vision of human nature or society is both morally defensible and incompatible with the implementation of the 'universal' human right in question"²⁷

implicitly condone) practices that contain anti-human rights practices such as Nazism. A further element to this is that, having accepted that relativism may promote a more limited form of tolerance (e.g. of other ways of life that do not interfere with human rights), such tolerance cannot be guaranteed in practice because relativism confuses descriptive and normative propositions.

²⁶ Note the discussion of “state cultures” and “real cultures”; see Freeman, (1998) *op. cit.*, *supra*

²⁷ Donnelly, (1989) *op. cit.*, *supra* p122

In modern society it would be very difficult, though not impossible, for these conditions to be met. In this way the protection of human rights' substance can largely be maintained and most permissible claims for cultural modification of human rights can be dealt with at the level of form. Alternatively there is a tough burden of proof incumbent upon those who would claim an alternative substantive means of protecting an aspect of human dignity. Donnelly concluded that,

"It may be necessary to allow limited cultural variations in the form and interpretation of particular human rights, but we must insist on their fundamental moral universality. Human rights are, to use an appropriately paradoxical phrase, relatively universal".²⁸

This approach to levels of relativism and universality is an attractive one. It suggests that there is a defensible position between radical universality (or cultural evolutionism), and cultural relativism. The heterogeneity of cultures can be respected without robbing the international observer of all critical faculties. This is useful in recognising and promoting the qualified universality of human rights.

Other aspects of Donnelly's thesis are not without complications, however, and must be distinguished. Differences in form and differences in substance may be clear conceptually, but in practice may be much more difficult to

²⁸ Donnelly (1989) op. cit., supra p124

maintain. Is the right agreed upon in substance discovered or derived from the collection of cross-cultural evidence of its respect in a variety of forms? Or is the right's existence at the level of substance logically prior to its elaboration in a variety of interpretations and forms?

It could be expected that Donnelly would argue that narrowly defined human rights such as those listed in the Universal Declaration of Human Rights (UDHR)²⁹ are the source of human rights' substance. According to Donnelly the concept of human rights is "an artefact of modern Western civilisation".³⁰ Somewhat controversially, he has argued that "most non-Western cultural and political traditions lack not only the practice of human rights but the very concept."³¹ Donnelly therefore sought to criticise the efforts that have been made to identify locate human rights-style values in diverse and non-western cultures.³² Whilst Donnelly's ideas of substance, interpretation and form are useful, it is submitted that claiming western propriety over not only the nomenclature of human rights, but also the less

²⁹ UN General Assembly Resolution 217A (III) UN Doc. A/810, at 71 (1948)

³⁰ Donnelly, "Human Rights and Human Dignity: An analytic critique of non-western conceptions of human rights", (1982) *76 American Political Science Review* 303, p303

³¹ Donnelly (1982) op. cit., supra p303

³² In other words, Donnelly would not agree with attempts to find "homeomorphic equivalents" of human rights in non-western society. See further Chapter 4, Section A, "Homeomorphic equivalence".

clearly defined values that they promote, invites criticism from non-westerners and should be avoided.

Donnelly's apparently extreme views on the philosophical parentage of human rights can be understood alongside another set of his arguments. For Donnelly, the concept of "human rights" was but one tool amongst many that could, if used properly, lead to the protection of "human dignity".³³ There are other paths that could lead to the realisation of human dignity,³⁴ which for Donnelly was a meta-value, more important than even human rights. Each path to the protection of human dignity, including the protection of human rights, should be subject to a full and fair analysis on its

³³ On human dignity see Beyelefeld & Brownsword, "Human dignity, human rights and human genetics" (1998) 6 MLR 661. The authors have identified that in many human rights treaties human dignity is motivated as the source for human rights (which is broadly comparable to Donnelly's argument), but that in another more specific sense human dignity can become a species of human right itself. The context of Beyelefeld & Brownsword's argument is personal autonomy and the right to profit from the use of one's own body. They argue that the notion of human dignity, if properly conceptualised, can help resolve complicated questions surrounding new technologies such as the cloning of genetic material, or even humans. Further discussion of this topic is outside the scope of this discussion of universality.

³⁴ There are clear similarities with Rhoda Howard's argument that human rights and "social justice" are not equivalent concepts, and that a system of social justice is not necessarily a system based upon human rights. See Howard (1993) *op. cit.*, *supra*, p319

merits. Donnelly's argument was that despite the western doctrinal parentage of human rights, such an analysis would demonstrate that human rights are the only means by which human dignity can be successfully protected in the modern world:

"Economic, social and cultural intrusions into, and disruptions of, the traditional community have removed the support and protection which would "justify" or "compensate for" the absence of individual human rights."³⁵

There are elements of truth in Donnelly's argument, but it is close to the universalisation arguments of Pannikar discussed above. It is agreed that human rights can be seen as an historical reaction to the excesses of the modern state, and so where non-western states make the transition to a largely centralised state the ill to which human rights were originally directed may become more apparent. However, this would appear to be true only of civil and political rights, whereas the idea of human rights has come to represent a wider range of rights including that are economic, social and cultural, or collective in nature. Moreover the utility of the whole range of human rights in the face of the modern state and globalised economy must not be made at the exclusion of acknowledging that human rights values exist in non-western cultures. A clearer explanation of the relationship between levels of qualifications in human rights protection must be sought,

³⁵ Donnelly (1982), *op. cit.*, supra p314

which simultaneously stresses that societies other than those in the West value the interests promoted by human rights.

In summary, Donnelly's explanation of the form, interpretation and substance of human rights is valuable, as is his scale running from radical universality to radical relativism. It is important to recognise a margin within which exist variations in the protection of human rights, but these must be qualifications located in the form and interpretation of human rights that do not detract from the demonstrable universality of their substance. Moreover this must not be a substance over which the West claims sole parentage. A way of further elaborating this is by reference to "thick" and "thin" concepts of human rights.

C Walzer and "Thick and Thin" Accounts of Human Rights

In his book "Spheres of Justice"³⁶, Walzer argued against the Rawlsian principle that a single universal concept of justice could exist. Each society will, within its own sphere, value particular goods³⁷ in its own way. Those goods can only be distributed "justly" within that society if their distribution

³⁶ Walzer, Spheres of Justice: a defence of pluralism and equality (1983), Basic Books: New York

³⁷ The word "goods" in this context denotes "social goods" as well as commodities.

is in accordance with the value ascribed to them. Each society should respect another's conception of distributive justice, or else the prioritisation of one sphere of justice over all others would amount to neo-colonial domination. Walzer also argued that there are different spheres of justice within societies too, and also that the valuation of particular goods will change from time to time. The separation of these spheres promoted similar tendencies as the doctrine of separation of powers. Walzer's later work on "thick" and "thin" accounts of morality serves as a limitation upon the relativistic tendencies of his earlier work on "spheres of justice".

In his more recent work,³⁸ Walzer has argued that moral terms have "minimal" and "maximal" meanings; that "thin" and "thick" accounts of them can be given.³⁹ Thick and thin moralities serve different purposes at different times, working in conjunction rather than contradicting each other. They exist contemporaneously. In order to explain the meaning of this dual account of morality, Walzer described having seen footage of anti-Communist protesters in Prague in 1989, carrying banners bearing slogans such as "truth" and "justice". When they waved their banners, Walzer

³⁸ Walzer, Thick and Thin: Moral argument at home and abroad (1994), University of Notre Dame Press: Notre Dame

³⁹ This element of Walzer's work is not unique, though his interpretation of it is. See e.g. Geertz, The Interpretation of Cultures (1972), Basic Books: New York, Chapter 1, "Thick Description: Toward an interpretive theory of culture".

argued that they were not relativists – it was their hope that everyone, in any place in the world, should associate with and support their cause. The moral concerns here were expressed “thinly” and were of broad international appeal.⁴⁰ However, after the “velvet revolution”⁴¹ in November 1989 the same people, still presumably as clear in their pursuit of truth and justice, were more immediately concerned with what was best for the ordering of their society in the post-Communist era, in the light of their history and culture. In addressing the issues of designing or modifying a healthcare or education system, or whether Czechoslovakia should remain as a single state, they did not insist with the same passion that the rest of the world endorse or reiterate their decisions.⁴² These moral considerations were part of a complex thick morality bound up with the shared history and experiences of the actual people living in that particular society.

The idea of a moral minimalism does not, for Walzer, describe an emotionally shallow or substantively minor morality. He has argued that,

"[Moral minimalism] is morality close to the bone. There isn't much that is more important than "truth" and "justice", minimally understood. The minimal demands that we make on one another are, when denied, repeated with passionate

⁴⁰ Walzer (1994), op. cit., supra, p3

⁴¹ So called because it took place peacefully. See Chapter 8 for further discussion of the anti-communist revolutions of central and eastern Europe.

⁴² Walzer (1994), op. cit., supra, p4

insistence. In moral discourse, thinness and intensity go together, whereas with thickness comes qualification, compromise, complexity, and disagreement."⁴³

Walzer has warned that however intuitively appealing it may be, it is incorrect to suggest that pre-existing thinly constituted universal moral principles have, over time, been elaborated "thickly" in the light of specific historical circumstances. This differentiates Walzer's views from other moral philosophers who have also used the terms "think" and "thin" in this context. Morality is instead,

"thick from the beginning, culturally integrated, fully resonant and it reveals itself thinly only on special occasions, when moral language is turned to specific purposes."⁴⁴

For example there is in the world some agreement on the importance of living together in relative harmony, but in times of upheaval (or shortly afterwards) people may be moved to express some of the core elements of these previously un-stated assumptions. Applied to the human rights context it can be argued that the adoption of the Universal Declaration of Human Rights (UDHR) was the expression of thin aspects of morality stated in the aftermath of World War II, but which actually existed as elements of differing particular thick moralities well before this.

⁴³ Walzer (1994), op. cit., supra, p6

⁴⁴ Walzer (1994), op. cit., supra p4

However for Walzer this example would present another complication.

Walzer argued,

“[M]inimalism when it is expressed as Minimal Morality will be forced into the idiom and orientation of one of the maximal moralities. There is no neutral (unexpressive) moral language”.⁴⁵

Thus it is important to recognise that though the principles embodied by the UDHR may be universal, their expression as rights is not necessarily easily recognisable to everyone. Nevertheless, Walzer’s position suggests that a value may be universal even if it is expressed in a manner that suits one particular group. In this way the Liberal Enlightenment can be seen as the development of language that led to the modern notion of human rights. However, this does not preclude the existence of those same values where the language has not developed in the same way. It is therefore very important, as is discussed in the following chapter, that most states have explicitly accepted the idea of human rights law notwithstanding that they may be expressed in a western idiom.⁴⁶

The recognition that human rights can be understood thickly and thinly is significant because in all but the paradigm cases of human rights abuse,

⁴⁵ Walzer (1994), op., cit., supra p9

⁴⁶ See Chapter 4, Section C2, “The Vienna World Conference on Human Rights”

human rights protection needs more than the examination of compliance with simple imperatives. It requires also an understanding of the multitude of actors in society, each with their different interests and values. National and international institutions must recognise that therefore, in the first place, the social and political institutions of particular societies must deal with much of the actual protection of human rights. This is the prescription of a gamut of positive action by all states to protect human rights, coupled with international institutions recognising some realistic limits to their own competence. According to Walzer:

"Rights-in-detail, rights thickly conceived, belong only to concrete men and women, who are [...] individuated in society. Since I know little about their society, I cannot foist upon the Chinese this or that set of rights [...]. So I *defer* to them as empirical and social individuals. They must make their own claims, their own codifications [...], and their own interpretative arguments"⁴⁷ [Emphasis added]

It is in this "deference" to particular states' own perceptions of what measures are needed to restrict interests that would otherwise be protected by the universal thinly-constituted conception of human rights that qualifications to universality find concrete expression. The deference advocated here recognises a margin within which different thickly-constituted efforts at the protection of human rights exist. Human rights are

⁴⁷ Walzer (1994), op. cit., supra pp60-61

generally universal, but in becoming embedded in society some particularities related to cultural issues affect the substantiation of human rights and result in *specific qualifications*. These specific qualifications to human rights must be examined but may be due deference. It is further demonstrated in Part Two that the “margin of appreciation” perfectly suits this understanding of human rights and local conditions.

Joseph Chan has argued that these cultural expressions exist as substantive issues of “political morality”. Whilst there are universal basic principles of human rights, Chan has argued that there are no universal principles of political morality to interpret them. Each society must therefore develop its own political morality suitable for itself in order to embed human rights in that society.⁴⁸ Chan has argued that Asian states have yet to fully recognise the need to create their own substantive political moralities.⁴⁹ They need to do this so that they squarely address the complex questions that the protection of human rights raises. It is thus not enough that a particular long-held belief appears to clash with a general human rights norm. This apparent clash must be examined in detail in the first place by the state where the clash arises, and interests of all the parties involved, including the

⁴⁸ Chan, “Thick and Thin Accounts of Human Rights: Lessons from the Asian Values Debate”, in Jacobsen & Bruun (eds.), Human Rights and Asian Values (2000), Curzon: Richmond

putative right-holder(s) and duty-bearer(s), must be clearly and explicitly balanced. Because this balancing process is so complex and the relevant interests idiosyncratic of the particular state, non-Asian states should not assume that a comparable balance achieved in their own state would be the suitable for one of the Asian states. Chan's use of the term "political morality" is thus distinct from, but related to, its use by Rawls.

It should be stressed that for this thesis, the particular qualifications to which deference is due as a result of their expression within a particular "thick" account of human rights could never legitimately contradict those minimum imperatives that constitute the universal "thin" account. As Chan has argued, the political morality that each society is required to formulate in order to ground human rights into its society must, in addition to doing justice to the historical situation of that society and capturing the contemporary values and aspirations of the people there, also meet the minimum standards of human rights.⁵⁰ A "thick" account of human rights will be linked to social structures and legal institutions that in many cases pre-date even the UDHR. However, as Donnelly too has argued,⁵¹ in the present time it may well be the case that the social structures that previously

⁴⁹ Chan, (2000) *op. cit.*, *supra*, p65

⁵⁰ Chan, (2000) *op. cit.*, *supra*, p61

⁵¹ Donnelly (1982) *op. cit.*, *supra*.

guaranteed human dignity are not sufficient for this any more. Thus they should be modified in order to better protect human rights (as an alternative vehicle to the protection of human dignity). Despite the deference due to elements of it, identifying the need to elaborate and respect a “thick” account of human rights therefore should not be seen as a justification for conservatism.⁵² Moreover qualifications based upon particular cultural values within a thickly constituted human rights system should only be permitted for *genuine* cultural values, i.e. the distortion of cultural particularities such as discussed in Chapter 2⁵³ should be prevented. Statism disguised as cultural sensitivity must be avoided, as must the idealisation of the third world. These are the justifications for requiring a practical and theoretical limitation to the extent of qualifications to universality.

D Conclusion

This chapter has clarified the meaning of universality for this thesis, stressing that it is a “qualified universality.” Such can avoid the negative reaction to human rights based upon a misconception of their scope and the “wrong comparison” indicated above. Likewise if it is acknowledged that

⁵² Note the conservative nature of relativism discussed in Chapter 2, Section B3

“Conservatism and the idealisation of the *status quo*”.

⁵³ See Chapter 2, Section B1 “Real Cultures and State Cultures”.

universal human rights protection is open to some variation in its application to particular states or societies, then the particular qualifications permitted by use of the margin of appreciation need not be taken as undermining the notion of universality.

Qualifications to human rights can be explained by reference to the Walzerian thesis of "thick" and "thin" accounts of morality as applied to human rights. Each thick account of human rights will display some local characteristics. The negative reaction to human rights is unnecessary because in protecting human rights it is not the intention to universalise a particular (e.g. western, European, or British) thickly-constituted concept of human rights. As noted with respect to the "wrong comparison fallacy", not every western value is part of human rights protection. Instead it should be ensured that as societies operate their *own* thickly-constituted concept, they remain true to the thin account in which human rights find their most concrete expression.

The advantage of locating qualifications to human rights in their form or interpretation, within the elaboration of a thickly-constituted concept of human rights in a given society, is that it leaves no room for residual objections to the universality of human rights thinly-constituted. The starting point is that human rights *are* universal even though there may be

specific qualifications to them. This is significant because as demonstrated in Part Two, when a Contracting Party to the European Convention invokes its margin of appreciation it does so from within the European human rights system – it does not attempt to argue that “human rights” do not apply to that state.

Instead the type of permitted qualifications to human rights must be detailed and particular, rather than dogmatic and general. The paradigm discussion of potential qualifications to universality would concern determinations about situations where cultural interests conflict with *particular* human rights as relied on by *particular* (groups of) people in a *particular* instance. For states that have hitherto had reservations about the cultural baggage of human rights, this would certainly allow the explicit weighing of the interests at stake. If scrutinised adequately, any proportionate departure from a human rights norm at this level should be rightly seen as a particular justified *exception* rather than a vaguely culturally-based *breach*. This approach seeks to be inclusive, encouraging genuine discussion by all sides on the importance of culture within human rights protection, and might avoid resort to the polarised, stereotypical, and largely unhelpful generalisations that prevent some societies from recognising elements of their “thick” morality in human rights thinly-constituted. It is demonstrated

in Part Two that the margin of appreciation in the European jurisprudence plays precisely this role.

Chapter Four

“Thick and Thin” analysis in theory and practice

Introduction

In order to properly understand the universality debate, Part One has so far discussed the threat to universal human rights posed by theories of cultural relativism. Cultural relativism should be avoided on practical and theoretical grounds, but it has also been argued that that whilst human rights are universal this does not preclude their respecting local values. Universality is necessarily and defensibly qualified. This is significant for the legitimacy of the margin of appreciation in European human rights law.

This chapter illustrates the extent to which it can be recognised that human rights are universal, even with respect to issues that have often been raised to undermine their universality. Moreover the conclusions reached in Chapter Three are shown to be supported by state practice as evidenced by the Vienna Declaration and Programme of Action. This chapter is therefore designed to complete the normative basis on which Part Two’s examination of the margin of appreciation is founded. It is thereby proven that without resorting to unrestrained relativism international human rights are poised to recognise and accommodate local values and conditions.

The specific issues discussed in Sections A and B of this chapter are religion, the role of duties to society and the idea of the person itself. The utility of finding “homeomorphic equivalents” of human rights in diverse societies is stressed. It is demonstrated that none of the issues discussed threaten the notion of qualified universality, or the existence of a thinly-constituted international concept of human rights.¹ They can be conducted within a framework of international human rights that recognises the interplay of human rights thickly and thinly constituted. The idea of thick and thin accounts of human rights is further applied to these examples, and in Section C support for the resulting conclusions is identified in state practice.

A Homeomorphic equivalence

In Chapter 3 Jack Donnelly’s argument that human rights should be exported even though they have an exclusively western origin² was rejected³

¹ See Walzer, Thick and Thin: Moral argument at home and abroad (1994), University of Notre Dame Press: Notre Dame

² Donnelly, “Human Rights and Human Dignity: An analytic critique of non-western conceptions of human rights”, (1982) 76 *American Political Science Review* 303

³ See Chapter 3, Section B, “Donnelly and the “Substance”, “Interpretation” and “Form” of Human Rights”

because of its tendency towards arrogance and cultural evolutionism. Chapter 2 discussed Alison Renteln's attempts to empirically demonstrate a limited universality of human rights based upon what was termed "additive universalism"; in truth a version of cultural relativism and therefore flawed logically and practically. Instead of either approach this section explores various attempts to locate human rights in non-western cultures or religions, and which thereby seek to demonstrate the universality of human rights.

The arguments examined in this section try and find the roots of modern human rights notions in specific cultures and religions, thus countering the argument that human rights are alien to those cultures and are not universal.⁴ This is conceptually distinct from additive universalism because it reverses the "burden of proof". Additive universalism starts from the premise that values are relative until it can be empirically demonstrated that particular values are cross-cultural universals. The search for homeomorphic equivalence starts from the premise that values are universal, whilst acknowledging specific qualifications in their local expression. This section does not propose to survey for itself the existence of human rights ideas in a

⁴ See e.g. Renteln, International Human Rights – Universalism Versus Relativism (1990) Sage Publications: New York; See Chapter 2, Section C2, "Additive Universalism" for discussion of Renteln's work.

wide variety of religions, but merely identifies that there is a body of research attempting to do this.

The perceived lack of human rights' cultural legitimacy in given societies leads to their infringement, as their basis is seen as alien and the mechanisms for their protection as an unwarranted outside imposition. In discussing human rights and Islam, Abdullah Ahmed An-Na'im has argued that while there are significant differences between the Qur'an and international human rights instruments, nevertheless similar ideas may be discerned. This is not the "transliteration" of human rights as seen by the West into other cultural languages, nor a search for analogy, but instead a search for a homeomorphic equivalent.⁵ This process is the identification of a particular social tool that fulfils the same respective functions as the protection of human rights. Evidence of such a social tool could be used to demonstrate that strongly held values in Islam are in fact recognised and protected by international human rights, challenging the assumption often made by westerners and some Islamic leaders that human rights and Islam are antithetical. A minimum level of agreement would further evidence a thinly-constituted universal concept of human rights, and many of the differences that supposedly prevent Islamic societies from accepting human

⁵ Panikkar, "Is the Notion of Human Rights a Western Concept?" (1992) 120 *Diogenes* 75

rights standards could be accommodated as qualifications to universality whilst the concept becomes explicitly and thickly embedded in society.

The Shari'a universal system of law and ethics which is to be obeyed by Muslims can be seen, according to An-Na'im, as "an historically-conditioned" interpretation of the Islamic Scriptures.⁶ Religious texts are, he has argued, like legal texts and can be open to a number of interpretations. The interpretation of those texts is a human, not a divine, process. While former interpretations of the Islamic law may well conflict with human rights norms, it is possible to locate homeomorphic equivalents of human rights in Islam. Islamic faith does not, according to An-Na'im, prohibit the promotion of the values inherent in human rights discourse because they can be located in Islamic tradition. This affirms the argument that human rights, thinly-constituted crystallised from pre-existing values held in a variety of societies, including those based upon Islam.⁷

⁶ An-Na'im, "Human Rights in the Muslim World" (1990) 3 *Harvard Human Rights Journal* 13

⁷ An-Na'im has conceded that only a minority of contemporary Muslims accept the possibility of such a radical reinterpretation of the Islamic Scriptures. Shaheen Sardar Ali, by contrast, has argued that because the Qur'an was itself revealed progressively over 23 years, displaying an evolution of ideas over that period, progression appears to be the very philosophy of the Qur'an. See Ali, "The conceptual foundations of human rights: a comparative perspective" (1997) 3 *EPL* 261

Surya Subedi has attempted to show that Hinduism and human rights are not in conflict. His argument is that while the West is largely responsible for the creation of the UN, the ideas behind this are not themselves exclusively western in origin. He goes on to find support for a wider notion of human rights derived from ancient Hindu writings.⁸ Again, this suggests a strong link between the identification of homeomorphic equivalents of human rights and the truth of the argument that human rights values are drawn from values that exist in all societies.

Some caution must be shown in attempting to locate a foundation for human rights in given religions.⁹ It was observed in Chapter 2 that human rights abuses have occurred in all cultures¹⁰ – it is true then that human rights abuses have also occurred within all religions. Other problems also flow from basing human rights on religion. For example it is impossible to find definite regional perspectives on human rights based on religion, because of the plurality of religions in any given region.¹¹ “Assuming that religion

⁸ Subedi, “Are the principles of human rights ‘Western’ ideas? An analysis of the claim of the ‘Asian’ concept of human rights from the perspectives of Hinduism” (1999) 30

California Western International Law Journal 45, p49

⁹ Müllerson, Human Rights Diplomacy (1997), Routledge: London, p76

¹⁰ See Chapter 2, Section B2 "Human rights abuses occur in all cultures"

¹¹ Yash Ghai has made this point with specific reference to the plurality of religions in Asia,

does indeed influence a people's perception of human rights", Yash Ghai has written, "then one would have to concede that there would be a plurality of perspectives, not one".¹² If religions are taken as the starting point for the legitimacy of human rights, then because of the diversity of religions and the fact that religions *are* "comprehensive doctrines",¹³ the resulting conception of human rights would be too broad and fraught with internal contradictions. Religions can provide only an unstable foundation for human rights because their own content is so often contested. More generally, in many places religion "takes its coloration"¹⁴ from politics. This means that deriving human rights from religion might be problematic because of the difficulty in separating the implications that some religions appear to have for human rights (but which actually stem from unrelated political considerations), from those that do follow from the religion itself. Finally, basing human rights upon religion assumes that all people are comfortable being defined by their religion.

but it is submitted that this point can be extrapolated to cover any regional grouping. Ghai, "Human Rights and Governance: The Asia Debate" (1994) *Australian Yearbook of International Law* 1, pp. 15-16

¹² Ghai (1994) op. cit., supra p16

¹³ Rawls, Political Liberalism, (1993) Columbia University Press: New York

¹⁴ Ghai (1994) op. cit., supra p15

There is nevertheless some use in noting similarities between religious ideas and human rights because, not only does it encourage familiarity with the concept, but it also bolsters the argument that human rights *are* universal. As An’Naim acknowledged it is the perceived “alienness” of human rights as much as the content itself that causes a negative reaction against them in some non-western cultures. In order to progress towards the actual protection of human rights the “religiosity”¹⁵ of human rights in general can be noted i.e. that there are religious-type ideas in the human rights treaties. Whilst there may be significant differences in form and interpretation of human rights in these societies, the identification of homeomorphic equivalence evidences that the substance remains the same. Many remaining differences or qualifications can be explained as existing in each society's particular thickly-constituted conception of morality.

The ability to find in given religions equivalents to the imperatives contained in human rights treaties is explained because the relationship between the thickly-constituted particular moralities (or comprehensive doctrines such as religions) and the universal thinly-constituted concept of human rights, is that the latter is drawn from the former. The values inherent in the UDHR were drawn from the various thickly-constituted

¹⁵ Ali (1997), *op. cit.*, *supra* p271

conceptions of morality, giving rise to what was identified as a thinly-constituted conception of human rights.

The importance of homeomorphic equivalence is one of guaranteeing familiarity with the concept of human rights in order that they are not seen as a threatening imposition, but rather a different way of expressing certain values. Most of Section A has concentrated on the attempts to demonstrate that non-western societies contain values that are amenable to the protection of human rights, in order for the states that represent those societies to participate fully in the international human rights system. Another important benefit must be stressed however, as regards the avoidance of arrogant cultural evolutionism. It is imperative for those in the west to become acquainted with different views about the protection of human rights and not instantly view them with scepticism.

B Duties to society, and the concept of a “person”

If the “religiosity” of human rights is stressed in order to encourage familiarity with human rights, then the concept of human rights resulting from each religion could substantially differ from that which was intended. Such a result could in fact serve to eventually challenge the existence of a universal thinly-constituted concept of human rights by shifting the

emphasis from universality to qualification. This section examines two important sources of dispute relating to religion and other aspects of "world-views" that are regularly used to suggest that human rights are alien to some societies - the relative importance of rights and duties, and the concept of "the person" itself.

It is argued that in fact these differences do not defeat the previously stated utility of referring to religion or other aspects of diverse practices in order to find homeomorphic equivalents of human rights, nor need they contradict the universality of human rights. The differences identified are qualifications within particular thickly-constituted sets of societal values that need not be unilaterally altered by human rights discourse. These differences need not contradict a thin account of human rights, as represented by international law, nor do they act as a barrier to the elaboration of a thick account of human rights in that society, even where this would involve some self-reflection and re-orientation.

B1 Human Rights as Human Duties

It was noted in Chapter 3 that Jack Donnelly argued “most non-western cultural and political traditions lack not only the practice of human rights but the very concept”.¹⁶ According to Donnelly in non-western cultures:

“[T]he substantive issues discussed today in terms of human rights, such as life, speech, religion, work, health, and education, are handled almost entirely in terms of duties that are neither derivative from nor correlative to rights, or at least not human rights”.¹⁷

With regard to Islam, for example, he argued that:

“Although Moslems are regularly and forcefully enjoined to treat their fellow man with respect and dignity, the bases for these injunctions are not human rights but divine commands which establish only duties [...]”.¹⁸

It is submitted here that, surely as long as the end result is the promotion of respect and dignity, there are similarities between social duties and human rights. Donnelly has not been consistently opposed to this argument, arguing at another time that:

¹⁶ Donnelly (1982) op. cit., supra p303; See Chapter 3, Section B “Donnelly and the “Substance”, “Interpretation” and “Form” of Human Rights”

¹⁷ Donnelly (1982) op. cit., supra p306

¹⁸ Donnelly (1982) op. cit., supra p306. Donnelly repeated this argument in his later work, Donnelly, Universal human rights in theory and practice (1989), Cornell University Press: New York, pp50-52

“While human rights [...] have not been a part of most cultural traditions, or even the western tradition until rather recently, there is a striking similarity in many basic values that today we seek to protect through human rights”¹⁹

This approach is closer to the position adopted in this thesis. It is conceivable that, when pressed, societies may agree on their basic values and that homeomorphic equivalents are more easily recognised. Such a process reveals a shared thinly-constituted conception of morality. The choice as to whether these values have best been promoted by emphasising rights or duties amounts to their elaboration in different thickly-constituted moralities. This approach is preferable to Donnelly’s assertion that non-western cultures lack the concept of human rights because it is inclusive; it seeks to draw similarities in diverse cultures in order to familiarise the protection of human rights. This prevents the impression that to support the idea of universal human rights is to advocate the exportation of multitudinous western values.

Similarities between rights and duties-based protection of human rights values can be noted if the notions of rights and duties themselves are examined. Such a process reveals that it is entirely possible to extract from a variety of cultures enough common ground to establish a basic human

¹⁹ Donnelly, "Cultural relativism and human rights" (1984) 6 *Human Rights Quarterly* 400, p 414

rights culture. Shaheen Sardar Ali has written of those who resort to Islam as an excuse for not protecting human rights. They, like Donnelly, have argued that Islam is a duty-based tradition that is therefore opposed to modern human rights thinking. However Ali has branded the distinction between rights-based and duty-based human rights as “artificial and misleading”, suggesting that it has been over-emphasised in human rights discourse.²⁰ In a passage that draws heavily on Hohfeldian analysis,²¹ Ali has queried whether “there [is] any difference in how a right (in the strict sense) is enforced / enforceable if not by placing the corresponding duty on the object of the duty”.²² Following this, Ali has correlated the five classes of human action in Islam with the Hohfeldian scale of rights, liberties, powers and immunities, showing that Islam contains both rights and duties. Because Ali had already shown that rights and duties could be conflated, she demonstrated that there is a sufficient rights-culture within Islam.

It is useful to find general similarities in religions and cultural traditions in order to encourage familiarisation with and acceptance of the concept of universal human rights. For example recognising an individual’s right to

²⁰ Ali (1997) op. cit, supra, p 273

²¹ See Hohfeld, Fundamental Legal Conceptions (1919), Yale University Press: New Haven. See also the analysis of this in Simmonds, Central Issues in Jurisprudence: Justice law and rights (2002), 2nd ed., Sweet & Maxwell: London

²² Ali (1997) op. cit., supra p273

life, held against a state, does not preclude that individual's "ruler" / government from at the same time obeying a perceived divine duty to protect him or her in return for their obedience and utility for the good of the society. The similarities in the conclusion of these approaches should be stressed.

In summary, some of the evidence collected suggesting that "human rights", as conceptualised by non-western states, are in fact systems of human duties can be refuted. Secondly, and more importantly, there is some instrumental value in attempting to emphasise similarities between systems or societies apparently polarised by their promotion of rights on the one hand and duties on the other. Taken together, and alongside arguments acknowledging the "religiosity" of human rights, the valuation of duties is shown not to necessarily threaten an understanding of the qualified universality of human rights based upon thick and thin concepts of morality.

B2 Human Rights and Duties to Society

An issue related to that discussed in the previous section is that various non-western writers suggest that the protection of human rights *alone* is not sufficient for the protection of all that humans require in order to live a good life. Other important interests can only be promoted if duties to society are

linked to human rights. This section explores firstly the problematic nature of some of these duties, and secondly demonstrates that other forms of duty can and should be respected by human rights law as part of particular societies' thickly-constituted concept of morality.

Some of the duties that states wish to impose upon their people conflict with recognised and defensible human rights norms and do not in fact stem from any form of relativism, but promote the sectional interests of the state *qua* the ruling elite. Reference has already been made to the unnecessary emphasis on duties by some authoritarian Islamic governments. According to Yash Ghai, "[T]he concept of duties can become a justification as well as an instrument of authoritarianism".²³ One explanation for this is that too often the idea of the state and the community are conflated, so that duties couched in terms of obligations to the community are in fact designed to strengthen the position of the state. Indeed this is one of the dangers of over-emphasis on group rights. "Appeals to the rights of the people collectively", Donnelly has argued, "are most often used by oppressive, paternalistic regimes to ignore or repress the desires, or to deny the rights of, real, concrete people".²⁴ Duties in this sense clearly have no place in any

²³ Ghai (1994), *op. cit.*, *supra* p19

²⁴ Donnelly (1989), *op. cit.*, *supra* p145

system aimed at the protection of human dignity²⁵ because they are state-centred.

By contrast, the abuse of duties is not inherent in their concept. To this extent it should be clarified once again that human rights are not as antithetical to the outcomes of respect for human duties as some authors contend. Respect for human rights does value mutual concern and assistance and the development of a sense of obligation to others, the community, and the common good. This in fact finds expression in a number of international documents and instruments. For instance Article 29(1) UDHR holds that:

“Everyone has duties to the community in which alone the free and full development of his personality is possible”.²⁶

Article 27 of the African Charter on Human and Peoples’ Rights²⁷ requires generally that:

²⁵ “Human dignity” is again used here in the Donnelly style sense of a meta-aim that human rights are designed to achieve.

²⁶ Art. 29(1) UDHR

²⁷ However some of the duties expressed in the ACHPR appear to be couched in terms that distinctly favour the interests of the state over the individual (e.g. Art. 29(2) and 29(5)).

- “1) Every individual shall have duties towards his family and society, the State and other legally recognised communities and the international community.
- 2) The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.”

This is echoed to some extent in Article 32 of the American Convention on Human Rights, though it is couched in the softer terms of “[e]very [person’s] responsibilities to his family, his community and mankind”²⁸. It goes on to add:

“The rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society.”²⁹

Similarly some of the human rights traditionally protected in international law are considered as being so important and sensitive as to carry with their exercise special duties and responsibilities. This can be seen with regard to justifying restrictions on the freedom of expression in Article 19(2-3) of the International Covenant on Civil and Political Rights and Article 10 of the European Convention on Human Rights. Whilst all these examples see duties as relating to rights, rather than creating a web of obligations separate thereto, they do show that the goals that duties are seen to promote are

²⁸ Art. 32(1) AmCHR

²⁹ Art. 32(2) AmCHR

considered desirable by international human rights law.

Peerenboom has argued that duties in modern human rights law are, again in Hohfeldian terms, simply corollaries to rights. International human rights law does not, he argued, enshrine or promote a free-standing *legal* duty to the state or to fellow citizens.³⁰ However, Peerenboom himself conceptualised duties as “ethical standards and guideposts”.³¹ “Ethical standards and guideposts” appear inherently vague, and incapable of precise legal formulation. Peerenboom should therefore accept that the promotion of such interests or values is often a non-legal process. Furthermore, it should also be possible to accept that while international human rights documents do not formulate in detail these positive duties, it is not to say that they are undesirable.

Criticism of the failure to promote general duties to society or the

³⁰ Peerenboom, “What’s wrong with Chinese Rights?; Toward a Theory of Rights with Chinese Characteristics” (1993) 6 *Harvard Human Rights Journal* 31, p43. In making this argument Peerenboom engaged in the “wrong comparison fallacy” indicated above. In suggesting that the modern human rights model does not represent the needs of China because, *inter alia*, there is not the requisite respect for duties, he cited the constitutional law of the United States of America. (He explained that in all but two of the United States there is no legal obligation to render aid to another). The “right” comparison would be with international human rights law.

³¹ Peerenboom (1993) *op. cit.*, supra p54

community generally “is not only ethically justified but it also provides a practical way of bridging the gulf between cultures that favour rights-talk and those more accustomed to the vocabulary of duties”³². In other words, promoting social duties can assist the aims of human rights, whilst rendering the idea human rights more acceptable to those who tend to be more familiar with duties. Stressing duties is not, however, a valid argument against protecting human rights. While the tendency towards excessive individualism at the expense of social duties in the West may be criticised, this is not to say that the animistic individual is actually an ideal-type preferred by the West and implied by human rights norms.

Peerenboom has actually, and perhaps unwittingly, made a very similar point. His “Theory of Rights with Chinese Characteristics” is, by its nomenclature, inherently wider than the concept of “*human* rights” that it could supersede in China.³³ His rights theory, Peerenboom stated, would be more communitarian in theory and practice than the existing international human rights law, containing both rights and duties:

“Rights will provide a minimum level of protection against others and the state;

³² Freeman “Human rights and real cultures” (1998) 1 NQHR 25, p37

³³ This is suggested in the sense that in writing about “human rights”, by prefacing the word “rights” with “human” the wider category of “rights” has been specified. Peerenboom’s “Theory of Rights” makes no such specification. Not every legal right is a human right.

duties will point to social solidarity and possibilities for human achievement”³⁴.

This is entirely consistent with position advocated in Chapter 3, that human rights do not represent a comprehensive doctrine.³⁵ Respecting human rights means ensuring a minimum level of protection against the state, whilst protecting duties is a different (but valid) goal. The general good must include the promotion of both rights and duties, but the modern notion of human rights clearly only protects one portion of that general good. It should not be expected to do any more - the notion of human rights, once again, should not be asked to become a comprehensive doctrine. Universal human rights should not amount to the universalisation of every western value, but equally they will not contain every value held in the East (loosely defined). This argument departs from Peerenboom’s by stating that the notion of human rights, thinly constituted, does not seek to displace the validity of that which it, as a concept or tool, is not in itself competent to further.

Adhering to international human rights standards does not devalue the worth of promoting social duties, in as much as they do not conflict with those human rights. Only a manipulative and absolutist government would seek

³⁴ Peerenboom (1993) *op. cit.*, *supra* p54

³⁵ See Chapter 3, Section A, “Universality not Uniformity”; Rawls (1993) *op. cit.*, *supra*

to promote social duties that conflict with human rights norms, so any other state is free to protect the genuine and useful idea of social responsibility within their thick elaboration of human rights. In this way human rights are not seen as antithetical to the promotion of duties to society.

B3 The "Person"

It is often contended that the vision of the person, particularly as an isolated individual, implicit in the modern meaning of human rights is incompatible with certain religions, strongly held world-views or alternative conceptions of the person. It is therefore necessary to emphasise possibilities of compatibility and non-mutual exclusivity between these competing conceptions. The aim here is to demonstrate that competing conceptions of the person can be accommodated with a concept of qualified universal human rights that respects values held and promoted within thickly-constituted local concepts of human rights, in so far as they do not contradict a minimum internationally agreed thinly-constituted concept.

Human rights, it was suggested at the beginning of this thesis, are inherent in all humans by virtue of nothing else than their humanity. However the Confucian, for example, would be concerned that they have not earned their

rights and therefore do not appreciate them enough. As a result of this they are not compelled to work together to improve their collective lot. In order to benefit from rights as a human, one has to *become* human through a social process that attempts to bring the interests of the state and society together. People should be inspired to partake in this process, as it is for the general good of society.³⁶ Thus because of its vision of the “human”, the human rights model does not do enough to promote the aims that Confucianism desires – a peaceful and harmonious community working together for common goals.

Panikkar has also suggested a different, wider, view of the human being deriving from Hinduism.

“The individual is just an abstraction, i.e. a selection of a few aspects of the person for practical purposes. [...] An individual is an isolated knot; a person is the entire fabric around that knot, woven from the total fabric of the real”.³⁷

The problem with what Panikkar seemed to see as the western concept of human rights is that it protects only the “individual” rather than the “person”. The person, argued Panikkar, includes parents, children, friends,

³⁶ See Peerenboom (1993) op. cit., supra

³⁷ Panikkar (1992) op. cit., supra p90

foes, ancestors and successors.³⁸ Clearly the rights (or duties) of some of these are not directly protected in international human rights law.

Panikkar has warned that the Hindu view should not be evaluated outside the context of a particular world-view, intimately linked to the concept of *karma*.³⁹ It is not the purpose of this defence of the qualified universality of human rights to do any such thing. This is precisely because it is not a weakness, or a reason for their abuse, that human rights do not protect the sort of interest of which Panikkar has written – human rights are simply not designed to, and legally speaking are probably incapable of, protecting such interests. In the same way as human rights do not preclude the valuation of duties to society, they do not serve to challenge the notion that there may be a wider meaning to the “person” than simply the biological matter that constitutes one human being. If human rights in international law are taken as the narrowest form of protection for an element of what Panikkar termed “the person”, then they do not preclude the protection of those other elements by states or cultures, be it formally or informally.

It is not the place to criticise the aims of Confucianism either. One must simply again recall the idea that “human rights” is not a comprehensive

³⁸ Panikkar (1992) op. cit., supra p90

³⁹ Panikkar (1992) op. cit, supra p98

doctrine. Confucianism sees rights (and duties) as the means of attaining certain societal goals. Human rights do not do this, and so it is argued that they are inadequate for any society grounded in Confucianism, such as China. But the aims of Confucianism surely are not frustrated by the much narrower concept of human rights because protecting human rights does not prohibit the simultaneous continuation of the Confucian tradition. It may be that human rights as enumerated in international law do not serve as a template for the ordering of all society, but then that is not their aim. The aims of Confucians with regard to the maintenance of a harmonious society can be attained alongside and in conjunction with the protection of human rights, both in the East and the West.

B4 Homeomorphic equivalence, duties and the human person

Having recognised in Section A that there is some utility in finding similarities between the values of diverse cultures and those expressed as human rights, this section has examined what are often perceived as two of the strongest signs that human rights and certain cultures are antithetical in the values they imply.

The recognition that the notion of human rights does not protect all the types of social good that it could if it were more wedded to duties, or a based upon

a wider concept of the person, should be viewed as recognition that those concerns are raised within particular thickly-constituted moralities. These should not be universalised, and therefore it should not be a cause of surprise or concern that they are absent from a minimalist or thin account of *international* human rights. In the same way that not every western value need be imported alongside the protection of human rights, there are concerns addressed by non-western societies that need not be universalised. Another way of expressing this is to argue that “human rights” protect only one element of what each society considers “is right”.

Donnelly has argued that certain actions, which non-western states think of as part of their human rights doctrines, are not found in the western model because they deal with “what is right”, rather than actual “rights”.⁴⁰ For example while it may be “right” to give to charity, the charity does not have, *ipso facto*, “a right” to any particular donation.

It has been contended by some that they should follow an alternative path to protecting human dignity precisely because human rights are too narrowly focussed on rights instead of “what is right”. “What is right” could be inclusive of duties, wider conceptions of the person, and diverse religious

⁴⁰ Donnelly, “Natural law and rights in Aquinas’ political thought” (1980) 33 *Western Political Quarterly* 520

principles, and these are not all protected by the notion of human rights. Thus, the argument goes, protecting only human rights does not protect enough.

It is true that human rights do not guarantee securing all of “what is right” because they do not amount to a comprehensive doctrine, but rejecting the notion of human rights does not follow from this realisation. Human rights do not prevent promoting “what is right”, and at the very least actually assist in this. Following the Walzerian model, it may be that whilst “rights” do not differ from society to society “what is right” does because the former are part of a thinly constituted morality whilst the latter are constituent elements of a thickly elaborated morality.

Examination of the notion of duties or wider concepts of the person has thus illustrated two separate points. Firstly, the supposedly very different eastern and western views may not be antithetical, and therefore it is possible here as elsewhere to find homeomorphic equivalents. Secondly, where the reach of human rights does not extend as far as that of a comprehensive doctrine, it is not problematic because human rights are not the only tool available to protect the entirety of what each thickly constituted moral system deems “is right”.

C Universality and International Legal Consensus

The final section of this Chapter, and of Part One of the thesis, demonstrates that the views expressed so far are supported in major international documents. The universality of human rights is clearly expressed and agreed, but alongside the importance of recognising cultural diversity. It is vital that critics of the margin of appreciation understand that the notion of universality carries with it an inherent recognition of local qualification. Equally however, it is clear that universal human rights take priority over the acknowledged qualifications to them.

It is necessary to refer to international legal consensus because of circumstances in which the model constructed so far is put under stress. There are some limits to stressing the religiosity of human rights, and in some circumstances it will not be possible to de-emphasise cultural differences though dialogue or discussion based upon mutual respect for thickly-constituted concepts of human rights. In particular, there are some weaknesses in the argument where cultural objections to human rights seem so rooted that it is difficult to explain them as natural expressions with a thickly-constituted version of human rights that does not detract from the particular right's substance. The Walzerian paradigm becomes stretched when, at this stage, it is still argued that the same culture that assisted in the

crystallisation of human rights thinly-constituted now contradicts it within its thickly-elaborated counterpart.

It could still be argued theoretically that such a contradiction is an internal one within the society, on the basis that human rights are said to be a crystallisation of values previous held in more complex accounts of morality. Each society should, rationally, eliminate that practice in favour of the protection of human rights in order that its values are not internally inconsistent. Likewise the philosophical justification for external encouragement of the removal of that inconsistency is grounded in the understanding that human rights, thinly constituted, are universal. However, on its own, this approach is open to the criticism that the particular clash or conflict is itself empirical evidence that human rights, even thinly-constituted do not exist universally, and that all that really exists are separate equally justifiable "spheres" of meaning or morality. In other words, without any agreement as to a "thin" account of human rights or morality, the relativist underpinnings of Walzer's earlier work⁴¹ re-appears and the various "thick" accounts of human rights previously justified begin an unchecked slide into radical relativism. This section serves to demonstrate just how well established a "thin" account of human rights

⁴¹ i.e. Walzer, Spheres of Justice: a defence of pluralism and equality (1983), Basic Books: New York

really is. This justifies the conceptualisation of remaining differences as one of either impermissible departures from human rights thinly-constituted, or permissible qualifications within a particular thickly-constituted elaboration of human rights (which necessarily do not undermine the substance of human rights).

C1 The UDHR

The history of the UDHR can be re-examined in order to challenge the assertion that its creators, and the values embedded within it, are purely western.⁴² Such an assertion contains an element of truth, but is a considerable exaggeration. If any polarisation of views was to typify the drafting and voting of the UDHR, it was that deriving from the Cold War.⁴³ Furthermore the perceived status of the UDHR since its adoption in 1948 has served to continually re-affirm its values and universal applicability,

⁴² This brief study draws only on secondary material about the UDHR. Whilst much primary material relating to the drafting process is still available, such an in-depth examination is outside the scope of the present work.

⁴³ The effects of this will only be mentioned in passing, given the relevance of, and limited space for, such discussion. However, the impact of the Cold War upon the genesis of the Council of Europe and the European Convention on Human Rights are explored in Part Three of the thesis.

thus undermining any residual effects of western or northern bias in the drafting process.

It is clear that the participants in the drafting process of the UDHR were not entirely western in origin. The Charter of the UN had been adopted in San Francisco in 1945 without containing a bill of rights of any kind. To remedy this a Commission on Human Rights was established with the task of presenting such a bill to the General Assembly, which it did in 1948. Eide & Alfredsson⁴⁴ list the main participants in the Commission's efforts to arrive at agreement as including firstly, John Humphrey, a Canadian legal academic and head of the UN Secretariat's Division of Human Rights. Egon Schwelb, also of the Secretariat, assisted him. Eleanor Roosevelt, a key early human rights activist and wife of the US President Franklin Roosevelt, chaired the Commission. It consisted originally of only Mrs Roosevelt, Mr P C Chang of China as vice-chair, and Mr Charles Malik, a philosophy professor from the Lebanon as rapporteur. The Commission was eventually expanded at the behest of Mrs Roosevelt.⁴⁵ Others who were to be key

⁴⁴ Eide & Alfredsson, "Introduction" in Eide *et al* (eds.) The Universal Declaration of Human Rights: a Commentary (1992), Scandinavian University Press: Oslo, p11. NB this list is re-printed in the substantially revised and reissued volume by Alfredsson & Eide (eds), The Universal Declaration of Human Rights: A common standard of achievement (1999), Kluwer Law International: The Hague, p xxviii

⁴⁵ See Humphrey, "The Universal Declaration of Human Rights: Its history and juridical

contributors to the process of drafting the Declaration included René Cassin of France, whose background emphasised economic, social and cultural rights in the socialist tradition. Other members of the expanded Commission were Mr Hernán Santa Cruz (a Chilean lawyer); Mr Omar Loufti (from Egypt); Ambassador Mrs Hausa Mehta (from India); General Carlos P Romulo (from the Philippines); Mr Bogomolov (from the then Soviet Union) and Mr Ribuiakar (from Yugoslavia).

Such a bare list of participants clearly does not serve to completely rebut the assertion that the UDHR has a western "flavour", but it does demonstrate that those who drafted it were not obviously culturally or religiously homogenous. Similarly the fact that no states dissented in the vote to adopt the Declaration when it came for adoption in the General Assembly on the night of the 10th December 1948 indicates that there was no fundamental opposition to the Declaration remaining.⁴⁶

Secondly, the issue of religious bias had been discussed in some detail by the drafters. That agreement on the draft finally adopted was ever reached

character" in Ramcharan (ed.) Human Rights: Thirty years after the declaration (1979),

Martinus Nijhoff Publishers: the Hague

⁴⁶ It is however well documented that each of the six Communist states that were then members of the UN abstained from the vote, along with Saudi Arabia and South Africa.

See e.g. Humphrey (1979) op. cit., supra p27

is arguably because any references to a religious or philosophical justification for the Declaration were dropped.⁴⁷ Some wanted an explicit reference to God as the Creator to underpin the virtue of the proposed declaration. Others did not, accepting references that certain values such as reason and conscience were endowed by nature. Those who had preferred a divine basis to the UDHR thought reference to nature would be taken as a rejection of God's existence. In order to achieve the common aim of securing the Declaration, all such references to God or nature were removed. In this way, whilst it may be that certain values actually underpin the Declaration, it does not explicitly affirm any one form of religion, worship or even secular humanism. It was not the drafters' intent to exclude any particular group of people on account of their religion or world-view.

Thirdly, whilst many of the current Member States of the UN were not involved in the drafting of the UDHR, they have since become members of UN. In doing so they have gradually but constantly re-affirmed the importance and universality of human rights as embodied in the UDHR. Any departure from the values agreed to would be inconsistent and

⁴⁷ Samnøy, "The origins of the Universal Declaration of Human Rights" in Alfredsson & Eide (eds.) (1999) op. cit., supra, p17. See also Humphrey (1979) op. cit., supra p27

contradictory.⁴⁸ It is this point that leads to a recent and very clear re-affirmation of universal human rights.

C2 The Vienna World Conference on Human Rights

General support for the aims of the UDHR and international human rights law can be provided by simply observing the participation of diverse states and peoples in the international efforts at protecting human rights. In addition to this, the clearer the support for the universality of human rights is identified, the more justified condemning attempts to undermine them become. If a particularly clear commitment is made, from which states still depart, there is a strong justification for criticising their practice. It is not only the identification of internal inconsistency between thick and thin concepts of human rights in society, but also recognition that states have departed from their undertakings.

In 1993 over 7000 participants, from 171 states and 800 NGOs attended the Vienna World Conference on Human Rights.⁴⁹ The conference was organised by the UN, with the aim of reviewing the system for the

⁴⁸ Cumaraswamy, "The Universal Declaration of Human Rights: Is it Universal?" (1997) 18 HRLJ 476

⁴⁹ For more details see the information held by the UN High Commissioner for Human Rights, accessible at <<http://www.unhchr.ch/html/menu5/wchr.htm>> (Accessed 17.2.2003)

international protection of human rights and setting out how better to protect them in the future. Three regional groupings representing Asia, Latin-American and the Caribbean, and Africa also convened prior to the conference. Their findings are examined further below. Outside the context of state activity multitudinous NGOs both prior to, and at, the conference worked together to co-ordinate their efforts at protecting human rights. On the 25th June 1993 representatives of the 171 states adopted the Vienna Declaration and Programme of Action, which is also discussed further below. The Declaration is of no direct legal effect; it is not a human rights treaty. This section demonstrates that the Declaration is nevertheless of significant importance in finding a justifiable balance between strongly held local values and international human rights standards.

The Vienna Declaration and Programme of Action⁵⁰ clearly re-affirmed the universality of human rights. Paragraph One reads as follows:

"The World Conference on Human Rights reaffirms the solemn commitment of all States to fulfil their obligations to promote universal respect for, and observance and protection of, all human rights and fundamental freedoms for all in accordance with the Charter of the United Nations, other instruments relating to human rights, and international law. *The universal nature of these rights and freedoms is beyond question*". [emphasis added]

⁵⁰ Vienna Declaration and Programme of Action, UN DOC. A/CONF.157/23 (12.7.1993); (1993) HRLJ 352

The Declaration was adopted, by consensus, by representatives of all 171 states. It was therefore by no means a western dominated exercise. All three official regional groupings issued declarations that also contained formal approval of the universality of human rights. Paragraph 2 of the African regional declaration⁵¹ stated that, “The universal nature of human rights is beyond question [...]”. The preamble to the Latin American and Caribbean declaration⁵² “bears in mind” that,

“the guiding principles of the study and implementation of international human rights instruments in the United Nations system should be interdependence, *universality*, objectivity, impartiality, non-selectivity and the responsibility of states to fulfil their obligations” [emphasis added].

Even the Asian declaration⁵³ discussed in Chapter 2⁵⁴ formally maintained in paragraph 7 that the Asian states “*Stress* the universality, objectivity and non-selectivity of all human rights [...]” [emphasis *per* the original].

⁵¹ UN Doc. A/CONF.157/AFRM/14 and A/CONF.157/PC/57, (24.1.1992) - “The Tunis Declaration”

⁵² UN Doc. A/CONF.157/LACRM/15 and A/CONF.157/PC/58, (11.2.1993) - “The San José Declaration”

⁵³ UN Doc. A/CONF.157/ASRM/8 and A/CONF.157/PC/59, (7.4.1993) - “The Bangkok Declaration”

⁵⁴ See Chapter 2, Section B1, “Real cultures and state cultures”

These statements should simply be taken as they stand, and any departure from these stated positions can be seen as breach of an international good faith, if not positive international law. The Vienna Final Declaration and the regional Declarations provide recent affirmation of the principle of universality. As such, together they demonstrate that ultimately there is some agreement on the substance of a thinly-constituted concept of human rights that ought to be protected, even in the face of strongly held local traditions or beliefs that contradict human rights norms. Supporting the primacy of cultural practices over basic human rights, thinly-constituted, contradicts all that was agreed at Vienna and can be criticised on that basis.

Some caution is however necessary. It is not universally accepted that the Vienna Declaration's affirmation of universality is so clear. Such arguments would serve to undermine the document's crucial role as a beacon of human rights' universality. Michael Freeman has argued that whilst the Vienna Declaration re-affirmed the principle of universality, it had similarities with the worrying aspects of the Bangkok Declaration mentioned in Chapter 2.⁵⁵ The diplomatic, and similar, wording of both these documents, he has argued, conceals that they go so far as to call into question the universality of human rights.⁵⁶ Without providing references to particular paragraphs,

⁵⁵ See Chapter 2, Section B1, "Real cultures and state cultures"

⁵⁶ Freeman (1998), *op. cit.*, supra p25

Freeman has attempted to illustrate this point by quoting the Vienna Declaration as stating that,

“[T]he significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind”.⁵⁷

Indeed these words are redolent of culturally relativist considerations, and are almost exactly the same as the phrase quoted from paragraph 8 of the Bangkok Declaration in the discussion of relativism as a state-centred theory in Chapter 2.⁵⁸ However, when these words are read within the context of the actual paragraph of the Vienna Declaration from which they are taken (paragraph 5), Freeman’s claim is quite simply defeated:

"All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While *the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind*, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms." [Emphasis added to indicate the source of Freeman’s quotation.]

The references to “regional particularities” and other differences do not prevent taking the Vienna Declaration as evidence of diverse states’

⁵⁷ Freeman (1998) op. cit., supra p25

⁵⁸ See Chapter 2, Section B1, "Real cultures and state cultures"

commitment to the universality of human rights. The statements recognising the importance of cultural diversity in the regional and final declarations can be seen merely as qualifications to the concept of *universal* human rights – they do not challenge the universality of human rights, thinly-constituted.

Paragraph 5 of the Vienna Declaration in fact provides a template for reconciling the apparently relativist statements with the re-affirmation of universality. It notes the importance of historical and other differences, but stresses these may not be adduced by states as reasons or excuses for failing to protect human rights. Thus some deference to regional particularities is expected as human rights are embedded in given societies, but such qualification should not be permitted to depart from human rights thinly-constituted. This is not simply an eloquent re-statement of the original problem of tensions existing between varying conceptions of human rights - the Declaration clearly puts the universality of human rights above the importance of regional particularities and cultural differences.

An argument similar to, but stronger than, Freeman's argument alone is that taken *together*, the references to regional particularities in the Asian and final declarations amount to a weakening of human rights' claim to universality. Nevertheless, firstly, as noted above both declarations

formally support the universality of human rights. Even if it is conceded that they give mixed signals, both declarations concentrate more on human rights than relativism, therefore it is reasonable to conclude that the dominant purpose was to promote universal human rights over regional particularism. Secondly, the level of universality clearly evidenced by both declarations is supported by the theoretical arguments made throughout Part One of this thesis. In other words, whilst the theoretical claim to universality requires some support by reference to state practice, departures from that state practice can be criticised because of the pre-established theoretical basis of universality. The two sides of the argument support each other, and should be considered simultaneously, thus strengthening their overall position.

The Vienna Declaration can be taken as important evidence that the idea of human rights is universally accepted. It was critical that this was demonstrated because it shows support for human rights notwithstanding that they are expressed, self-evidently, in the language of “rights” favoured in the West. It is important therefore to realise that the idea of “human rights” expressed as such may well be indicative of a certain western linguistic orientation, but does not prevent the values they protect from being universal. It is a feature of western thought, thickly constituted, that certain interests or goals are expressed as “rights”. However, a morally

minimalist conception of the values protected by human rights is nevertheless universal, and the Vienna Conference has confirmed that the term “human rights” is an acceptable way of describing the range of those values.

D Conclusion

Section A introduced the notion of “homeomorphic equivalence”, which from a universalist perspective served to reinforce the rejection of Donnelly’s argument that human rights values have failed to originate outside western cultures. Instead it was argued that stressing similarities between the values promoted in diverse societies can aid familiarisation with the concept of human rights, and reduce scepticism and fear of other cultures. This is part of the process of recognising that human rights thinly constituted have derived from a multiplicity of different thickly constituted moralities.

Section B went on to explore this argument with reference to the notion of duties and varying conceptions of the human person. It was stressed that human rights do not protect all of “what is right” because they do not amount to a “comprehensive doctrine”. Conversely, no comprehensive doctrine could be universal because it would be derived from only one

thickly-constituted morality. Thickly-constituted moralities or conceptions of human rights should not be universalised because such would require uniformity; something which is not required by universality.

Finally Section C demonstrated a firm and tangible shorthand for the claim that human rights, thinly-constituted, are universal – the Vienna Declaration. In doing so it has been reiterated that historical and local traditions must be considered, and that therefore the enterprise of establishing homeomorphic equivalents of human rights is valuable. This serves to reaffirm the promotion of the “qualified” universality of human rights advocated in Chapter 3.

Taken together the elements of this chapter have served to demonstrate how an understanding of universal human rights based upon the interrelation of thick and thin concepts of morality can be applied to even the most controversial issues in international human rights law. It is accepted that there is some variation in the protection of human rights, but that such qualifications do not necessarily undermine their universality.

Conclusions of Part One: The Theoretical Context of the Universality

Debate

In order to fully assess whether the margin of appreciation as used in the European human rights system threatens the universality of human rights it has been necessary to begin by clarifying the theoretical context of the universality debate. Many criticisms of the margin have been based upon the understanding that it is a relativistic concept because it allows for the modulation of human rights protection in recognition of local conditions. However the introductory chapter to this thesis argued that such criticisms have often been based upon a limited understanding of both universality and relativism.

Chapter Two demonstrated that the European Court would indeed undermine the notion of human rights if it adopted an openly relativistic stance. However, Chapter 3 and Chapter 4 have argued that universality is not the same as uniformity. Indeed in defending the universality of human rights, it has been acknowledged that it is a universality which, in being transformed from international minimum imperatives to actual protection in different states, requires scope for some cultural modification. It is a “qualified universality”.

In practical terms, human rights instruments are an accepted summary of a universal moral minimum. For this reason a basic, minimum, or “thin” concept of human rights should ultimately prevail over inconsistent local cultural practices that grossly contradict human rights norms. However, some choices made with respect to the protection of human rights and the ordering of society generally are due deference because they are expressions within a thickly-constituted concept of human rights. These qualify rather than undermine the idea of universal human rights. Paradigmatically these would be questions relating to the relative weight of an individual human right and another collective interest. Choices made in such situations are not intended for universalisation, and should not be criticised as if they were.

This leads to the second element of rebuttal to the argument that the margin of appreciation is a relativistic principle. It is necessary now to demonstrate that in principle the operation of the margin is such that it actually accords to the model suggested here in Part One. In other words, it has been demonstrated that according respect for local conditions in the protection of human rights is not necessarily an unreservedly relativistic process. It has yet to be proven that the margin of appreciation itself recognises diversity without retreating to relativism.

Part Two – European human rights law and the “margin of appreciation”

Introduction

The Introduction to this thesis identified criticisms of the European Court of Human Rights’ utilisation of the margin of appreciation. The main argument was that by conceding a margin to Contracting Parties the European Court is unable to maintain an adequately universal standard of human rights protection.¹

In order to answer such criticisms it was argued that is necessary to examine a balance between knowledge of both the nature of universality and the operation of the margin of appreciation (MoA) itself. Only with an understanding of the universality debate can any meaningful conclusions be made about the margin’s alleged threat to universality, therefore Part One has examined the theoretical context of the universality debate. It was acknowledged that the notion of human rights has come under attack from

¹ E.g. Benvenisti, “Margin of Appreciation, Consensus and Universal Standards”, (1999) 31 *New York University Journal of International Law* 843; *Z v Finland*, (1998) 25 EHRR 371 (Decided 25.2.1997), Partly dissenting Opinion of Judge De Meyer, Part III; Lester, “Universality versus subsidiarity: a reply” (1998) 1 EHRLR 73;

those who see it as having a particular cultural bias. From this debate the conclusion was drawn that human rights must in fact protect and preserve some level of cultural variety, though the actual universality of human rights is beyond question.

To complete the balance between knowledge of the universality debate and knowledge of the MoA, the MoA is now examined in detail. Part Two is thus intended to dispel the myths that non-specialists may have about the nature of the MoA. It is demonstrated that the MoA has operated to strengthen the European human rights system whilst respecting the local conditions of its Contracting Parties.

Indeed not *all* commentators agree that the MoA fundamentally undermines the notion of universality. For example, Eva Brems has argued that the MoA fits into Jack Donnelly's "weak relativist" position, from which the conclusions of Part One were partially derived.² According to Brems, the variations that the MoA permits are "restricted to the realms of

² Brems, "The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights", (1996) 56 *Zeitschrift für Ausländisches öffentliches recht und volkerrecht* 240, p310; see Chapter 3, Section B, "Donnelly and the "Substance", "Interpretation" and "Form" of Human Rights, referring in particular to Donnelly, Universal human rights in theory and practice (1989), Cornell University Press: New York

interpretation and implementation".³ However she did not substantiate this claim in detail, nor seek to justify whether even such limited variations are philosophically warranted. Thus whilst her work on the MoA was detailed and her comments welcome, it only treated the universality debate in a cursory fashion.

Joseph Chan has also recognised the role that the margin of appreciation can play in grounding human rights into diverse cultures.⁴ The context of his argument results in only a brief examination of the MoA, but his insight is exceptionally valuable, and deserves to be developed further. Chan linked the MoA to the issue of universality and relativism, in the context of thick and thin accounts of human rights.⁵ He argued that Asia should be allowed

³ Brems (1996), op. cit., supra p310. Recall that Donnelly saw three categories of relativist claims, taking place at the level of substance, interpretation and implementation. Allowing relativist claims that impact upon the substance of human rights was, for Donnelly, the most serious and least defensible concession to local traditions. Relativism in the interpretation and implementation of human rights was however necessary in order to avoid "radical universalism", which is tantamount to cultural evolutionism or imperialism. See Donnelly (1989), op. cit., supra

⁴ Chan, "Thick and Thin Accounts of Human Rights: Lessons from the Asian Values Debate", in Jacobsen & Bruun (eds.), Human Rights and Asian Values (2000), Curzon: Richmond

⁵ See Walzer, Thick and thin - moral argument at home and abroad (1994), University of Notre Dame Press: Indiana

to formulate its own approach to the protection of human rights, but without undermining the fundamental premises of human rights as understood internationally. For Chan, the European Court's use of the MoA was adduced as empirical legal evidence that human rights allow and require active and substantial ideological interpretation.⁶ Combined with philosophical arguments to the same effect, Chan sought to justify a certain level of discretion to be left to Asian states in coming to terms with the substantiation of human rights, thickly-constituted, within their societies. However Chan did not provide evidence for his claim that the European MoA aids the grounding of human rights, thickly constituted, even in Europe. If the MoA amounted to unchecked cultural relativism as some have implied, then Chan is wrong to rely on the European model as an example because the variation permitted by the MoA would undermine human rights, thinly constituted. Whilst Chan's work on universality was detailed, his treatment of the MoA itself was superficial.

These references to Brems and Chan indicate the need to examine both sides of the equation in detail. However, despite the imbalance between elements of their arguments Brems and Chan have clearly implied the existence of a much more sophisticated relationship between universality and relativism than those who see the MoA as simply relativist and therefore indefensible.

⁶ Chan (2000) *op. cit.*, supra p68

The purpose of Part Two is to develop these rare and brief comments linking a positive view of the MoA to the necessary variation of human rights, in order to rebut the argument that the MoA is synonymous with unrestrained cultural relativism. It is argued that the Court's use of the margin has simply allowed it to respect choices made within each society's thickly-constituted conception of human rights, without undermining the substance of universal human rights.

Chapter 5 introduces the European human rights system and charts the evolution of the MoA. Chapter 6 looks at the factors which govern the width of the margin in particular cases, and Chapter 7 concludes Part Two by clarifying the factors that underpin the margin's existence. Part Three then goes on to defend the role of the MoA in the context of a Council of Europe with a massively expanded, and therefore more diverse, membership.

Chapter Five

The Genesis of the ECHR and the evolution of the MoA

Introduction

In Section A this chapter offers a background to the operation of the margin of appreciation (MoA) by summarising briefly the context in which the European Convention on Human Rights was adopted. Section B goes on to analyse the evolution of the MoA since it was first used. Both sections provide the context for a comprehensive understanding of the MoA's defensibility in principle and practice.

A Genesis of the ECHR - Two World Wars

The genesis of the European Convention on Human Rights is inextricably bound to a history of European and world conflicts. World War II changed the continent of Europe irrevocably.⁷ Europe's borders had moved, and its allegiances both internally and externally were in a state of flux. World War I had already seen an end to the multinational empires that previously

⁷ On the political history of Europe see e.g. Rose, What is Europe? A dynamic perspective (1996), Harper Collins: New York; Wilson & van der Dussen (eds.) The history of the idea of Europe (1995) (Revised Edition), Routledge: London

dominated the continent, leaving in its wake a collection of “new” states carved out of the collapsed empires. This was particularly evident in central and eastern Europe, with the emergence of, for example, Czechoslovakia from the Austro-Hungarian Empire, and Poland from parts of Germany, Russia, and Austro-Hungary. The 1919 Treaty of Versailles legitimated these new states, and other international treaties attempted to protect the national minorities which they inevitably created.⁸

The reparations imposed upon Germany after World War I were proving impossible to maintain, and in eastern Europe totalitarian regimes began to flourish. Meanwhile in north-western Europe democracy was actually expanding towards universal suffrage. Even without taking into account ancient history, inter-war Europe was a continent far from homogenous.⁹

In post-1945 Europe even the order established after the 1919 Treaty of Versailles was in tatters. The descent towards World War II had begun when Nazi Germany annexed Sudetenland from the German-speaking part of Czechoslovakia, and it continued with the invasion of Poland. At the

⁸ For an introduction see Steiner & Alston, International Human Rights in Context (2000), (2nd Ed) OUP: Oxford, p93 *et seq*

⁹ See Pogany “A new constitutional (dis)order for Eastern Europe”, in Pogany (ed.), Human Rights in Eastern Europe (1995), Edward Elgar: Aldershot, pp222-230

same time, and ultimately resulting in their eventual opposition, Hitler permitted Stalin's invasion of the Baltic states with the "non-aggression pact".¹⁰ The ensuing war between European states became global.

The physical losses of Europe both through war and genocide, and the devastation of land war waged with new destructive technologies, required that Europe rebuild itself. Notably, the allegiances that had combined to secure the Nazi's defeat quickly crumbled. North-western Europe allied itself with the USA in a "North-Atlantic Europe", whilst the Eastern states fell under the influence of communist Russia, in the so-called Eastern Bloc.¹¹ These separate groups of states were aligned on military lines, with North-Atlantic Europe engaged in collective defence through the North-Atlantic Treaty Organisation (NATO),¹² and the Eastern states through the Warsaw Pact. The first response of the western European states to self-defence had been to prevent a revival of Germany's aggression, in the form

¹⁰ See the documents reproduced by Yale Law School's "Avalon Project", including the treaty of non-aggression itself, signed on the 23rd August 1939, <<http://www.yale.edu/lawweb/avalon/nazsov/nonagres.htm>> (Accessed 3.2.2003)

¹¹ See Rose, (1996) op. cit., supra pp38-42

¹² Established with the signing of the North Atlantic Treaty on 4 April 1949. See generally Sands & Klein, Bowett's law of international institutions (2001), (5th ed.), Sweet & Maxwell: London, pp191-196

of the Brussels Treaty Organisation.¹³ However it was against the Eastern Bloc that defence was now required. Only with the aid of the USA was this possible, hence North American involvement in NATO.

A2 European human rights

The idea of a European human rights charter pre-dates the Council of Europe, which was created in 1949.¹⁴ Movements for the unification of Europe proliferated post-1945, but many of them came together for the first time in the form of the “International Committee of the Movements for European Unity”.¹⁵ The Committee held the “Hague Congress of Europe” in May 1948, and amongst other stated objectives called for a charter of human rights. The Congress, at which there were high-level delegates from

¹³ The Brussels Treaty Organisation, which comprised the UK, France Belgium, the Netherlands and Luxembourg was set up on the 17th March 1948, under Article 51 of the UN Charter.

¹⁴ Robertson, “The political background and historical development of the European Convention on Human Rights” in The European Convention on Human Rights (1965), British Institute for International and Comparative Law: London, p24. A shorter but updated version of this paper is contained in Merrills & Roberts, Human Rights in Europe (2001), (4th Ed.), Manchester University Press: Manchester, pp1-15.

¹⁵ Beddard, Human Rights and Europe (1993), (3rd Ed.), Grotius Publications: Cambridge, p19

sixteen states (and observers from more), was designed to demonstrate the need and support for European unity. At the end of the Congress its conclusions, which suggested the need for some form of pan-European governance, were submitted to the Brussels Treaty Organisation. After some reluctance from the British, it was agreed that a European assembly should be created. This led to the formulation of the Statute of the Council of Europe, and its signing in May 1949.¹⁶ Unlike NATO, the Council of Europe was not designed to facilitate the *military* defence of western Europe. It was criticised at the time of its formation for not providing for closer European integration. This role was eventually be taken on by what became the European Union (a name which France and Italy had actually suggested for the Council of Europe, indicating their early support for further integration).¹⁷

The Statute of the Council of Europe is notable for its requirement in Article 3 that member states must respect human rights and the rule of law. Thus democracy, a notion which still serves as an important factor in MoA cases before the Court of Human Rights, was always a pre-condition for membership of the Council of Europe. This is reaffirmed in Article 8 of the

¹⁶ Statute of the Council of Europe, *European Treaty Series*, No. 001

¹⁷ Simpson, Human Rights and the End of Empire: Britain and the Genesis of the European Convention (2001), OUP: Oxford, p642

Statute, which provides sanctions for a breach of Article 3, including expulsion and suspension of membership. Robertson suggested there were two reasons for the Council of Europe's stance on democracy. Firstly, as suggested above, the ideological conflict of eastern and western Europe was at that time becoming ever more serious. Between the end of the Hague Congress and the Statute being signed communists had taken power in Czechoslovakia, the Greek civil war had begun, and the Berlin Blockade¹⁸ had taken place. The need to demonstrate opposition to communism and dictatorship was very clear. The second reason offered by Robertson was that many of the people involved in drafting the Statute had been in resistance movements or suffered at the hands of oppressive regimes before and during the Second World War (or both). They were acutely aware that the first steps towards dictatorship involved the suppression of individual liberties, and that once this process began it was difficult to stop.¹⁹ The Council of Europe would be a means of preventing the descent to tyranny. The Statute was signed on the 5th May 1949 by Belgium, Denmark, France,

¹⁸ Between the 24th June 1948 and the 12th May 1949 Soviet forces prohibited any land access to Berlin, which was in the Russian zone of Germany. See Pennacchio, "The East German Communists and the Origins of the Berlin Blockade Crisis," (1995) 29 (3) *East European Quarterly*. See also <<http://www.usafe.af.mil/berlin/quickfax.htm>> for video footage supplied by the US Air Force of the blockade and the airlifts that contributed to its end (Accessed 4.3.2003).

¹⁹ Robertson (1965) op. cit., supra p27

Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden and the UK. After seven ratifications, the Statute came into effect on the 3rd August 1949.

The creation of the ECHR itself was spurred on by the activities of the United Nations, founded in 1945. The Universal Declaration of Human Rights, from which the European Convention took much of its inspiration, was signed in 1948.²⁰ The European Convention was created both in response to the atrocities committed in World War II, and once again as a reaction to the powerful communist Eastern-Bloc. The Convention was to be built upon the democratic values that informed the Statute of the Council of Europe and were considered common to the states that first signed it, evidencing their common heritage and shared cultural values.²¹ It is therefore notable that the newer Contracting Parties to the ECHR are now participants in a mechanism that was specifically designed to symbolise the difference between them and the system's early members.

For the Soviet forces involved in rebuilding Germany "democracy" could be imposed from without, by utterly controlling its political and economic

²⁰ UN General Assembly Resolution 217A (III) UN Doc. A/810, at 71 (1948). See Chapter Four, Section C1, "The UDHR" for a brief discussion of the UDHR's genesis.

²¹ Seymour, "The extension of the European Convention on Human Rights to Central and Eastern Europe: Prospects and Risks", (1993) 8 Conn. J. Int'l L 243, p244

system in order to support anti-fascist policies. The western powers, also aiming to promote a concept of democracy, chose to do so via free elections and human rights.²² The incompatibility of these approaches to governance in post-war Europe is clear, and runs deeper than the simple opposition of liberalism and communism.

Creating an institutional mechanism for protecting human rights was one of the first matters on the agenda of the new Council of Europe, with its limited membership. At the time some people expressed concern that the Council would simply duplicate the work of the UN, which was in the process of formulating mechanisms for the international protection of the values enshrined in the UDHR. As Beddard has noted, it is fortunate this position was not taken, since it took another seventeen years for the UN to secure agreement on the international Covenants on civil and political rights and economic, social and cultural rights.²³

Given the difficulties faced by the UN, the time it took to draft the ECHR was not especially long; a period lasting just over one year.²⁴ There were

²² Sandford, From Hitler to Ulbricht (1983), Princeton University Press: Princeton

²³ Beddard (1993) op. cit., supra p22

²⁴ Discussion of the actual process by which the Convention was adopted is outside the scope of this thesis. For a detailed examination of the Convention's drafting see Beddard (1993) op. cit., supra; Simpson, (2001) op. cit., supra; Robertson (2001), op. cit., supra.

throughout this time matters upon which states disagreed with some consistency. Primarily these were the precise details of the enforcement mechanisms and certain of the suggested rights.²⁵ Indeed from the first suggestions that there might be a charter of human rights, the British government opposed the creation of a court. The erosion of sovereignty necessitated by submission to an international court was novel, and it was also suspected that the proposed mechanisms might be too heavily politicised to be effective. Moreover the idea that an individual might be able to petition the court directly was seen by many as either superfluous or another impermissible challenge to the sovereignty of states.

As to the rights themselves the Council of Europe found difficulty in finalising the list of rights, and separating “core” rights from other desirable objectives. Particularly problematic were the right to peaceful enjoyment of one’s possessions (the right to property); the right of parents to have their children educated in accordance with their own religious and philosophical convictions; and the right to free and fair elections.

See also Janis, Kay & Bradley, European Human Rights Law (2000), (2nd Ed), OUP: Oxford, pp16-22;

²⁵ Beddard (1993) *op. cit.*, supra p22

The final version of the Convention, opened for signature on the 4th November 1950, opted for a compromise between the various competing positions. The problematic rights were consigned to an additional protocol. The jurisdiction of the Court itself was to be optional,²⁶ and the right of individual petition would also be subject to an optional declaration by the states parties before it could be invoked.²⁷

It is notable that the rights as eventually enshrined in the Convention were considered at the time to be defined in some detail.²⁸ According to Beddard it may well have been the intention of the negotiators to spell-out the rights clearly in order to constrain the activities of the Commission, thereby leaving little scope for expansion of the obligations by way of interpretation.²⁹ However the meaning of human rights protection has gradually changed from the post-World War II, Cold-war response to bad-faith human rights abuses and communism. The level of detail in the Convention may well have been appropriate to provide detailed protection against the rise of a regime such as was seen in Nazi Germany, but modern

²⁶ Old Article 46 ECHR

²⁷ Old Article 25 ECHR

²⁸ Beddard (1993) *op. cit.*, supra p25

²⁹ *Ibid.*, p25

democracies as well as totalitarian regimes are subject to scrutiny from the perspective of human rights.

The debates in the Council of Europe about the scope and enforcement of the proposed convention do not provide evidence of nascent totalitarianism and opposition to human rights by the participating states. They can be seen as different reactions to European unity and the role of human rights in it. All the states involved in drafting the Convention agreed human rights ought to be protected, and thus it can be suggested that the idea of human rights thinly-constituted was fully accepted. States merely differed in the means chosen to do so. Also, more notable than the difficulties that resulted in the adoption of the protocols, was the agreement on the other rights (albeit with some debate of the extent of such definition).

Each state clearly had different interests but, as in any intergovernmental organisation, compromises were sought that achieved to mediate between the sectional interests of each participating state whilst promoting the common goal of the organisation. In this way every state that participated in the Convention's drafting left its imprint upon the system's eventual form. The most important question in the Convention's early period of operation was how strong those imprints were. An effective system for human rights protection would have to stress its collective benefit for all humans over its

achievements for particular states. If it were not effective, then the Convention could not operate against the forces that led to oppression in Nazi Germany, or against the forces of communism. It is against this background that the European jurisprudence must be viewed.

A3 The early operation of the European Court and Commission of Human Rights

The Convention entered into force on the 3rd September 1953, after 10 ratifications.³⁰ The European Commission was set up in 1954, and the Court in 1959. Under old Article 25(4), the Commission could only begin to exercise its powers in respect of individual communications once six High Contracting Parties had declared they recognised the competence of the Commission to receive such communications. The Court itself was constituted only in 1958. There were, evidently, considerable procedural and political hurdles before the Court and Commission could begin their work.

The first case the Court decided on its merits was *Lawless v Ireland* on the 5th July 1961.³¹ This was some eight years after the Convention came into

³⁰ Old Art. 66(2) ECHR. See now Art. 59(2)

³¹ *Lawless v Ireland (no. 3)* (1979-80) 1 EHRR 15 (Decided 1.7.1961)

effect, meaning that in the 1950s the Court delivered no judgments at all. The Commission had filtered out almost all the applications, declaring them inadmissible.³² In the 1960s the Court gave ten judgments, and in the 1970s this more than doubled to twenty-six.³³ Nevertheless, in comparison to the figures of today, this was still a relatively small number of judgments. For example in 2001 the Court gave eight-hundred and eighty-eight judgments,³⁴ of which seven-hundred and twenty-five were decisions on the merits.³⁵

In addition to identifying that the number of judgments has risen since the Court began functioning, it is important to note that the Court is now far more willing to find against states than it was in its initial period of

³² 710 of the 713 first cases were declared inadmissible. Janis *et al* (2000) op. cit., supra p30. See also Merrills & Robertson (2001) op. cit., supra p 275; Mikaelson, European protection of human rights: The practice and procedure of the European Commission of Human Rights on the admissibility of applications from individuals and states (1980), Sijthoff & Noordhoff: Alphen aan den Rijn

³³ See “Alphabetical list of the 469 judgments delivered by the Eur Court HR (as of 23 June 1994)” (1994) 15 HRLJ 116; Janis *et al* (2000), p25; Merrills & Robertson (2001) op. cit., supra p288

³⁴ European Court of Human Rights, Survey of Activities 2001 (Information document issued by the Registrar of the European Court of Human Rights), (2001), Available at [http://www.echr.coe.int/Eng/EDocs/2001SURVEY\(COURT\).pdf](http://www.echr.coe.int/Eng/EDocs/2001SURVEY(COURT).pdf) (Accessed 4.2.2003)

³⁵ I.e. they were not friendly settlements, stuck out, or otherwise resolved. Ibid.

operation.³⁶ The first case in which any form of finding was made in favour of the applicant was in *Neumeister v Austria*, in 1968.³⁷ On the one hand this was the first case heard on its merits concerning Austria, and only the fourth case heard overall.³⁸ On the other hand, it was by then nearly ten years since the Court had been constituted, and nearly fifteen years since the Convention had come into effect. It can thus be observed that the activity of the Court in its early period of operation was quite slow. Moreover it is demonstrated below that it took nearly twenty years for the MoA's operation to evolve into its current role.

Some of the Court's initial timidity can be explained by the novelty and youth of the European human rights system, in that in order for a complaint to be successful it must be couched in appropriate terms and show an understanding of the system. Naturally in the initial phase there was no such understanding, either from the public at large or their lawyers. Nevertheless the number of applications made and cases decided grew

³⁶ It is demonstrated in Chapter 8, Section C, "The European Court's activity since the fall of the Iron Curtain" that this is true not only for the original Contracting Parties, but for the newer ones also.

³⁷ *Neumeister v Austria* (1979-80) 1 EHRR 91 (Decided 27.6.1968)

³⁸ NB The judgment in the similar case of *Wemhoff* was delivered on the same date, but with the opposite conclusion (*Wemhoff v Germany* (1979-80) 1 EHRR 55 (Decided 27.6.68)).

steadily until the 1980s, when the Council of Europe's expansion began in earnest and the Court took on a role more akin to that it plays today.³⁹

It is arguable that the success of the Court's activity can be attributed to the limited number of states under its jurisdiction. This could be for two main reasons. Firstly the states participant in the system had a similar level of development and commitment to democracy, and therefore when human rights violations were found they were universally condemned and seen as an exception to norm. Secondly, and more controversially, it can be argued that since the Contracting Parties were a narrow subset even of broadly "European" states, human rights were never felt to be an outside cultural imposition.⁴⁰ This makes it all the more important to examine the Court's recent jurisprudence in Part Three of this thesis.

³⁹ Janis, Kay & Bradley described an "explosion" of activity under the Convention in the 1980s. Janis *et al* (2000) *op. cit.*, supra p25

⁴⁰ Arguably the UK could be an exception to this, since it has in past relied on residual liberties rather than positive rights to protect its citizens (or subjects). The advent of the Human Rights Act 1998, which allows the invocation of Convention rights in the domestic courts is seen as altering this traditional view. For background to the changes implied by the new Act, see Irvine, "Activism and restraint: Human rights and the interpretative process" (1999) 4 EHRLR 350; Vick, "The Human Rights Act and the British Constitution" (2002) 37(2) *Texas International Law Journal* 329

The history of the Council of Europe, and therefore the European Convention on Human Rights is thus bound to the recent history of Europe. The practical impetus for the system's creation was the end of World War II and the onset of the Cold War. It has been further demonstrated that the Court's workload and activity have gradually increased, as has its confidence to act against the Contracting Parties.

B The Evolution of the MoA in ECHR Jurisprudence

The following section analyses the role that the evolving MoA played in consolidating the European human rights system. It is argued that the MoA provided a valuable tool to mediate between intergovernmental supervision and national activity. Whilst the link to matters of cultural sensitivity was not explicit at this stage, such mediation between different levels of human rights protection is nevertheless comparable to the recognition of thin and thickly-constituted conceptions of human rights.

The use of the MoA originally arose from the reports of the European Commission of Human Rights concerning Article 15 ECHR, on derogation from the treaty, but has since spread into other parts of the treaty. This fact is recognised by supporters and critics of the doctrine alike. For those who

have called for the MoA to be abandoned,⁴¹ its increased scope of application is particularly problematic. For those who are critical of the MoA's application rather than its existence,⁴² it is still a matter for concern because the problems caused by the margin, whilst not inherent, are in danger of being amplified.

In contrast to both of the positions identified above, the argument presented below is that, firstly, the MoA was developed in respect of emergency and non-emergency situations almost simultaneously, rather than spreading from the former to the latter only after the MoA had crystallised into a complete legal concept. Secondly the MoA has changed in style since it was first used, moving from an expression of deference to a means by which heightened scrutiny of state action can be achieved. If it were not for the period of initial caution, the second phase could not have come to exist. Once the MoA is shown to promote heightened scrutiny, then its use in more circumstances than those concerning emergency situations should be welcomed rather than feared.

⁴¹ E.g. Hutchinson, "The Margin of Appreciation Doctrine in the European Court of Human Rights" (1999) 48 ICLQ 3

⁴² E.g. Greer, The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights (2000), *Human Rights Files No. 17*, Strasbourg: Council of Europe Publishing

B1 From Emergency to non-emergency situations?

International human rights protection is controversial in international law generally because it allows states and international organisations to examine what would otherwise be considered within each state's domestic jurisdiction. Submission to a higher regime of international scrutiny is therefore at odds with a purely Westphalian concept of state sovereignty. This aside, it can be observed how, since World War II, international human rights systems have flourished.⁴³ Nevertheless the balance between human rights and state sovereignty has always been a difficult one to make (not least of all because it is not clear who or what should have jurisdiction to make that balance). This balance is difficult in peacetime but in times of emergency such as civil war, where state sovereignty is threatened by something other than simply the notion of human rights, the balance is even more delicate. It is at this time when states make derogations from treaties, arguing that the exceptional circumstances justify measures that would otherwise not be necessary. However, it is precisely in times of crisis that human rights are most under threat, where the perceived needs of the collective may be used as a justification for the abuse of the individual.

⁴³ See generally e.g. Robertson & Merrills, Human Rights in the World (1996), MUP:

Manchester

The MoA's use can be dated in principle to the recommendations of the European Commission on Human Rights in the case of *Greece v UK*.⁴⁴ The case concerned the UK's use of corporal and collective punishment on Cyprus, which it administered at that time. Without using the phrase "margin of appreciation", the Commission was still prepared to grant some discretion to the UK in deciding whether measures which interfered with Convention rights were "strictly required by the exigencies of the situation".⁴⁵ The case was eventually settled without going to the European Court.⁴⁶

⁴⁴ *Greece v UK* (Application no. 176/56). The Commission's Report was withheld at the time, with subsequent references to the case being confined to quotes contained in *Lawless v Ireland* (op. cit., supra). However on 17th September 1997, by Resolution DH (97) 376, The Committee of Ministers decided to make the Report public.

⁴⁵ Art 15(1) ECHR permits derogation from certain protected rights under the ECHR, but requires that the measures taken are "strictly required". This amounts to a requirement of proportionality. For a full discussion of the conditions for derogation, and the factors affecting the width of the MoA in this context, see Chapter 6, Section A "Emergency situations"

⁴⁶ The "Cyprus question" itself was resolved, so the case never even reached the Committee of Ministers under the old Article 32 "friendly settlement" procedure. The Committee thus terminated its examination of the case, by Resolution DH (59) 12 (20.4.1959). The friendly settlement procedure is now contained in Arts. 38-39 ECHR.

As noted above, the The Court’s first judgment was in *Lawless v Ireland*,⁴⁷ which was a derogation case. In *Lawless* the applicant complained that his detention by the Irish authorities for five months without trial had constituted an interference with his right to liberty under Article 5 ECHR. The Irish authorities had detained the applicant on the basis that he was potentially an active member of a republican terrorist organisation (*viz.* the IRA). It then sought to demonstrate that its actions were covered by a derogation. The European Commission explained in detail its fledgling concept of a “margin of appreciation”, and though the Court did not use the phrase in its judgment, it found that the derogation was valid and therefore that there had been no breach of Article 5. Notably, the Court stated not that there was clearly a “public emergency threatening the life of the nation”, as is required under Article 15 for a valid derogation, but that the Irish government had “reasonably deduced” the existence of one.⁴⁸ This appeared to extend the concept of the MoA because previously it had been confined to the questions of whether particular measures were justified, and not whether the actual emergency existed.

⁴⁷ *Lawless v Ireland*, op. cit., supra

⁴⁸ *Ibid.*, “The law”, para. 28.

The role of the Court applying the MoA in an emergency context was first explained in detail by the Court in the 1978 case of *Ireland v UK*⁴⁹, another derogation case concerning the Troubles in Northern Ireland. However this was *after* the principle had been used with respect to other substantive articles of the Convention. Just as it had done as regards Article 15, the Court was required to formulate for itself the role it ought to play in mediating between human rights and ultimate state sovereignty as regards the substantive articles of the Convention. Again, this can be seen as attempting to delimit the proper scope of human rights thinly-constituted, over which the Court has ultimate jurisdiction, and human rights as elaborated in the maximal moralities of the ECHR's Contracting Parties.

Articles 8, 9, 10 and 11 ECHR each set out a right in their first paragraph and in the second paragraph concede that the right may be limited in certain circumstances. Legitimate aims for a restriction of free expression under Article 10(2) ECHR, for example, are

“national security, territorial integrity or public safety, [...] the prevention of disorder or crime, [...] the protection of health or morals, [...] the protection of the reputation or rights of others, [...] preventing the disclosure of information received in confidence, [and] maintaining the authority and impartiality of the judiciary”.

⁴⁹ *Ireland v UK* (1979-80) 2 EHRR 25 (Decided 18.1.1978)

Similar, though not identical, conditions are listed in the other articles.⁵⁰ Even when the state's aim is legitimate in this sense, the restriction must, according to Article 10(2) ECHR be "prescribed by law" and "necessary in a democratic society". As is discussed further in Chapter 6, the MoA tends to be applied most frequently in discussion of this final criterion.⁵¹ Thus in an Article 8 case in 1970,⁵² the Court was able to hold that when Belgian authorities restricted a detained vagrant's correspondences, they had not transgressed their "power of appreciation"⁵³ to determine whether such restrictions were necessary in the light of the legitimate aims invoked (prevention of disorder or crime, the protection of health or morals, and the protection of the rights and freedoms of others).

⁵⁰ For example Article 8, which protects the right to respect for private and family life, may also be limited in the interest of the "economic well-being of the country".

⁵¹ However Chapter 9 notes that recently the MoA has been invoked in respect of determining whether a respondent state has correctly identified a "legitimate aim".

⁵² *De Wilde & Others v Belgium*, (1979-80) EHRR 373 (Decided 18.6.1971)

⁵³ The Court sometimes uses the phrase "power of appreciation" instead of "margin of appreciation", most often when the authentic language of the judgment is French. This difference in terminology has no substantive effect on the concept itself, and is becoming less frequent (though see *Constantinescu v Romania* (2001) 33 EHRR 33 (Decided 27.6.2000), para. 69, discussed further in Chapter 9).

It was in the 1976 case of *Handyside v UK*,⁵⁴ that the Court gave its clearest yet explanation of the MoA's rationale in non-emergency situations.⁵⁵ This case was referred to in the Introduction to this thesis as being one of those which has been the subject of considerable discussion, and has caused significant concern because of the relativism it is perceived to imply. The applicant had contended that his freedom of expression under Article 10 was subject to interference by national authorities. Mr Handyside had published in English the "Little Red Schoolbook", a non-conformist schoolbook available in other European states. Religious and other community leaders in the UK objected to its anti-authoritarian stance, its condoning of sexual experimentation (including homosexuality), and its liberal attitude to some drugs. In 1971 the applicant was convicted under the Obscene Publications Acts 1959 and 1964.

The European Court justified some deference to national institutions on balancing a human right against a legitimate public interest because national authorities were in "direct and continuous contact with the vital forces of

⁵⁴ *Handyside v UK* (1979-80) 1 EHRR 737 (Decided 7.12.1976)

⁵⁵ By this time it had also already been used in respect of Article 14 on discrimination. See *Case Relating to Certain Aspects of the Laws on the Use of Languages In Education In Belgium* (1979-80) 1 EHRR 252, (Decided 23.7.1968) (Known as the *Belgian Linguistic case*)

their countries”.⁵⁶ National state authorities were therefore better placed than an international judge, it argued, to give an opinion on the exact content of what is needed in order to achieve a particular legitimate aim in their own state, particularly when the aim was the protection of something as subjective as "morals".⁵⁷ However, this margin, or power, of appreciation was not unlimited - it went “hand in hand” with a European supervision. Nevertheless, bearing in mind the young age of the schoolbook's intended audience, the European Court found that the UK had not violated a Convention right in this case. This is clearly one of the cases in which the Court showed respect for the British authorities’ conception of morality, thickly-constituted. As such it will be discussed further when the factors that underpin the MoA’s existence are identified.

By the time that the Court gave its clearest explanation of the MoA in derogation cases in *Ireland v UK*, the 1978 case mentioned above, the language used in *Handyside* had fed back into the discussion of Article 15:

“It falls in the first place to each Contracting State, with its responsibility for "the life of [its] nation", to determine whether that life is threatened by a "public emergency" and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing

⁵⁶ *Handyside v. UK*, op. cit, supra, para. 48

⁵⁷ See the quotation given in the Introduction to this thesis; *Handyside v UK* op. cit., supra, para. 48

needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. In this matter Article 15 para. 1 leaves those authorities a wide margin of appreciation.

Nevertheless, the States do not enjoy an unlimited power in this respect. The Court, which, with the Commission, is responsible for ensuring the observance of the States' engagements (Article 19), is empowered to rule on whether the States have gone beyond the "extent strictly required by the exigencies" of the crisis [...]. The domestic margin of appreciation is thus accompanied by a European supervision."⁵⁸ [References omitted]

It can be seen therefore that the relationship between the MoA in emergency situations and in the context of limiting human rights in peace-time is not as simple as some have suggested. It is certainly true that the logic of the MoA was first used in the context of Article 15, but it was by no means "finished" by the time it was first used outside that context. The development of the MoA and any refinement it has undergone are the result of the interaction of case law relating to substantive rights as well as derogations.

Moreover if it is accepted that one of the implications of the MoA is the recognition of inter-European moral diversity, then such values must also

⁵⁸ *Ireland v UK*, op. cit., supra, para. 207. Whilst the derogation was validated by the Court, it nevertheless found a violation of the non-derogable Article 3.

inform the operation of the MoA in emergency situations as well as with respect to the substantive articles of the Convention. For example the situation in Northern Ireland that gave rise to the Convention's early jurisprudence on derogations is not devoid of a cultural context. In fact it is the religious and cultural context that is the root of the problem. Neither Ireland nor the UK's response to terrorism can be seen outside the context of balancing the interests of sectarian groups of varying degrees of militancy. Judge De Meyer recognised as much in his concurring opinion in *Brogan v UK*,⁵⁹ which dealt with limitations to the human rights guaranteed by Article 5 ECHR in the context of Northern Ireland. In paragraph 48 of the judgment the majority recognised the need for a "balance between the defence of the institutions of democracy in the common interest and the protection of individual rights". Judge De Meyer's entire separate concurring opinion read as follows:

"Whilst wholly concurring in the result of the judgment, I would observe, as to the dictum in paragraph 48, that the present case does not really raise the issue of 'the defence of the institutions of democracy', but rather concerns a problem of civil coexistence within a society deeply torn by national and religious antagonisms."

The use of the MoA in emergency situations and non-emergency situations is indicative that the Court's role in balancing the interests of States and human rights involves it in sensitive, often localised, disputes. Moreover in

⁵⁹ *Brogan and Others v UK* (1989) 11 EHRR 117 (Decided 29.11.1988)

principle it appears that by conceding a MoA the Court attempts to show respect for human rights as conceptualised in the respondent state's thickly constituted morality.

B2 The MoA's evolving role

In the cases referred to above the MoA appeared to work in favour of the respondent State, in each example resulting in the finding that there was no breach of the Convention.⁶⁰ The youth and novelty of the system, as well as the more conservative approach of the commissioners and judges explain

⁶⁰ See Jones, "The devaluation of human rights under the European Convention", (1995) *Public Law* 430, p435. Likewise whilst a violation of Article 5 was found in the early case *De Wilde & Others v Belgium*, the MoA was used to justify an interference with the applicants' rights under Article 8(2) (*De Wilde & Others v Belgium*, op. cit., supra). In *Swedish Engine Drivers' Union v Sweden* the Court also held that discrimination between the government's treatment of certain trade unions did not violate Article 14 taken together with Article 11 because the choices the government made were "reasonable and objective" and did not violate the state's power of appreciation (*Swedish Engine Drivers' Union v Sweden* (1979-1980) 1 EHRR 617, (Decided 6.2.1976), para. 47). In *Engel and Others v The Netherlands*, whilst violations of certain aspects of Articles 5 & 6 were established, the MoA was used to find for the respondent state on other matters (namely on the question of whether military justice must be identical to civilian justice, be identical for all ranks, and be identical in each Contracting Party), (*Engel and Others v Netherlands* (1979-80) 1 EHRR 647 (Decided 8.5.1976))

this.⁶¹ In the early period of their operation it was necessary for the Court and Commission to establish their credibility and forge a relationship of trust with participating states. The continued operation of the Convention system still depends upon the co-operation of the Contracting Parties.⁶² Nevertheless a change in the way that the MoA is used can be dated from the late 1970s, but after the *Handyside* case. From this period onwards, the Court appeared more willing to find against the respondent Contracting Party. Both Yourow and Jones identify 1979 as the year in which this change took place.⁶³ Of more interest than the precise date of this change are its nature and significance.

Prior to 1979 there are some examples of the Court using the MoA in cases where a violation of the Convention was established. These include the *Belgian Linguistic* case from 1968, where the Court found a violation of

⁶¹ See e.g. Yourow, The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence, (1996) The Hague: Kluwer, p25

⁶² Van Dijk & Van Hoof, Theory and practice of the European Convention on Human Rights, (1998) Kluwer: The Hague, p95

⁶³ Yourow (1996), op. cit., supra: Jones (1995), op. cit., supra. Yourow's study of the MoA described the cases up to 1979 as leading "towards standards", whilst the post 1979 cases demonstrate the "assertion of standards". The reasons for, or normative significance of, this shift in behaviour remain under-explored in Yourow's book.

Article 2 of Protocol 1 taken in conjunction with Article 14.⁶⁴ More significant is the 1975 case of *Golder v UK*,⁶⁵ concerning restrictions on prisoners' correspondence. In *Golder* the Court explicitly rejected the respondent government's attempts to rely on their MoA in order to justify an interference with Article 8.⁶⁶

The above examples can be considered sporadic and isolated. It was not until the late 1970s that a new pattern began to develop. In the 1979 case of *Sunday Times v UK*, the respondent state argued that its interference with the applicant's right to free expression was necessary in a democratic society, and, following the minority in the Commission, relied heavily upon its MoA.⁶⁷ The applicant newspaper had begun a series of articles intended to explore the background to the "thalidomide scandal". Thalidomide was a tranquilliser drug, often prescribed to pregnant women. Use of the drug was eventually linked to the birth of a very large number of deformed babies. The company that produced thalidomide complained to the Attorney General that such a series of stories would prejudice the various tort actions currently proceeding against them. After the introductory article was

⁶⁴ *Belgian Linguistic case*, op. cit., supra

⁶⁵ *Golder v United Kingdom* (1979-80) EHRR 524 (Decided 21.2.1975)

⁶⁶ *Ibid.*, para. 45

⁶⁷ *Sunday Times v UK* (1979-80) 2 EHRR 245 (Decided 26.4.1979), para. 58

published, the Attorney General secured interim injunctions restraining the publication of further material about the cases. There followed a series of domestic cases concerning the legality of the injunctions, which, having been ultimately upheld in the House of Lords, remained in effect until 1976. The applicants contended that the injunctions had interfered with their rights under Article 10 ECHR.

In the *Sunday Times* case the European Court attempted to distance itself from the position adopted by both the UK and the majority of the Commission in the *Handyside* case, who had suggested that the reviewing function of the European Court was confined to examining the reasonableness of state action. It described its role in these terms:

"This [the MoA] does not mean that the Court's supervision is limited to ascertaining whether a respondent State exercised its discretion reasonably, carefully and in good faith. Even a Contracting State so acting remains subject to the Court's control as regards the compatibility of its conduct with the engagements it has undertaken under the Convention."⁶⁸

This passage is contained in a section of the judgment that actually re-affirms the existence and legitimacy of the MoA. The Court had unleashed the doctrine as a means of respecting state sovereignty, but was now attempting to set limits upon its operation. The respondent State, to the

⁶⁸ Ibid., para. 59

contrary, clearly considered that the MoA advocated deference to its own determinations in this context.

Having stressed that the MoA was still a useful concept, but that it did not prevent the Court from going further than ascertaining the bare reasonableness of State action, the Court had to then carefully justify why in the instant case it considered the MoA had been exceeded. Instead of explicitly asserting a growth in its powers as an international court, and thereby demonstrating how far removed the European Court's jurisdiction was from traditional concepts of international law, it instead distinguished the *Handyside* case by reference to the "legitimate aim" invoked.

In *Handyside* free expression was limited with the aim of protecting "health or morals". In *Sunday Times* it was "maintaining the authority and impartiality of the judiciary" that was at stake. This, considered the Court, was a much more objective notion than "morals", and therefore the width of MoA should be narrowed. Having thus established that a more extensive European supervision was in order, the Court examined whether the interference corresponded to a "pressing social need", whether it was proportionate to the legitimate aim pursued, and whether the reasons for the interference were "relevant and sufficient".⁶⁹ The Court examined the

⁶⁹ *Ibid.*, para. 62

circumstances of the case in the light of these principles, and found that there had indeed been a breach of the Convention.⁷⁰

In the *Sunday Times* case the MoA was used as a means to arrive at the conclusion that there was a violation of the Convention. Even in its early case law, as is demonstrated below, the Court did not formally equate the MoA with an automatic finding for the state. Nevertheless, the result of the early cases could lead to the conclusion that, *de facto*, a finding for the state would be the outcome of any case in which the MoA played a role. Cases such as *Sunday Times* show the MoA at a time when neither states nor the Court were entirely sure of its outer limits. The UK, and the 9 judges who dissented, favoured an approach that would defer more to the determinations of the national authorities. The judgment itself reveals how the Court in fact moulded its now familiar concept of the MoA into a method by which a searching enquiry of the respondent state's behaviour could be conducted.

The MoA can be seen as akin to a "Trojan horse", introduced into the Convention system as a concession to state sovereignty. Recall that the jurisdiction of the Court and the availability of the individual complaints

⁷⁰ The Court's methodology and the effect of particular legitimate aims on the width of the MoA are explored in detail in Chapter 6.

mechanism were initially optional.⁷¹ Thus the Court had to balance not only the needs of the individual against States' participation in the system, but also against their continued acceptance of the optional portions of the Convention. Without the earlier cautious approach of the Court and Commission to the enforcement of the Convention rights, the later stability of the system that has allowed far-reaching developments in European human rights protection to flourish would not have been possible. Many commentators refer to older cases to make an argument relevant to contemporary circumstances. This is dangerous because the Court and Commission in the early days of the Convention system let the MoA play a different role to that which it now plays. For this reason cases from the two eras should not be confused, even if the precise turning point cannot be identified.

As the Convention system stabilised and gathered respect the Court and Commission were able to extend their review function using the language and logic of the MoA. What had once been a concession to states was now gradually requiring states to provide ever more thorough justifications for their limitation of human rights. Case law from this new era is examined in

⁷¹ This changed when Protocol 11 came into effect in 1998. See Chapter 8 for more details of Protocol 11.

Chapter 9, where the developments resulting from the end of the Cold War are considered.

C Conclusion

This chapter forms a background to the further discussion of the MoA. The context of the Convention's adoption and early operation must be considered when examining earlier case law. The Court has grown in stature and this is reflected in the changes that use of the MoA underwent. The principle has played a significant practical role in strengthening the Convention system and establishing the credibility of its enforcement mechanisms, with the MoA itself gradually transforming from a concession to states into a process in which States are called upon to justify in increasing detail any curtailment of human rights.

It was noted that over time the Court has given more and more judgments, and even before the end of the Cold War further states joined the system. Thus by the end of the 1970s there were 20 states participating in the system.⁷² This was precisely the time that the MoA evolved from a concession to a method to structure significant analysis over each instance of a state's purported limitation of human rights. The increased

⁷² (1979) 22 *Yearbook of the European Convention on Human Rights* 39

participation in the system, the careful use of the MoA and the growing public awareness of the Convention system each combined to consolidate the system.

It has been rather simplistically suggested that in this same period the MoA spread from emergency to non-emergency situations, but a closer examination reveals significant interaction between these categories of case. In each instance that the Court uses the MoA it makes a choice about whether a potential human rights abuse is merely a defensible response to local conditions rather than a fundamental threat to human rights. This is true even of the early cases where the Court was more deferential. It can still be seen as enquiring into the extent to which a Contracting Party purported to depart from human rights thinly-constituted.

Chapter Six

Establishing the “margin of appreciation’s” width

Introduction

This chapter continues Part Two’s detailed examination of the margin of appreciation (MoA). The Introduction to this thesis noted that it could be argued that the margin of appreciation is simply flawed in principle because it permits too much in the way of deference to local conditions. This chapter concerns two ways in which this could arise. Firstly, if the width of the margin conceded in each case was decided arbitrarily. Secondly if there were no outer-limits to the MoA then it could amount to the effective exclusion of the Court’s jurisdiction in certain matters.

In order to demonstrate that the MoA is not flawed in principle both these criticisms must be addressed. However technical these points may appear, if they were true then it could not be said that the MoA limits variation of human rights only insofar as they are thickly-constituted in each Contracting Party. Without principles guiding its width and its preservation of the Court’s ultimate authority, the MoA could allow the erosion of human rights thinly-constituted. A third element to the defence of the MoA in principle is

addressed in Chapter 7; the precise relationship of the MoA's operation to the Walzerian paradigm.

Stephen Greer has questioned whether the MoA is really a doctrine at all "since it could be said to lack the minimum theoretical specificity and coherence which a viable legal doctrine requires".¹ This imprecision of the MoA led to Rosalyn Higgins warning that cases such as *Handyside*² have "gratuitously kept alive a concept which has been increasingly difficult to control and objectionable as a viable legal concept".³ The importance of such apparently inconsistent application of the MoA has also been recognised by Eyal Benvenisti, who suggested that it could result in the perception of "double standards" in European human rights protection.⁴ It would be politically controversial and a threat to the Court's legitimacy if some states felt that others were the beneficiaries of an unjustifiably wider margin.

¹ Greer, The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights (2000), *Human Rights Files No. 17*, Strasbourg: Council of Europe Publishing, p32

² *Handyside v UK* (1979-80) 1 EHRR 737 (Decided 7.12.1976); See the Introduction and Chapter 5 for further discussion of this case.

³ Higgins, "Derogations under human rights treaties", (1976-1977) 48 BYIL 281, p315

⁴ Benvenisti, "Margin of Appreciation, Consensus and Universal Standards", (1999) 31 *New York University Journal of International Law* 843, p844

The following discussion rebuts such arguments, encompassing assessment of whether the doctrine indeed lacks precision or is, as Lord Lester has argued, "standardless".⁵ Emergency and non-emergency contexts are separated, and the different factors that determine the width of the MoA in each of these contexts are identified. Section A examines emergency situations, and Section B deals with non-emergency situations. Both sections identify that principles guide the width of the MoA. Section C questions whether the existence of the MoA signifies that the jurisdiction of the Court can be excluded in certain circumstances. It is demonstrated that this is not the case. In this way it is concluded that the fluctuating width of the MoA in particular cases does not undermine human rights thinly-constituted, but reflects that the Court defers to Contracting Parties on questions relating to their own maximal elaborations of human rights.

A Emergency situations

Chapter 5 demonstrated that the MoA was first used with respect to Article 15 ECHR. It was also argued that evolution of the MoA involved interaction between Article 15 cases and cases concerning the substantive

⁵ Lester, "Universality versus subsidiarity: a reply" (1998) 1 EHRLR 73; The Introduction referred to these comments also.

rights in the Convention. In both categories of cases it has fostered the relationship between the states and the system, and operates in the most sensitive of cases. Nevertheless the Court has used the wording of the Convention to narrow or expand the width of the MoA, which has inevitably led to some differences of approach in the two categories of cases. Indeed the MoA tends to be wider in emergency situations generally, but can also expand or contract with respect to the precise element of Article 15 in discussion.

Article 15 reads as follows:

“15(1) In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

15(2) No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

15(3) Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.”

Higgins⁶ has identified three categories of limitation inherent in Article 15; textual limitations, substantive limitations and procedural limitations. These correspond with the order in which the conditions of Article 15 are set out.

“Textual” limitations are the two distinct requirements in Article 15 that the situation is a time of “war or other public emergency” and that the measures are “strictly required”. These two requirements form the bulk of the following discussion, where it is established that the MoA conceded over the *existence* of an emergency situation is wider than that conceded over the *measures taken* to deal with such a situation. “Substantive” limitations, deriving from Article 15(1) and 15(2) are that the measures are, firstly, not inconsistent with other obligations under international law, and secondly that the derogation is not from obligations under Articles 2,3,4 or 7. These are substantive in the sense that they concern the subject matter of the derogation. Finally the formal conditions set out in Article 15(3) can be termed “procedural”. Unlike Higgins’ work, which dealt with the whole of Article 15, this exposition is concerned solely with its relevance to the MoA.

A1 The existence of war or a “public emergency”

⁶ Higgins, *op. cit.*, *supra*: see also O’Boyle, “The margin of appreciation and derogation under Article 15: Ritual incantation or principle” (1998) 19(1) HRLJ 23

Article 15(1) contains the limitation that for states to derogate from their obligations, there must be a time of “war or other public emergency threatening the life of the nation”. Questions regarding the meaning of “war” in its most conventional sense have generally been very rare because open warfare has been for the most part avoided in the recent history of western Europe. However, Europe’s relative “peace” is continually threatened by various forms of limited war, or terrorism. Questions surrounding such circumstances, and whether they amount to an “other public emergency” have been more frequent and more controversial.

In the *Lawless* case,⁷ introduced in Chapter 5, it was seen that in examining Article 15(1) the Court held that Ireland had “reasonably deduced” the existence of a public emergency. This clearly suggests that Ireland’s interpretation of the situation was one within a permissible range, rather than the only possible answer at which a state in Ireland’s position could have arrived. This amounts to allowing the Irish authorities a MoA. A more explicit use of the MoA in this context can be seen in the cases of *Ireland v UK* in 1978 and *Brannigan and McBride v UK* in 1993. In both of these cases it was stated that in principle states are in a better position than

⁷ *Lawless v Ireland* (no. 3) (1979-80) 1 EHRR 15 (Decided 1.7.1961)

the European Court to decided “both on the *presence* of such an emergency and on the *nature and scope* of derogations necessary to avert it”.⁸

The language in *Ireland* and *Brannigan* confirms that states will normally have a wide margin of appreciation in respect of both whether there is a war or other public emergency (presence of an emergency) and whether the measures taken are strictly required (nature and scope of the derogation). Recent case law has re-affirmed this position, thereby avoiding the methodological mistake of reliance upon case law from a previous era of the Convention’s history to justify or explain its current conduct. For example in *Aksoy v. Turkey*, as well as re-stating that the MoA does not exclude the Court’s review function entirely, the Court recalled:

“that it falls to each Contracting State, with its responsibility for "the life of [its] nation", to determine whether that life is threatened by a "public emergency" and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle better placed than the international judge to decide both on the presence of such an emergency and on the nature and scope of the derogations necessary to avert it. Accordingly, *in this matter* a *wide* margin of appreciation should be left to the national authorities.”⁹

⁸ *Ireland v UK* (1979-80) 2 EHRR 25 (Decided 18.1.1978), para. 207; *Brannigan and McBride v UK* (1994) 17 EHRR 594 (Decided 26.5.1993), para. 43, [emphasis added.]

⁹ *Aksoy v Turkey* (1997) 23 EHRR 553 (Decided 18.12.1996), para. 68 [emphasis added]

It is important to note the wording of the final sentence of this quotation, the language of which is, as demonstrated, frequently used in Article 15 cases. It is unusual that the Court concedes a margin “in this matter”, rather than “in these matters”, since *prima facie* the margin tends to be wider over the question of the public emergency’s existence than over the measures taken to deal with it. In other words, the Court normally deals with these questions as two separate invocations of the MoA, rather than as a composite test.

A wider MoA about determining whether a situation is an “emergency” is generally justified by the Court because the state has access to a greater range of local resources to assist in establishing the existence of such a situation. It can also be argued that this question is much more closely linked to the states’ sovereignty than the second question. Whether the “exigencies of the situation” require the actual measures taken questions the means employed in the instant case. By contrast, the question of the situation’s existence has much wider ramifications for the state’s credibility. It could be a great affront to a Contracting Party if the European Court effectively suggested that state had over-reacted to a situation that was not really an emergency at all. Given that, and despite the obfuscatory use of language identified in *Aksoy*, the Court has successfully separated the two questions, allowing it to agree with a respondent state that its concerns are

serious and well founded, but take the less fundamental step of arguing that its actions in the case at hand were not justified.

Nevertheless the MoA's use in as regards the existence of a public emergency has been much criticised. Jones, echoing the earlier work of Higgins,¹⁰ has criticised whether the Court is actually in such a bad position to assess whether an emergency situation exists. According to Jones:

“Leeway should be granted to a government in choosing the appropriate means to deal with an emergency, but is not the existence of a threat to the life of the nation a matter capable of objective analysis?”¹¹

It may be that an emergency situation is capable of some level of objective determination, but to take such an approach neglects the delicate interplay of human rights and state sovereignty. To suggest that the determination is capable of limited objective assessment is simply to agree with the MoA's use as it is. In contrast to Jones, O'Boyle actually stressed the “inherent *subjectivity*” of this “political assessment”.¹² If it is a political question, and one that even democracies might disagree upon, then surely the political

¹⁰ Higgins (1976-1977) op. cit., supra p299, “[T]he question of whether a threat to the life of a nation exists is capable of objective answer”.

¹¹ Jones, "The devaluation of human rights under the European Convention", (1995) *Public Law* 430, p435

¹² O'Boyle (1998) op. cit., supra p26 [emphasis added]

organs of the state in question rather than an international court should answer it. It might also be noted that, without using the MoA, the Court runs the risk of relying too heavily on the benefit of hindsight. It would be unfair to determine whether a state's actions were justified by reference to the eventual resolution (or not) of the emergency situation.¹³

A2 “Strictly required by the exigencies of the situation”

Judge Martens implied in his Concurring Opinion in *Brannigan & McBride v UK* that the idea of a restriction being simultaneously “strictly required” and yet also the subject of MoA analysis is contradictory.¹⁴ In the same case Judge Martens also contrasted the permissible limitations under Article 15 with those under Articles 8-11, arguing that the “strictly required” phraseology in Article 15 required more active scrutiny by the Court than the “necessary in a democratic society” language of the other articles. Both forms of analysis can be seen as an enquiry into the proportionality of the state's emergency measures¹⁵ but the Court has tended to embark upon a

¹³ Ibid.

¹⁴ *Brannigan & McBride v UK*, op. cit., supra, separate Concurring Opinion of Judge Martens

¹⁵ Eissen has termed this “proportionality in ‘thinly veiled form’”. Eissen, “The principle of proportionality in the case-law of the European Court of Human Rights” in Macdonald, Matscher, & Petzold (eds.), The European system for the protection of human rights

thorough analysis of this aspect of the Article 15 requirements thereby narrowing the scope of the MoA.

A recent example of this is the case of *Aksoy v Turkey*,¹⁶ mentioned above. The case concerned the applicant's torture and detention without trial, resulting from the government's belief that he was a member of the PKK, a terrorist organisation seeking independence for Turkish Kurds.¹⁷ After filing his application the applicant was shot dead by allegedly government agents before the case was heard. Though the applicant had denied any involvement with the PKK, the government claimed his death was a result of squabbles between rival factions of that organisation. The European Convention case itself concerned his earlier arrest, interrogation, and alleged torture at the hands of the Turkish authorities (which, on this occasion, he had survived). A violation of the non-derogable Article 3 was found quite straightforwardly. However the Turkish government claimed that the alleged violation of Article 5 was covered by a derogation it had made. In examining the derogation, the Court agreed with Turkey that:

(1993), Martinus Nijhof: Dordrecht. The issue of proportionality is discussed in Section B3(iii) below.

¹⁶ *Aksoy v Turkey*, op. cit, supra

¹⁷ The PKK's name can be translated as the "Workers' Party of Kurdistan".

“[I]n the light of all the material before it, that the particular extent and impact of PKK terrorist activity in South-East Turkey has undoubtedly created, in the region concerned, a ‘public emergency threatening the life of the nation’”

Thus, in accordance with the arguments made in the preceding section, the Court allowed a fairly wide MoA over the question of whether a public emergency existed.¹⁸ The controversial aspect of the case arose with respect to whether the derogation was “strictly required”; the second of Higgins’ textual limitations on derogation. The Court proceeded to examine the length of the unsupervised detention that had led to the possibility of the applicant’s torture. It also examined what safeguards were available to detainees. In spite of the obvious need for investigation into terrorist activities, the Court could not accept it was necessary to have held the applicant for fourteen days without judicial intervention.¹⁹ Moreover the safeguards available to the applicant had been insufficient. There had been no speedy remedy of *habeas corpus*, or a legally enforceable right of access to a lawyer, doctor, friend or relative. Accordingly, the Court agreed with the Commission that the Turkish authorities had gone beyond their MoA:

¹⁸ Interestingly, from the language used, it could be argued that the Court took a decision for itself rather than merely suggesting that such a situation could be “reasonably deduced” from the material before it.

¹⁹ *Aksoy v Turkey* op. cit., supra, para 78

“The Court has taken account of the unquestionably serious problem of terrorism in South-East Turkey and the difficulties faced by the State in taking effective measures against it. However, it is not persuaded that the exigencies of the situation necessitated the holding of the applicant on suspicion of involvement in terrorist offences for fourteen days or more in incommunicado detention without access to a judge or other judicial officer.”²⁰

For the first time in its history, the Court thus held that the respondent state’s derogation was not valid in these circumstances. It is submitted therefore that since it is now possible for the Court to rule against the respondent state on this basis, the question of whether the situation is or is not an emergency is of secondary importance. Clearly the Court is correct to examine for itself evidence that the situation does in fact exist, but if it can enquire deeply into whether the measures are “strictly required”, then the fact that a wide margin is often conceded on the first textual limitation is less problematic. This permits the Court to share some agreement with the respondent state, even when ultimately it finds a breach of the Convention. It has already been argued that one of the main strengths of the MoA is that it provides a forum for discussion of sensitive issues, and that in the past its prudent use has strengthened the Convention system.²¹ The decision in

²⁰ Ibid., para 84

²¹ See Chapter 5

Aksoy is a welcome one, but is also a careful one that seeks to find some common ground with the respondent state.²²

A3 Emergency situations - Conclusion

It is clear the consistent patterns emerge on examination of the Court's jurisprudence relating to the MoA in emergency situations. Indeed the steps that the Court requires states to take in order to demonstrate the validity of a derogation involve the provision of detailed reasons. This is symptomatic of the MoA's development into a process whereby states are compelled to

²² The most recent cases dealing with derogations have both also concerned Turkey. See the Court's judgment in *Sakik & Others v Turkey* (1998) 26 EHRR 662 (Decided 26.11.1997) and the Commission's Report in *Simsek v Turkey* (1998), Unreported – Application no. 28010/95 (Decision of the European Commission of Human Rights, 16.4.1998). Both hinge upon the same point. Both cases consider the *Aksoy* judgment, but distinguish it in one important way. Whilst the *Aksoy* judgment held that the measures were not required by the exigencies of the situation, the geographical area in which the interference took place was actually covered by the derogation. In *Sakik* and *Simsek* the Turkish authorities attempted to rely upon the same derogation, but with respect to another part of Turkey not mentioned in the derogation. The Court and Commission both reasoned that extending the derogation beyond the area named in it could not be within the object and purpose of the Convention, viz. that restrictions be “strictly required”. Such reasoning leaves little scope for application of the MoA.

justify in great detail any attempted limitation upon their protection of human rights.²³

In general the threat to a state's sovereignty and the state's expertise over that matter result in the Court permitting a wider MoA over emergency situations than over the substantive articles of the Convention. However, the Court treats the specific requirements of Article 15 separately. The MoA conceded tends to be wider over the question of whether an emergency situation exists than over the measures taken to deal with such a situation. The *Aksoy* decision, amongst others, is evidence of this. It is therefore established that Court's application of the MoA in emergency situations is principled and methodical.

B Factors guiding the width of the MoA – Non-emergency situations

Even outside the context of emergency situations the Convention permits the limitation of human rights for general public interests in certain circumstances. The MoA is applied as part of the process to determine whether such limitations violate the Convention. It has been applied in respect of the substantive articles of the Convention, and in respect of the

²³ See Chapter 5, Section B2, "The MoA's evolving role"

principle of non-discrimination contained in Article 14 (which can only be used in conjunction with other Convention rights).

The discussion below concentrates on limitations foreseen by the second paragraphs of Articles 8-11 and Article 1 of Protocol 1. Article 14 is not discussed in its own right because it does not raise any novel issues, and has not yet been the subject of any discussion in respect of MoA cases emanating from central and eastern Europe.²⁴

This section demonstrates that there is a complex range of factors contributing to the MoA's width in non-emergency situations. Critics of the MoA suggest that the complexity of these factors renders the MoA indeterminate. Van Dijk and Van Hoof argued that it is difficult to predict how the Court will decide the question of the MoA in any given case.²⁵ Whilst the range of factors considered here are more numerous than those relating to Article 15, it does not mean that themes have not developed, or that principles cannot be discerned.

²⁴ On Article 14 see Schokkenbroek, "The prohibition of discrimination in Article 14 of the Convention and the Margin of Appreciation" (1998) 19(1) HRLR 20

²⁵ Van Dijk & Van Hoof, Theory and practice of the European Convention on Human Rights, (1998) Kluwer: The Hague, p91

A variety of commentators have sought to identify factors that guide the width of the MoA, and have detailed their application in particular cases.²⁶ The examination presented here does not attempt to analyse the MoA's role article by article; it is not intended to be exhaustive. Any attempt to list exhaustively the precise width of the MoA in each case, and thereby conclusively gauge its width in the future would be inherently flawed because each case raises its own issues. The MoA is not a mechanical process, indeed its fluidity is its ultimate strength. This section takes a thematic approach, identifying common patterns that can be observed in various cases and analyses.

B1 The Court's methodology

In examining limitation of human rights the Court tends to ask three questions, all of which guide the width of the MoA. These questions can be

²⁶ Brems, "The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights", (1996) 56 *Zeitschrift für Ausländisches öffentliches recht und volkerrecht* 240; Hutchinson, "The Margin of Appreciation Doctrine in the European Court of Human Rights" (1999) 48 *ICLQ* 638, p640; Jones (1995) op. cit, supra p438 *et seq.*; Mahoney, "Marvellous richness of diversity or invidious cultural relativism" (1998) 19(1) *HRLJ* 1, p5 *et seq.*; Schokkenbroek, "The basis, nature and application of the margin of appreciation doctrine in the case law of the European Court of Human Rights" (1998) 19(1) *HRLJ* 30, p34 *et seq.*; Van Dijk & Van Hoof (1998) op. cit., supra p87 *et seq.*

seen as tests that the respondent state must pass if it is to satisfy the Court that its interference with a Convention right does not undermine human rights thinly constituted. The Court asks:

- 1) Is the interference prescribed by law?
- 2) Is the interference in pursuit of a legitimate aim?²⁷
- 3) Is the interference necessary in a democratic society?

A certain amount of discretion is permitted in respect of the first question, though it is conceptually distinct to that permitted by the MoA. Typically, the question is a formal one, based upon rule of law considerations that any restriction should be in accordance with published law of which the citizen is, or can be, aware. In *Kruslin v France*, the Court stated that the term used in Article 8(2):

“requires firstly that the impugned measure should have some basis in domestic law; it also refers to the quality of the law in question, requiring that it should be accessible to the person concerned, who must moreover be able to foresee its consequences for him, and compatible with the rule of law.”²⁸

²⁷ In respect of Article 14 the Court has stated that the principle of equality is violated where the difference in treatment has no objective and reasonable justification. An element of this is whether the difference in treatment pursued a “legitimate aim”, even though Article 14 does not itself list any particular aims. See *Belgian Linguistic* (1979-80) 1 EHRR 252, (Decided 23.7.1968), para. 35

²⁸ *Kruslin v France* (1990) 12 EHRR 547 (Decided 24.4.1990), para. 27

The UK, with its largely unwritten constitution and reliance upon common law, has faced some difficulties in persuading the European Court that some of its restrictions on human rights are “prescribed by law”. Noting that many of the most significant cases in the Convention system have been brought against the UK, Yourow has postulated whether the English legal system, combined with a “heightened” civil liberties tradition in the UK, has “propelled” issues from the UK to the Convention system.²⁹ In *Sunday Times v UK*, the European Court considered whether restrictions on free expression by way of the common law contempt of court doctrine were “prescribed by law”:

“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 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.”³⁰

²⁹ Yourow, The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence, (1996) The Hague: Kluwer, p5 (fn 9)

³⁰ *Sunday Times v UK* (1979-80) 2 EHRR 245 (Decided 26.4.1979), para. 47

Whilst this is not an example of the MoA *per se*, it does evidence a tendency to accommodate diverse legal systems in the Convention jurisprudence. It is thus apparent that the Court possesses a willingness to modulate the protection of human rights, at least in terms of the means chosen to protect and restrict them. The real difficulty is to ascertain whether the modulation permitted goes so far as to undermine the protection of human rights substantively. The meaning of “prescribed by law” is so fundamental that it must be considered as part of respect for human rights, thinly constituted. In order to be defensible, any variations in this context must for these reasons relate only to form, rather than substance or even interpretation.³¹ Given that the Court in *Sunday Times* went on to spell out distinct requirements that to be “prescribed by law” a restriction must be “adequately foreseeable” and “sufficiently precise”,³² it seems that the Court can restrain the modulation it permits quite successfully. Not only is the heterogeneity permitted in this context different to the MoA, but it also relates to a distinct form of variation. As a result, the level of variation permitted is different and narrower, and the Court does not use the language of deference. This is a matter of human rights, thinly constituted, over

³¹ See Chapter 3, Section B, “Donnelly and the “Substance”, “Interpretation” and “Form” of Human Rights”; Donnelly, Universal human rights in theory and practice (1989), Cornell University Press: New York

³² *Ibid.*, para. 49

which the Court must retain full authority, rather than human rights, thickly constituted, with respect to which the Court must work in conjunction with national determinations.³³

The second and third questions identified above are very closely related. The “legitimate aims” for limiting a Convention right are listed exhaustively in the Convention itself. There is some discussion about whether a particular activity falls into one of the categories provided, but the Court tends not to apply MoA analysis to this question.³⁴ It hears evidence on the matter and decides for itself what the aim of the measure was, and whether this aim was “legitimate”. This has typically been one of the briefest parts of a judgment, and the Court is usually “satisfied” that the state had a legitimate aim. This is similar to conceding a wide MoA over whether a “public emergency” exists inasmuch as both concern the necessary pre-conditions for curtailment of a Convention right. In each situation the Court is more inclined to fostering agreement over the legitimacy of the state’s determination that the pre-condition is met than whether the means chose to deal with it were appropriate.

³³ See below, where the interpretation and implementation of the Convention are distinguished.

³⁴ See e.g. *Handyside* op. cit., supra para. 46; *Sunday Times v UK* op. cit., supra, paras. 54-57 (a short discussion to establish the purpose of “contempt of court”); c.f. *Rekvenyi v Hungary* (2000) 30 EHRR 519 (Decided 20.5.1999), para. 41 (Discussed in Chapter 9)

The most important feature of the second test is that the particular aim invoked fundamentally affects the necessity of the interference. The next sections clarify the meaning of necessity and its relationship to legitimate aims.

B2 Necessity in a democratic society

The necessity test is conceptually similar to the requirement that derogations must be “strictly required”, in that both require a proportionate relationship between aim pursued and the measure taken. The Court’s general approach to necessity was summarised in the *Pretty* case as follows:

“According to the Court’s established case-law, the notion of necessity implies that the interference corresponds to a *pressing social need* and, in particular, that it is *proportionate to the legitimate aim pursued*; in determining whether an interference is “necessary in a democratic society”, the Court will take into account that a margin of appreciation is left to the national authorities, whose decision remains subject to review by the Court for conformity with the requirements of the Convention. The margin of appreciation to be accorded to the competent national authorities will vary in accordance with the *nature of the issues* and the *importance of the interests at stake*.”³⁵ [Emphasis added]

³⁵ *Pretty v UK* (2002), Unreported - Application no. 2346/20 (Decided 29.2.2002), para. 70.

The facts of this case are given below.

There are therefore specific requirements that necessity involves establishing a “pressing social need” and proving a relationship of proportionality between the means and the ends. To these the Court often also adds the requirement that “relevant and sufficient reasons” are provided.³⁶ The precise relationship between “necessity” and “pressing social need” was established in earlier case-law, but is less frequently discussed at present. In paragraph 48 of the important *Handyside* judgment the Court elaborated upon the meaning of “necessity”, comparing it with other words used in the Convention:

“The Court notes at this juncture that, whilst the adjective "necessary", within the meaning of Article 10 para. 2 [...], is not synonymous with "indispensable" [...], the words "absolutely necessary" and "strictly necessary" and, in Article 15 para. 1, the phrase "to the extent strictly required by the exigencies of the situation"), neither has it the flexibility of such expressions as "admissible", "ordinary" [...], "reasonable" [...] or "desirable". Nevertheless, it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of "necessity" in this context.”³⁷

Thus the notion of necessity in the context of Article 10(2), and the other limiting clauses of articles 8,9, and 11 occupies a middle ground between the strict requirements required in emergency situations and the more fluid

³⁶ See e.g. *Nikula v Finland* (2002), Unreported - Application no. 31611/96 (Decided 21.3.2002), para. 47

³⁷ *Handyside v UK* op. cit, supra para. 48

requirements of, for example, Article 4(3)(a).³⁸ It carries with it a degree of seriousness, but much in the same way as the Court leaves some discretion to states in determining whether a state of emergency exists, it leaves some discretion to states in identifying a “pressing social need”. It is in performing this task that the Court recognises that the Convention leaves to states a MoA. Underpinning this task is the explicit criterion of proportionality to the legitimate aim pursued, and the understanding that the “nature of the issues” and the “importance of the interest” will have a bearing upon the decision. The following sections explore these factors.

B2(i) Relevance of the legitimate aim pursued

After establishing whether the restriction in principle pursues one of the aims listed in the second paragraphs of Articles 8-11, the Court must determine how that particular aim impacts upon the necessity question. Certain legitimate aims tend to result in a consistently broad or narrow MoA, and the context in which the aim is pursued may also impact upon the MoA’s width. It is not intended to examine each legitimate aim here, but

³⁸ Article 4(3) ECHR concerns the exclusion of certain matters from constituting “forced or compulsory labour”. Article 4(3)(a) thereby excludes “any work required to be done in the *ordinary* course of detention”. [Emphasis added].

simply to demonstrate that there are differences between the MoA that each implies.

It was noted above that in the *Sunday Times* case the Court established that not each of the legitimate aims specified in the Convention carries equal weight. For example, it was seen in the *Handyside* case that the protection of morals resulted in a wide MoA being conceded to the UK.³⁹ Likewise in the 1992 case of *Open Door and Dublin Well Woman*, the European Court discussed the Irish approach to abortion, and acknowledged that,

“[...] the national authorities enjoy a wide margin of appreciation in matters of morals, particularly in an area such as the present which touches on matters of belief concerning the nature of human life.”⁴⁰

However, earlier in the same paragraph of the *Open Door* case, the Court quite rightly made clear its disagreement with Ireland’s contention that states’ discretion in the field of protection morals was “unfettered and unreviewable”.⁴¹

³⁹ Very similar wording to para. 48 of *Handyside* was used in the later case of *Muller & Others v Switzerland* (1991) 13 EHRR 212 (Decided 24.5.1988), para 35.

⁴⁰ *Open Door and Dublin Well Woman v Ireland* (1993) 15 EHRR 244 (Decided 29.10.1992), para. 68

⁴¹ *Ibid.* See also Section C below on states’ attempts to exclude the Court’s jurisdiction.

Nevertheless, a difference of approach can be seen between the Court's approach to the legitimate aim of protecting morals and, for example, the aim of maintaining the judiciary's authority and impartiality. In *Sunday Times* the Court distinguished the *Handyside* decision, arguing that in the earlier case a very subjective legitimate aim was at stake, where the national authorities were better placed therefore to decide on the content of what was required to maintain the judiciary's authority. The Court reasoned that,

“Precisely the same cannot be said of the far more objective notion of the "authority" of the judiciary. The domestic law and practice of the Contracting States reveal a fairly substantial measure of common ground in this area. [...] Accordingly, here a more extensive European supervision corresponds to a less discretionary power of appreciation.”⁴²

The assumption is that the more subjective the legitimate aim pursued, the more appropriate it is for national rather than European assessment, and *vice versa*. The width of the MoA expands or contracts accordingly.

A further complication is the context in which the legitimate aim is pursued. For example, where a particular restriction is part of a general economic, social or environmental policy, as desired by an elected government, the Court is less likely to interfere.⁴³ This can be observed in particular with

⁴² *Sunday Times v UK* op. cit., supra para. 59

⁴³ Schokkenbroek (1998) (“The basis, nature and application of the margin [...]”) op. cit.,

regard to property rights under Article 1 of Protocol 1 and the effect that planning regulation has on rights under Articles 6 and 8. For example, in *Buckley v UK*, the Court stated that:

“In so far as the exercise of discretion involving a multitude of local factors is inherent in the choice and implementation of planning policies, the national authorities in principle enjoy a wide margin of appreciation”.⁴⁴

The justification that underlies this approach is similar to that seen with respect to the aim of protecting morals. The respondent state is in a better position than the international court to balance the competing policy interests at stake. As is discussed further in Chapter 7, this is perfectly compatible with an institution that sees itself as subsidiary to the national systems it nevertheless polices.⁴⁵

Such examples demonstrate why the recent *Hatton*⁴⁶ case is so controversial. In *Hatton and Others v UK*, the applicants contended that a change in government regulations of night flying had increased the amount of noise emanating from Heathrow airport during the night. The applicants, who lived very close to the airport, argued *inter alia* that this was a breach

supra p34

⁴⁴ *Buckley v UK* (1997) 23 EHRR 101 (Decided 25.9.1996), para. 75

⁴⁵ See Chapter 7, Section A, “Subsidiarity in the ECHR”

⁴⁶ *Hatton and Others v UK* (2002) 34 EHRR 1 (Decided 2.10.2001)

of the Government's positive duty to protect their right to respect for family and home life under Article 8 ECHR.

The Court, following its earlier decision in *Lopez Ostra*⁴⁷, maintained that the principles to be applied if the alleged violation was of a positive obligation under Article 8(1) or a failure to comply with the conditions of Article 8(2) were broadly the same. The Court argued that:

“In both contexts, regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole. In both contexts the State enjoys a certain margin of appreciation in determining the steps to be taken to ensure compliance with the Convention”.⁴⁸

In the light of this, the legitimate aims listed in Article 8(2) could thus be instructive in determining whether a positive obligation under Article 8(1) had not been fulfilled. The potentially overriding legitimate aim at issue was the “economic well-being of the country”.

Much to the concern of the dissenting minority the Court went on to apply what the dissent described as a “wholly new test”⁴⁹, and questioned whether the Government's prior investigation into noise levels was “proper and

⁴⁷ *Lopez Ostra v Spain* (1995) 20 EHRR 277 (Decided 9.12.1994)

⁴⁸ *Hatton and Others v UK* op. cit supra, para. 96

⁴⁹ *Ibid.*, , per Judge Kerr, Dissenting Opinion, in “Striking the balance”

complete”. Only such an investigation could satisfy the condition that, under the Convention, states are:

“required to minimise, as far as possible, the interference with [Article 8] rights by trying to find alternative solutions and by generally seeking to achieve their aims *in the least onerous way as regards human rights.*”⁵⁰ [Emphasis added]

The investigation carried out by the UK authorities had not been adequate, and thus the Court found a violation of Article 8.⁵¹

The separate concurring opinion of Judge Costa stressed that a MoA must be left to states in this sphere, and that there were serious reasons for considering that the interference with applicant’s rights was not disproportionate. However, on the facts, he felt that the applicants had had to pay too high a price for the economic well-being that purported to justify the state’s actions. Referring even more strongly to the MoA were the partly dissenting and dissenting opinions of Judges Greve and Kerr, respectively. Judge Greve, citing the *Buckley* case, argued that the standard relied on by the majority was “incompatible with the wide margin of appreciation left by the European Court to Contracting States in other planning cases”. He then reiterated the reasons for allowing a wide MoA in

⁵⁰ Ibid., , para. 97

⁵¹ The Court also found a breach of Article 13 ECHR, but since the Human Rights Act 1998 has now come into effect, this part of the judgment was less controversial.

these cases, viz. that the issues at stake concerned people who are not parties to the particular action (the general public), and that those people can only become involved through the domestic political process. Thus, combined with the factual complexities of planning cases, the balance struck by the majority had not taken into account the state's wide MoA. Likewise, Judge Kerr argued that it was:

“difficult to see how [the test used by the majority] can be reconciled with the principle that States should have a margin of appreciation in devising measures to strike the proper balance between respect for Article 8 rights and the interests of the community as a whole”.

The UK government have, under Article 43(1) ECHR requested that the case, originally decided by a 7 judge chamber, be reheard by a Grand Chamber of 17 judges. It is with the failure to recognise an adequate MoA that the UK government have taken issue.

Planning lawyers and environmentalists welcomed the *Hatton* decision,⁵² and expressed disappointment that the Government's response has been to challenge the decision rather than alter its own behaviour.⁵³ In another sense, however, the decision in *Hatton* can be criticised for its failure to

⁵² See e.g Cook, “Environmental rights as human rights” (2002) 2 EHRLR 196

⁵³ See e.g. Editorial, “The *Hatton* case and the future of night flights at Heathrow” (2002) March, *Journal of Planning and Environment Law* 255

promote consistency in the Court's reasoning, threatening to undermine the use of the MoA and the credibility of the Court. The Court could have found for the applicants whilst still using MoA analysis by stressing the nature of the interference, or any of the other factors that tend to narrow the MoA. By failing to use the MoA at all, the Court appears to re-affirm the erroneous view that it can only be used in cases where the outcome favours the respondent state. Viewed this way it is a retrogressive decision.

A further problem may arise when considering the context within which the MoA operates, because it has been argued that the context of the MoA includes whether the interference was made urgently, "on the horns of a dilemma",⁵⁴ rather than in normal circumstances. Whilst an official "emergency situation" gives rise to MoA analysis under Article 15, acknowledging an extra tier of non-Article 15 lesser emergencies, justified in the name of protecting national security, could seriously undermine the Convention.⁵⁵ Moreover, allowing MoA analysis both in relation to the normal restriction of human rights and their emergency restriction may offer respondent states two chances to justify their actions; firstly under a normal limitation clause; and secondly under a derogation, if the first argument fails.

⁵⁴ Mahoney (1998) *op. cit.*, supra p5

⁵⁵ Brems (1996), *op. cit.*, supra p293

It is certainly concerning that in earlier cases such as *Klass*⁵⁶ the Court took a particularly deferential approach to matters of national security in non-emergency cases. Clearly the Court must bear in mind here the same issues that concern emergency situations *stricto sensu*, namely that delicate matters relating to state sovereignty are involved. However, the way that the two types of circumstance in which the MoA operates can be distinguished. A valid derogation can temporarily prevent the Court from holding that an interference with human rights is a violation of the Convention when, but for the derogation, a violation would be found. An example of this was the *Lawless*⁵⁷ case, where the extended detention of suspected criminals was permitted in a manner which would, but for the emergency situation, clearly violate the Convention. It was incapable of justification outside the special circumstances of the case. Where the MoA is used outside the context of Article 15, it does not justify or excuse a violation of the Convention. The MoA in non-emergency cases (even concerning national security) is used to demonstrate that the interference is not a breach at all. These cases simply reflect a democratic balance struck between the rights of the individual and the rest of society. In some cases this will disadvantage certain individuals,

⁵⁶ *Klass and Others v Germany* (1979-80) 2 EHRR 214 (Decided 6.9.1978)

⁵⁷ *Lawless v Ireland* (no. 3) op. cit., supra

but it is the role of the Court to ensure that the disadvantage is proportionate to the aim pursued.

In summary the legitimate aim a respondent state invokes to justify its restriction of a human right guides the width of the MoA that the Court will recognise. The legitimate aims have different levels of importance. With some consistency the Court will concede a narrow margin where the aim is a goal that can be assessed objectively, such as maintaining the impartiality of the judiciary. Where the aim deals with subjective factors such as the protection of morals, or the defence of national security, the MoA tends to be wider. Likewise where a government's general policies are at stake then, notwithstanding the *Hatton* decision, the MoA is in principle quite wide. The identification that such issues guide the Court's reasoning is evidence that the MoA is applied methodically, and not without precision. However it remains important that the Court keep emergency situations and the limitation of human rights in the name of national security in peacetime conceptually distinct.

B3 Relevance of the interest at stake and the surrounding issues

The legitimate aim is clearly important to the Court's considerations in MoA cases, but so is the right invoked and the particular aspect of it relied

upon. Whether there is a European consensus about the issue can also influence the Court, as does the extent of the intrusion upon the right invoked. Each of these factors combines in order for the Court to establish whether an interference with a Convention right was necessary in a democratic society. Each is now examined in turn.

B3(i) The right at stake, and how it is invoked

It is well established in the jurisprudence of the European Court and Commission that certain of the rights enshrined in the ECHR are not appropriate for MoA analysis at all. These rights tend to be the most fundamental to a democratic society, and closely correlate with the rights deemed non-derogable under Article 15. For example the MoA plays no role in regard to Article 2 (the right to life), Article 3 (freedom from torture) and Article 4 (freedom from slavery). On such matters, states have no MoA at all.⁵⁸ The MoA is also virtually non-existent in respect of Article 14 when it is invoked in respect of certain major aims of Council of Europe such as reduction of sexual and racial discrimination.⁵⁹ These are matters the observance of which can be determined without regard for their

⁵⁸ See Callewaert, "Is there a margin of appreciation in the application of Articles 2, 3 and 4 of the Convention?" (1998) 19(1) HRLJ 6

⁵⁹ See Schokkenbroek (1998) ("The prohibition of discrimination [...]"), op cit., supra

elaboration within a locally constructed conception of human rights, thickly constituted.

A separate but related issue discussed further in Chapter 7 is that some rights tend not to be subjected to MoA analysis because of the way they are defined, rather than the subject matter they cover. This is particularly true of the “due process” articles, concerning the right to liberty (Article 5) and the right to a fair trial (Article 6). The difference stems from the fact that, in addition to their importance in a democratic society, these rights are defined with more precision than the other substantive rights under the Convention. In other words the definition of these rights that the Convention provides leaves far less room for judicial discretion.

In addition, certain aspects of some rights are more deserving of protection because they serve a particularly special function in a democratic society.⁶⁰ For example the Court has consistently held that an interference with the most intimate aspects of private life under Article 8 requires the production of particularly compelling reasons. The MoA conceded to the respondent

⁶⁰ Brems has drawn the conclusion that the “internal hierarchy” of rights, wherein only especially valued elements of certain rights result in a narrow MoA, is more important and easier to discern than any difference between separate rights. See Brems (1996) *op. cit.*, *supra* p269

state in such matters is therefore usually narrow. The Court dealt with legislation criminalising aspects of consensual male homosexual intercourse in the Republic of Ireland and Northern Ireland in the cases of *Norris* and *Dudgeon* respectively. In *Dudgeon* the Court accepted that, following *Handyside*, the MoA is more extensive where the protection of morals is an issue. It continued:

“However, not only the nature of the aim of the restriction but also the nature of the activities involved will affect the scope of the margin of appreciation. The present case concerns a most intimate aspect of private life. Accordingly, there must exist particularly serious reasons before interferences on the part of the public authorities can be legitimate for the purposes of paragraph 2 of Article 8”⁶¹

Having established that the MoA was narrow, the Court in *Dudgeon* found that the reasons supplied by the UK for its interference were “relevant” but not “sufficient”.⁶² A similar conclusion was reached in the *Norris* case, so that in both cases the Court found breaches of the Convention. Interestingly, in *Norris* the Court was keen to demonstrate that it was the type of interference that differentiated its view on morals from its position in *Handyside* and not the right at stake.⁶³ It could easily be argued that, given the impugned laws were popular locally, the Court ought to have

⁶¹ *Dudgeon v UK* (1981) 4 EHRR 149, (Decided 24.2.1981), para. 52.

⁶² *Ibid*, para. 61

⁶³ *Norris v Ireland* (1991) 13 EHRR 186, (Decided 26.10.1988), para. 44

respected the national authorities' arguments. The idea of consensus is explored further below. At this stage, the importance lies in recognising that, with some consistency, the Court narrows the MoA in matters relating to sexual autonomy and other intimate aspects of private life.⁶⁴

A similar pattern of consistently narrowing the MoA is seen with respect to free speech under Article 10. Here the matter is not so much that the interference is particularly onerous to the applicant (even though that may be the case), but that the interests of democracy are best served by a free press. In *Dichand v Austria*, the Court recalled that, according to established case law, freedom of expression constitutes “one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual’s self-fulfilment.”⁶⁵ Whilst acknowledging that a MoA existed in determining whether restrictions on free expression were necessary in a democratic society, the Court stated that there is very

⁶⁴ Recent cases supporting this principle include *A.D.T. v UK* (2001) 31 EHRR 33 (Decided 31.7.2000); *Lustig-Prean and Beckett v. United Kingdom* (2000) 29 EHRR 548 (Decided 27.9.1999); *Smith and Grady v. United Kingdom* (2000) 29 EHRR 493 (Decided 27.9.1999)

⁶⁵ *Dichand v Austria* (2002), Unreported - Application no. 29271/95, (Decided 26.2.2002), para. 37

little scope under Article 10(2) for restrictions on “political speech or debates on questions of public interest”.⁶⁶

In the *Dichand* case, the applicants were the editor and owner of an Austrian newspaper that had criticised a lawyer for failing to resign from his law firm when he became heavily involved in politics.⁶⁷ The lawyer, a Mr. Graff, first became chairman of the Austrian Peoples’ Party, and later he became an MP and Chairman of the Austrian Parliament’s Legislative Committee. In particular the applicants alleged that Graff had been personally involved in creating legislation that directly benefited some of his clients. Mr Graff was granted a temporary injunction and then a permanent injunction restraining repetition of the comments, and requiring the publication of an apology. Various domestic appeals failed to satisfy the applicants. The applicants contended that the injunctions breached their right to free expression under Article 10 ECHR. Acknowledging that as regards politicians acting publicly the “limits of acceptable criticism” were wider than with private persons,⁶⁸ the issue for the Court was nevertheless whether

⁶⁶ *Dichand v Austria*, op. cit., supra para. 39

⁶⁷ It was possibly no co-incidence that Graff had legally represented a media group in competition with owners of the applicant’s newspaper in a number of recent unfair competition cases. This suggests that applicant’s dispute with Graff contained an element of professional rivalry, in addition to the precise substance of the human rights action.

⁶⁸ *Dichand v Austria*, op. cit., supra para. 39

the restriction on the applicants' rights was justified by reference to the "rights and reputation of others" in Article 10(2). The Court went on to reason that:

"The press plays an essential role in a democratic society. Although it must not overstep certain bounds, in particular in respect of the reputation and rights of others, its *duty* is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest [...]. Not only does it have the task of imparting such information and ideas, the public also *has a right to receive them*. Were it otherwise, the press would be unable to play its *vital role of "public watchdog"*".⁶⁹ [Emphasis added; references omitted]

Accordingly, despite conceding that the applicants had published "harsh criticism in strong, polemical language" on a "slim factual basis", the Court found a breach of the Convention.⁷⁰ As it had established in *Handyside*, Article 10 extended to information or ideas that offend, shock or disturb, and therefore in upholding the injunction the Government had "overstepped" the MoA allowed to states. The interference was, in this respect, disproportionate to the legitimate aim pursued.⁷¹

⁶⁹ Ibid., para. 40

⁷⁰ Ibid., para. 52

⁷¹ Ibid., para. 52

It is clear that both the right invoked and the aspects of it affected by the case at issue contribute to the width of the MoA. Far from being evidence of an unprincipled approach, the flexibility of MoA analysis, and its resulting ability to provide a structure upon which to build meaningful arguments, demonstrates its ability to cope with the infinite range of cases that come before the Court. This flexibility does not undermine the MoA's utility in mediating between European human rights thinly and thickly-constituted; it contributes to it.

B3(ii) European consensus or common ground

This factor explains why, for example, the question of morality has been one that the Court has frequently seen as appropriate for analysis within a broad MoA. In general, where there is a broad European consensus about the issue at stake, the MoA tends to be narrower. By contrast, where there is no European consensus, the MoA tends to be wider.⁷² This consideration is linked to the context in which a legitimate aim is pursued, inasmuch as, for example, there is a consensus that elected decision makers should take broad policy decisions. However, the consensus analysis examined here concerns more specific issues, which usually relate to the particular subject matter of the case at hand.

⁷² This pattern is repeated in cases where the MoA is used in relation to Article 14. See e.g. *Engel and Others v Netherlands* (1979-80) 1 EHRR 647 (Decided 8.5.1976), para. 72

In *Nikula v Finland*,⁷³ the applicant, a lawyer, had been convicted of defaming the public prosecutor in court in the course of defending her client. Taking into account the factors surrounding the applicant's conviction, the European Court felt the conviction was disproportionate to the aim pursued. In arriving at this conclusion, the Court considered the MoA:

“However, in the field under consideration in the present case there are no particular circumstances – such as a clear lack of common ground among member states regarding the principles at issue or a need to make allowance for the diversity of moral conceptions – which would justify granting the national authorities a wide margin of appreciation [...]”⁷⁴ [References omitted]

This can be contrasted with the position described in *Handyside* above where the lack of a uniform European conception of morals persuaded the Court that the respondent state deserved a wide MoA.

A problematic aspect of the Court's consensus analysis is that, as with the other factors guiding the MoA and the MoA taken as a whole, there is a perceived lack of consistency in its application. At times the Court embarks upon a detailed analysis of various European practices, and at others is

⁷³ *Nikula v Finland*, op. cit., supra

⁷⁴ *Ibid.*, para. 46

content merely to state that there is or is not a European consensus.⁷⁵ Where consensus analysis plays a role in deciding a case, evidence should be provided in order that respect is not unduly given to “state cultures” presented as “real cultures”.⁷⁶

A further practical complication, taking the *Handyside* case itself, is that the meaning of “consensus” is not always clear. The *Handyside* case is commonly cited as the first and most important case that indicates states should have a wide MoA in matters relating to morality. Because there was no uniform European view about the rightness or otherwise of the unorthodox views presented in the Little Red Schoolbook, the UK was conceded a wide MoA. However, it must be recalled that the book had already been published in a number of other European states. Even if it could be argued that there was no overarching European morality, there might still have been a consensus that the book in question was suitable for publication.

⁷⁵ Brems (1996) *op. cit.*, supra p284-285. Brems also identified that in fashioning an appropriate standard the Court sometimes looks beyond the frontiers of the Council of Europe, and sometimes confines its analysis to states similar in size to the respondent (*ibid.*).

⁷⁶ See Freeman, “Human rights and real cultures”, (1998) 1 NQHR 25; See also Chapter 2, Section B1, “Real cultures and state cultures”

In spite of these issues, consensus analysis is valuable for a system that seeks to respect cultural variety whilst promoting a uniform basic level of human rights. The Court takes into account the element of European consensus on a given issue alongside the other factors considered here. This provides a valuable reminder of European cultural pluralism.⁷⁷ The use of consensus analysis is a means justifying the Court's decisions in certain cases in such a way as to demonstrate that the MoA is guided by clear principles.

B3(iii) The question of proportionality

In addition to the right relied upon and the context in which it was invoked, the particular form of interference with it may play an important role in determining whether it was necessary in a democratic society. For instance a fine imposed upon a journalist may be an appropriate means of protecting the rights and reputation of others, curtailing the journalist's freedom of expression in accordance with Article 10(2). However, a lengthy prison sentence imposed in exactly the same circumstances for the same reasons might render the interference outside the terms of the Convention because of its excessive nature. Less radically, the amount of the fine itself could be so excessive, even if a fine at a lower level would be permissible.

⁷⁷ See Chapter 7, Section C3, "Evolutionary interpretation and consensus analysis"

The width of the MoA helps to determine the level at which the limitation of a human right becomes disproportionate. In this sense, the notion of proportionality does not guide the width of the MoA as such, but it is instrumental in finding whether an interference amounts to a violation of the Convention. Thus even where the MoA is at its widest, an interference can still only be “necessary” if it is also “proportionate”. As is demonstrated in the next section, it is therefore incorrect to assume that the use of the MoA must signal a finding for the respondent state.

The requirement that all restrictions on human rights under Articles 8-11 must be “necessary in a democratic society” is the main source of the proportionality test’s influence.⁷⁸ As Eissen observed, it is only a “small step” from “necessity” to proportionality.⁷⁹ This step was first made in the *Handyside* case, discussed above. The cases demonstrate how the Court weighs the interference against the legitimate aim pursued or the danger thereby averted.⁸⁰ Cases discussed above such as *Sunday Times*, *Dudgeon*

⁷⁸ As mentioned above, the requirement under Article 15 that emergency measures must be “strictly required by the exigencies of the situation” is also a form of proportionality test.

⁷⁹ Eissen in Macdonald *et al* (eds.) (1993), op. cit., supra p126

⁸⁰ Matscher, “Methods of interpretation of the Convention”, in Macdonald *et al* (eds.) (1993) op. cit., supra. P78

and *Norris* were each decided in terms that clarify that the respondent state had not observed the principle of proportionality.⁸¹

In some cases disproportionality can encompass that the measure itself was too broad, such as the wholesale criminalisation of consensual homosexual conduct in *Dudgeon* and *Norris*. In other cases the Court considers the nature of a narrower form of limitation and its effects upon the applicant. For example, in another case concerning the *Sunday Times* newspaper, the Court examined an interim injunction that restrained the newspaper from reporting matters related to a controversial book. The book was written by an ex-secret service agent and gave details the publication of which, according to the government, were prejudicial to national security. The Court found that, on the facts, a breach of the Convention had occurred because most of the information covered by the injunction was at the relevant time already in the public domain. On the issue of prior restraint the Court reasoned as follows:

“[...] the Court would only add to the foregoing that Article 10 of the Convention does not in terms prohibit the imposition of prior restraints on publication, as such. [...] 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

⁸¹ See *Sunday Times*, op. cit, supra, para. 67; *Dudgeon* op. cit., supra, para. 61; *Norris*, op. cit., supra, para 46

publication, even for a short period, may well deprive it of all its value and interest.”⁸²

From this it can be perceived that prior restraint is considered to be far a more serious form of interference with Article 10 than a sanction imposed after the event. For this reason, the risk averted by prior restraint would have to be far more serious to be covered by Article 10(2) than an interference arising from punishment post-publication in order for the interference as a whole to be proportionate.

In examining the necessity and proportionality of the interference, the Court thus examines its particular form. Lord Diplock, in the English case of *R v Goldstein*, described the proportionality test as meaning that one “must not use a steam hammer to crack a nut”.⁸³ The test of the European Court of Human Rights goes much further than this in examining the form of the interference or limitation. The Court often, therefore, goes into great depth in its enquiries into the circumstances of the case, requiring that the reasons provided by the respondent state are both “relevant” and “sufficient”. It is here where the MoA and proportionality most obviously overlap.

⁸² *Sunday Times v. UK (No. 2)* (1992) 14 EHRR 229, (Decided 26.11.1991), para. 51

⁸³ *R v Goldstein* [1983] 1 WLR 151, at 155B

Where the interference takes place in a circumstance in which the respondent state is normally granted only a narrow MoA, it will have to supply more in the way of reasons in order for the Court to find that the interference was proportionate to the legitimate aim pursued. Thus in cases such as *Sunday Times*, *Norris* and *Dudgeon*, it was the failure to provide sufficient reasons that convinced the Court of the interferences' disproportionality.

In the *Nikula* case also discussed above the European Court reasoned that restriction of a defence counsel's freedom of expression in court, even by way of a lenient criminal sanction, could only be necessary in exceptional circumstances. The national authorities themselves were not unanimous that there were sufficient reasons for the interference. In the view of the European Court, the Finnish authorities had therefore failed to demonstrate such reasons in fact existed. The European Court found that in upholding the applicant's conviction for defamation, and ordering her to pay costs and damages, the Finnish Supreme Court had thereby not acted in proportion to the legitimate aim of protecting the rights and reputation of the public prosecutor.⁸⁴ In this way, it can be said that the MoA frames the proportionality test.

⁸⁴ *Nikula v Finland*, op. cit., supra paras. 55-56

Another aspect of the interrelationship between proportionality and the MoA is the choice of test made by the Court.⁸⁵ In circumstances where limitations must be “necessary in a democratic society”, such as those just discussed, the Court tends to adopt the three stage test of asking whether the means are proportionate to the ends, whether there is a pressing social need, and whether relevant and sufficient reasons have been provided. In relation to certain rights that have a broader character, either because the right itself is deemed slightly less important or because its exercise impacts upon a policy area which affects the whole population, a more relaxed test is used. For example it was stated above that the MoA tends to be wider when dealing with planning regulations. This is mirrored in the exercise of the right to peaceful enjoyment of possessions under Article 1 of Protocol 1, where the Court tends to require simply a “reasonable relationship of proportionality” between the means employed and the objective sought.⁸⁶

⁸⁵ See Van Dijk & Van Hoof (1998) *op. cit.*, supra p80; See also Clayton, “Regaining a sense of proportion: The Human Rights Act and the Principle of Proportionality”, (2001) 5 EHRLR 504

⁸⁶ Likewise in respect of Article 14 the Court has consistently held that a difference of treatment must not only pursue a legitimate aim, but that there must be a “reasonable relationship of proportionality” between the means employed and the aim sought to be realised. See *Belgian Linguistic*, *op. cit.*, supra para. 35

Such a test leaves a greater scope for States' discretionary action, but is justified for the same reasons that tend towards a wider MoA in the same category of cases. Article 1 of Protocol 1 is phrased slightly differently to the other Articles of the Convention and its Protocols, inasmuch as it explicitly mentions the right's curtailment in the "public interest", rather than where it is "necessary in a democratic society". This consideration, and the Court's general approach Article 1 of Protocol 1, is captured in following section of the judgment in *The Former King of Greece and Others v Greece*:

"An interference with the peaceful enjoyment of possessions must strike a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights [...]. The concern to achieve this balance is reflected in the structure of Article 1 as a whole [...]. In particular, there must be a *reasonable relationship of proportionality* between the means employed and the aim sought to be realised by any measure depriving a person of his possessions [...]."⁸⁷ [Emphasis added; references omitted]

The most significant aspect of the proportionality principle for the purpose of this thesis is that it can be used as the means by which to foster some

⁸⁷ *Former King of Greece & Others v Greece* (2001) 33 EHRR 21 (Decided 23.11.2000), para. 89. Interestingly, the Court found for the applicant in this case, in spite of adopting a test that seems pre-disposed to state discretion. It must also be noted that the Court sometimes uses the phrase "reasonable relationship of proportionality" when describing the first stage of the more searching three stage proportionality test.

sense of agreement with the respondent state, even where that state is found to have violated the Convention. It was suggested in Chapter 6 that the European Court has used the MoA to establish its own credibility, and to stabilise the European system of human rights protection. In doing this, the proportionality principle has been of immense value. It allows the Court to empathise with the respondent state's motives, whilst carefully reprimanding it for the means chosen to achieve its legitimate aims. This fulfils a parallel function to agreeing that a public emergency in the context of Article 15 exists, but holding that the measures taken to avert it were not strictly required by the exigencies of the situation.

B4 Non-emergency situations - conclusion

The preceding discussion has highlighted some of the broad principles that govern the MoA's use. The matrix of factors guiding the width of the MoA is certainly complex, but such complexity should not be mistaken for a lack of principle. Into this mixture of factors are the aim pursued, the right or rights at stake, the level of European consensus and the type of interference made.

A much longer analysis could cross-reference each substantive article with each legitimate aim or countervailing interest, and create a table of factors

that could assist the Court in its deliberations. However, such micro analysis would miss the wider and general themes that underpin the MoA's use, and would not begin to examine whether the MoA's continued use is defensible. Similarly, an exhaustive micro analysis of each of these factors would be too insulated from the context in which international human rights adjudication takes place. Only a very limited level of understanding about the European Court or the MoA can be gleaned from an analysis of the case law alone. Despite the almost infinite variety of fact-patterns that can make up human rights cases, the European Court often uses very formulaic language to promote consistency with its earlier judgments. This suggests that the MoA is capable of principled application, but also that the words used in particular judgments do not give a full picture of the case.

C MoA Analysis: Abdication of the Court's responsibility?

Having established that there are principles guiding the width of the MoA, the remaining second concern identified in this chapter's introduction is addressed. It has been suggested that the MoA opens the door too far to the subjective interests of the state party, thereby effectively excluding the Court's review powers. If the MoA is to be seen in the context of qualified universality, this could present a problem, inasmuch as the qualifications could swallow the universality. This section demonstrates that the

“European supervision” which goes “hand in hand” with a defensible conception of the MoA is very real.

The use of the term “margin of appreciation” has caused some confusion in this context. A wide margin of appreciation is often, erroneously, treated as synonymous with a finding in favour of the state. This has led to the accusation that MoA allows the Court to abdicate its judicial role in hard cases. If the MoA created a reserved domain of state action, then its use would run the risk of contradicting the Convention itself. It would have the effect of preventing the Court from fulfilling its obligation under Article 19 ECHR to “ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto”.⁸⁸ Similarly, Benvenisti has shown suspicion of the MoA on the basis that,

“The rhetoric of supporting national [MoA] and the lack of corresponding emphasis on universal values and standards *may lead national institutions to resist external review altogether*, claiming that they are the better judges of their particular domestic constraints and hence the final arbiters of their appropriate margin.”⁸⁹ [Emphasis added]

⁸⁸ See Mahoney (1998) op. cit., supra p4. NB old Art. 19 referred also to the role of the Commission.

⁸⁹ Benvenisti (1999) op. cit., supra p844

Such comments are not isolated. For example in *Brannigan & McBride*, discussing derogation under Article 15 ECHR, Judge Martens also seemed to see the Court as equating a wide MoA with a finding for the state:

“The first question is whether there is an objective ground for derogating which meets the requirements laid down in the opening words of Article 15. Inevitably, in this context, a certain margin of appreciation *should* be left to the national authorities. There is, however, no justification for leaving them a *wide* margin of appreciation because the Court, being the "last-resort" protector of the fundamental rights and freedoms guaranteed under the Convention, is called upon to strictly scrutinise every derogation by a High Contracting Party from its obligations.”⁹⁰ [Emphasis added]

Judge Martens conceded that states were permitted a certain MoA; it was "inevitable" and "should" be left. His concern seemed to be with the width of margin; that it was an avowedly wide one. The implication was that with a narrow MoA, the Court could still maintain its role as the "last resort" protector of human rights, but that it was incapable of doing so where the margin conceded was wide.

It was argued above that because of Article 15's clear links to state sovereignty, the Court has indeed traditionally allowed a wide MoA to

⁹⁰ *Brannigan & McBride v UK*, op. cit., supra, separate Concurring Opinion of Judge Martens.

states in questions relating to it. The width of the MoA in this context has been the subject of some criticism, leading Yourow in the concluding sections of his 1996 study to wonder if, “at some future stage of maturity the Court could actually muster a majority to find state action in breach *even* of Article 15”.⁹¹ In the event, Yourow’s question was soon answered, as was seen in the *Aksoy* case discussed above.⁹² In that case the Court held that Turkey’s derogation was invalid, and that it had not thereby successfully suspended the rights to which it purportedly applied. The *Aksoy* case provides evidence that even with respect to Article 15 the Court retains ultimate authority thus, as O’Boyle remarked in his analysis of *Ireland v UK*, the discretion afforded by the MoA with respect to derogations “should not be confused with limited immunity of state policy from review or limited examination”.⁹³

With respect to the personal freedoms or rights, it has long been established that there is “no uniform European conception of morals”⁹⁴. There is therefore, as already seen, a wide MoA left open to Contracting Parties who seek to justify interference with a human right on the ground of the

⁹¹ Yourow (1996) op. cit., supra p188 (emphasis added)

⁹² *Aksoy v Turkey*, op. cit., supra

⁹³ O’Boyle (1998) op. cit., supra p29

⁹⁴ See e.g. *Handyside v UK*, op. cit., supra para. 48.

protection of morals.⁹⁵ Despite this, as in the recent case of *A. D. T v. the United Kingdom*,⁹⁶ the Court does not shy away from imposing limits on the extent of this margin and finding a violation. Just as it had done in *Norris* and *Dudgeon*, the Court responded to the UK's reliance on its MoA by emphasising the intimate nature of the interests affected, thereby neutralising the effect that a moral issue would normally have on the width of the MoA. The complexity of the factors that go into establishing the width of the MoA thus works to arrive at a defensible result, guaranteeing that even in matters where a wide MoA is usually conceded the Court's jurisdiction is not excluded.

The roots of the European Court's views on the outer limits of the MoA can be clearly discerned in earlier case law. Discussing Irish anti-abortion laws in *Open Door and Dublin Well-Woman v Ireland*, the European Court reasoned as follows:

"The Court *cannot agree that the State's discretion in the field of the protection of morals is unfettered and unreviewable* [...]. [The Court] acknowledges that the national authorities enjoy a wide margin of appreciation in matters of morals, particularly in an area such as the present which touches on matters of belief concerning the nature of human life. [...] However this power of appreciation is

⁹⁵ i.e under the second paragraph of Arts. 8 – 11 ECHR

⁹⁶ *A.D.T v. UK*, op. cit., supra. Note the Government's claim of a wide MoA in para. 27.

not unlimited. It is for the Court, in this field also, to supervise whether a restriction is compatible with the Convention."⁹⁷ [Emphasis added]

The MoA as currently understood clearly does not create a reserved area of discretion for Contracting Parties, into which, contrary to Article 19, the Court is prohibited from enquiring. Thus there should be no question of the MoA rendering any form of question outside the potential jurisdiction of the Court, or encouraging such a belief. Instead, the MoA provides a means by which necessary arguments, often with a cultural element, can be presented to the Court. The MoA in no way prejudices a decision on a given set of facts either way. The MoA as is a methodology; a framework upon which arguments can be hung, not a short-hand for a particular conclusion.

A contributory problem in this context is the meaning of "deference", when it is expressed that through the MoA the European Court "defers" to the views of domestic authorities on some matters. For example Michael Hutchinson concluded that, "reliance on the margin of appreciation is an announcement of deference, and not coherent judicial principle".⁹⁸ The language of deference can clearly give the impression that the Court has abdicated its role, allowing domestic authorities to be the final arbiters of

⁹⁷ *Open Door and Dublin Well-Woman v Ireland*, op. cit., supra, para. 68

⁹⁸ Hutchinson (1999) op. cit., supra p649

human rights claims. However this problem only arises where “deference” is understood as automatic compliance with the views of the Contracting Parties. Taking those views into account, however, does not suggest *automatic* yielding to the Contracting Parties, even though there may be a disposition towards doing so. Even where the Court suggests that it has “deferred” to the national authorities, then as long as it provides cogent reasons, that deference is demonstrably not automatic. Those factors identified above as determining the relative width of the margin in cases all provide material from which reasoned decisions can be fashioned. It is only where the reasons are withheld that the Court’s deference has the appearance of being automatic.

In summary, it can be shown that the MoA does not exclude the Court’s jurisdiction by forcing it to yield automatically to the views of Contracting Parties. Examples from the case law relating to emergency and non-emergency situations prove this.

D Conclusion

If the MoA is to be seen as a method of mediating between human rights and local conditions then it must be capable of controlling its width and retaining an outer limit of permissible variation. The factors that govern the

width of the MoA have been explored in other academic works, but this chapter has linked the importance of such factors to the universality debate. It is true that there are no rigid rules about the width of the MoA, but since it is designed to operate on a case by case basis to find the optimum distribution of competence between human rights maximally and minimally understood, this is hardly surprising. Moreover, it is clear that a principled approach to this distribution has developed. Within these principles the Court has not been robbed of its ability to decide on a case by case basis, fettering the important discretion it has. Likewise even where a wide MoA is conceded in principle, the jurisdiction of the Court is not excluded. Thus as the Court has grown in stature it has constructed a series of factors that consistently govern the width of the MoA and require states to justify their actions in increasing detail. It is nevertheless desirable that the Court's approach in respect of the specific issues of planning decisions and the consensus principle is principle, though these do not threaten the integrity of the MoA itself.

Chapter One identified two main criticisms of the MoA, namely that it may be flawed in principle or that it has become flawed. Combined with Part One, this and previous chapter have begun the proposal that the MoA is not flawed in principle. The MoA has assisted in the consolidation of the European human rights system, and is capable of coherent application. The

next chapter makes explicit the links between the MoA and the idea of qualified universality.

Chapter Seven

Principles underpinning the MoA's existence

Introduction

It was suggested in the introduction to this thesis that the margin of appreciation (MoA) would be flawed in principle if it conceded too much to relativism. One way in which this could occur was dismissed in Chapter 6; the inconsistent application of an infinite margin. A second would be if the MoA fundamentally conflicted with the model of qualified universality presented in Part One. In other words the MoA would still be flawed in principle even if it were consistently applied if it was consistently relativistic.

This chapter makes explicit the factors that underpin the Convention and the MoA's existence, demonstrating that the level of deference to national determinations permitted by the MoA can be seen as respect for decisions made within particular thick accounts of human rights. It therefore provides a balance between operational knowledge of the MoA and understanding the universality debate. Significantly, the view presented here brings with it not only the notion that some deference can be justified, but also that there are accepted limits to the deference. Indeed the thin or minimalist account of human rights provides the ultimate limit, thereby explaining why the

Court's jurisdiction is not excluded by invocation of the MoA. Walzer observed that a minimalist view is a:

"view from a distance or a view in a crisis, so that we can recognise injustice only in the large. We can see and condemn certain sorts of boundary crossings [...] like the appearance of the secret police in the middle of the night. But we won't have much to say about the precise boundaries of the home and the family [...]."¹

Setting those precise boundaries is something that can only be done from within a maximalist morality. Walzer's theory suggests that those precise boundaries (inasmuch as they do impact on human rights), are part of a particular thickly constituted concept of human rights, and local rather than international determinations of their location should be preferred. The MoA doctrine as used in the ECHR system recognises this. The Court's use of the MoA can be seen as a necessary concession to the richness and thickness of the human rights culture in Europe, meaning in practice that the Court can and should defer to Contracting Parties on some questions.

In elaborating upon this argument Section A examines the concept of subsidiarity and the significance of a "democratic society". In order to further clarify the scope and meaning of the MoA Section B distinguishes questions relating to the definition of human rights from those about

¹ Walzer, Thick and Thin: Moral argument at home and abroad (1994), University of Notre Dame Press: Notre Dame, p39

conflicting public interests. In Section C the chapter explores other principles of interpretation used by the Court and explains their interaction with the MoA.

A Subsidiarity in the ECHR

In the European Convention context the principle of “subsidiarity” means that the intended effect of the ECHR is to encourage states to bring their domestic law into conformity with the standards of the Convention, rather than for the Convention rights to be relied on directly. Human rights ought to be protected by national authorities, rather than by the Strasbourg mechanisms. In European Convention law the principle of subsidiarity is used to express that the Convention mechanisms are thus subsidiary to the activities of the Contracting Parties themselves. It is shown here that such an observation is supported by the terms of the Convention, and has been consistently re-affirmed by the Court.

Convention rights such as free expression in Article 10 are defined in such a way as to include the possibility of their curtailment in limited circumstances, therefore the limitation of those rights is as much a part of their definition as the positive right itself. Both aspects of the Convention right are equally subject to the principle of subsidiarity: in the first place it is

for Contracting Parties to protect human rights, but it is also for them to decide what limitations are needed in order to further other public interests. In this way the principle of subsidiarity leads to the existence of the MoA.²

The concept of subsidiarity in a wider sense relates to the level at which decisions are taken. The principle dictates that power should be exercised at the lowest practical level within a political system.³ In other words, there is a presumption in favour of lower authorities.⁴ In a European Union context, subsidiarity relates to whether activities can be pursued at the European level, or whether they ought to be dealt with by national authorities.⁵ This is in furtherance of the EU's aim of creating an "ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen."⁶ There are similarities in the EU and

² Petzold has identified other manifestations of the principle of subsidiarity in the way that the Court operates in addition to the MoA. See Petzold, "The Convention and the principle of subsidiarity" in Macdonald, Matscher, & Petzold (eds.), The European system for the protection of human rights (1993), Martinus Nijhof: Dordrecht (1993), pp49-59

³ Teasdale, "Subsidiarity in Post - Maastricht Europe", (1993) 64(2) *Political Quarterly* 187

⁴ Emiliou, "Subsidiarity: An effective barrier against 'the enterprises of ambition'", (1992) 17(5) *European Law Review* 383

⁵ See Article 5 EC Treaty (old Art. 3b); Craig & De Burca, EU Law, (1998) 2nd Ed, OUP: Oxford, pp124-129

⁶ Article 1 (Old Article A), Treaty on European Union

Council of Europe's use of the term "subsidiarity", but the EU's version is specifically tailored to supranational, quasi-federal governance. Subsidiarity in the European Convention plays a different role.

Evidence of the notion of subsidiarity in the Convention is provided firstly by Article 1 ECHR. The primary aim of the ECHR, stated in Article 1, is to ensure that *Contracting Parties* secure within their jurisdiction the rights and freedoms set out in the Convention.⁷ Failure to provide an "effective remedy before a national authority" for the breach of a Convention right is a breach of the Convention itself.⁸ The position was neatly summarised in the case of *Z and Others v UK*:

"The Court emphasises that the object and purpose underlying the Convention, as set out in Article 1, is that the rights and freedoms should be secured by the Contracting State within its jurisdiction. It is fundamental to the machinery of protection established by the Convention that the national systems themselves provide redress for breaches of its provisions, *the Court exerting its supervisory role subject to the principle of subsidiarity*. In that context, Article 13, which requires an effective remedy in respect of violations of the Convention, takes on a crucial function."⁹ [emphasis added]

⁷ Article 1 ECHR

⁸ Article 13 ECHR

⁹ *Z and Others v UK* (2002) 34 EHRR 3 (Decided 10.5.2001), para. 103

The requirement that all domestic remedies must be exhausted before the Strasbourg enforcement mechanisms are engaged also emphasises that the subsidiary nature of the protection offered by the Convention.¹⁰ This recognises the traditional rule of international law that states should have the opportunity to redress any claims made against them in domestic law before international law can play a role.¹¹ In this sense, it is a principle derived from respect of states' sovereignty. The other admissibility requirements under the Convention also re-affirm the principle that the European Court itself is the last resort, and that the primary arena for judicial protection of human rights is in national courts.¹²

Likewise confirmation of the subsidiarity principle in the Convention is provided by Article 53. Article 53 (old Article 60) does not prohibit the protection of human rights to a greater extent than the Convention itself specifies:¹³

¹⁰ Article 35 ECHR (old Art. 26)

¹¹ See e.g. Brownlie, Principles of Public International Law, (1998) 5th Ed, OUP: Oxford pp496-506; Harris, Cases and Materials on International Law, (1998) 5th Ed, Sweet & Maxwell: London, pp617-623; O'Brien, International Law (2001), Cavendish: London, pp376-379. See also Draft Article 45 of the 1996 ILC Draft Articles on State Responsibility.

¹² The admissibility requirements are contained in Articles 34 and 35 ECHR.

¹³ Herbert Petzold noted this with respect to the pre-Protocol 11 Convention: Petzold (1993)

"Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party"

The Convention is thus a residual safeguard of human rights that ought ideally to be protected in national law. It clearly also suggests that the Convention is not itself a maximum standard for the protection of human rights in Europe, but more a minimum standard.¹⁴

Judicial affirmation of the principle of subsidiarity dates far back into the European Court's jurisprudence, and can be seen in many of its most famous judgments such as the *Handyside* case and *Belgian Linguistic*.¹⁵ Paragraph 48 of the *Handyside* judgment contains the observation that:

op. cit., supra

¹⁴ Hutchinson, who also dismissed the idea of the Convention as a maximum standard, did not link his argument to Art. 53, but preferred to suggest such a conception would simply be "hostile" to the protection of human rights. See Hutchinson, "The Margin of Appreciation Doctrine in the European Court of Human Rights" (1999) 48 ICLQ 638, p642. A response to Hutchinson's argument is considered below.

¹⁵ *Case Relating to Certain Aspects of the Laws on the Use of Languages In Education In Belgium* (1979-80) 1 EHRR 252, (Decided 23.7.1969). See especially para. 10 under the heading "Interpretation adopted by the Court".

"The machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights. [...]The Convention leaves to each Contracting State, in the first place, the task of securing the rights and liberties it enshrines."¹⁶

The concept of subsidiarity is thus used in the Convention system to encourage domestic authorities to shoulder the burden of protecting and promoting human rights. This is confirmed by the terms of the Convention and the case law that has resulted from it. Its relevance to the MoA can be emphasised by referring again to the notion of thick and thin concepts of human rights.

In this thesis Walzer's work has been taken to suggest that when human rights are invoked, universal standards are applied, albeit expressed in language with a western liberal tint. Whilst moral minimalism may provide a critical perspective from which to view other states' behaviour, it is not a free-standing set of universal moral precepts. In other words, universal human rights have derived from, and are intimately connected to, the local cultures that enunciated them after World War II and reiterated them at Vienna in 1993. Walzer has argued that minimalism can only result in a temporary collaboration of values derived from different maximalist moralities. After each phase of temporary minimalism or thinness, the value

¹⁶ *Handyside v UK* (1979-80) 1 EHRR 737 (Decided 7.12.1976), para. 48

holder retreats to his or her thickly constituted morality. Likewise the decisions of the European Court carry critical weight for the state to which they are addressed, but as soon as the Court begun to prescribe how a Contracting Party in violation of the Convention must re-order its legal system it would have moved beyond the assertion of universal, minimalist norms.¹⁷ If it did so, it would simultaneously fail to give adequate respect to the respondent state's maximalist morality *and* contradict the principle of subsidiarity.

A2 Subsidiarity and the separation of powers

The principle of subsidiarity and the MoA that necessarily flows from it are results of the division of power between two separate levels of regulation. The MoA expresses that in some matters it is more appropriate for Contracting Parties themselves rather than the Strasbourg organs to take certain decisions. Elements of this division of power produce similar issues as those seen in domestic judicial review cases, whilst others present a wholly new, international, character.

In the model of democracy assumed by the Convention, elected decision makers have the prime responsibility for taking political decisions. The

¹⁷ See Walzer (1994) *op. cit.*, *supra* p10

European Court thus tends to recognise a wider MoA when presented with decisions taken by democratically elected bodies, such as was seen with respect to cases involving general policies relating to planning and the environment in Chapter 6. This is similar to the position of domestic courts which recognise a distinction between appeal and review, attempting to preserve the separation of powers.¹⁸ In order to respect fully the idea of a democratic society, the European Court must show some respect for elected national authorities, and also, to a lesser extent, discretionary administrative activity. These considerations flow not so much from the Court as an international institution, but rather from its simply being a court.¹⁹

In addition to factors that affect all courts, the institutional context of European Convention law adds another dimension. The issue is not only between separating the different powers of one state, but also the respective competences of national and international institutions. The separation of powers issue is thus closely linked to the subsidiarity argument, and the delicacies of balancing human rights and state sovereignty. It has led to the Court's objections at being seen as a Court of fourth instance, and, in

¹⁸ See Schokkenbroek, "The basis, nature and application of the margin of appreciation doctrine in the case law of the European Court of Human Rights" (1998) 19(1) HRLJ 30

¹⁹ See Brems, "The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights", (1996) 56 *Zeitschrift für Ausländisches öffentliches recht und volkerrecht* 240, p293

accordance with the principle of subsidiarity, it will usually respect findings of law and fact by national courts.²⁰ Thus the Court's use of the MoA is a natural by-product of the distribution of power between national and international bodies.²¹ Coupled with the observation that the MoA need not signal an automatic victory for the respondent state, the MoA can be seen as an attempt to make explicit the Court's view of its own role in particular cases.²²

A3 Subsidiarity, separation of powers and a democratic society

The concept of a democratic society in which the determinations of elected decision makers deserve respect is the foundation for the Court's approach to subsidiarity and the separation of powers. More generally, it can be argued that the notion of a "democratic society" permeates the entire European Convention system. In this sense, the idea of "democratic society" provides the practical parameters that human rights, thinly constituted, demand.

²⁰ See *Edwards v UK* (1993) 15 EHRR 417 (Decided 25.11.1992), para. 417; Petzold (1993) op. cit., supra p50

²¹ Mahoney, "Marvellous richness of diversity or invidious cultural relativism" (1998) 19(1) HRLJ 1

²² Schokkenbroek (1998) op. cit., supra p31

In the preamble to the Statute of the Council of Europe, participating states reaffirm:

"their devotion to the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy".²³

Likewise the Preamble to the ECHR states that fundamental freedoms:

"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".

Furthermore the limitations on human rights permitted in Articles 8-11 all require that such limitations are "necessary in a *democratic society*". The meaning of "necessity" in this context was examined in Chapter 6. Further case law elaborates upon the importance of a "democratic society". For example in *United Communist Party of Turkey v Turkey* the Court summarised its position as follows:

"Democracy is without doubt a fundamental feature of the European public order [...]. That is apparent [... firstly, from the Preamble to the Convention [...]. [The Court] has pointed out several times that the Convention was designed to maintain and promote the ideals and values of a democratic society [...]. In addition, Articles 8, 9, 10 and 11 of the Convention require that interference with the exercise of the rights they enshrine must be assessed by the yardstick of what is

²³ Statute of the Council of Europe, ETS 01

“necessary in a democratic society”. The only type of necessity capable of justifying an interference with any of those rights is, therefore, one which may claim to spring from “democratic society”. Democracy thus appears to be the only political model contemplated by the Convention and, accordingly, the only one compatible with it.”²⁴

The Court looks to the concept of a "democratic society" as part of its guiding rationale, or its general object and purpose, when it interprets the Convention and gives judgments. The notion of a "democratic society" thus gives some clues as to where the Court draws the line in regard to the principle of subsidiarity. Whilst it may be that a variety of different national measures which all secured the rights guaranteed by the Convention could all be permitted, a national measure that did not conform to the Convention could not be. The principle of subsidiarity recognises some discretion only as to how to *comply* with the Convention; it does not leave discretion *not* to comply with the Convention, because such a level of discretion would undermine the notion of a democratic society.

In order for human rights to become fully embedded in society, it is important that they are recognised as being thickly elaborated in each society's system of governance. This is the subsidiarity argument; the

²⁴ *United Communist Party of Turkey v Turkey* (1998) 26 EHRR 121, (Decided 30.1.1998), para. 45

Convention itself is the minimum standard of human rights, thinly constituted, but the obligation to secure Convention rights in domestic law and provide a domestic remedy for their breach necessitates interaction with complex local factors and institutions. Since the Convention is drawn from the traditions of the Contracting Parties, it is expected that ordinarily human rights are protected, and that resort to the Convention is matter of last resort. Respect for a democratic society (which represents the ordinary state of affairs) is the limit that prevents local influence on the elaboration of human rights from contradicting human rights, thinly constituted. The Convention thus offers protection from human rights abuses at two levels.²⁵ It protects firstly against “naked, bad faith abuse of power”.²⁶ In this sense, the Convention clearly required from the outset a standard of human rights, thinly-constituted, in response to the recent horrors of the Second World War. However in protecting human rights the Court also has to deal with restrictions imposed in the name of the general interest, and which whilst impacting disproportionately on the individual, were imposed in good faith. According to Mahoney:

“It is only in this second context, once the first degree of protection has been assured, that the doctrine of the margin of appreciation comes into play, that is to

²⁵ See Mahoney (1998) *op. cit.*, supra p2 & p3

²⁶ *Ibid.*, p4

say, only if the preliminary conditions of normal democratic governance have been shown to exist”.²⁷

In this second level of protection, the “good faith” curtailment of human rights can be seen as taking place within the thick elaboration of human rights in particular societies. Some discretion is justified here, but it is constrained by the first level of protection, or human rights thinly constituted. The “first level” of protection explains why the jurisprudence discussed in Chapter 6 evidences the consistent view that the MoA does not create an unreviewable area of state discretion.

A4 Conclusions on subsidiarity

The principle of subsidiarity is recognised as being central to an understanding of the Court’s role. It has also frequently been linked to the MoA. The view presented in this section adds to such observations by locating the issue of subsidiarity within the context of the interrelationship of human rights thickly and thinly constituted.

The idea that national authorities rather than the Strasbourg institutions ought to deal with human rights protection in the first place recognises that

²⁷ Ibid., p4

many aspects of human rights protection are locally resonant. The separation of powers doctrine at national level has taught that judicial bodies are not best placed to weigh difficult policy decisions. At the international level similar concerns govern the European Court's use of the MoA, where it is careful not to delve too deeply into the detailed elaboration of human rights by each Contracting Party. If it overstepped its role it would run the risk of failing to respect determinations made within each society's maximal morality. Nevertheless the notion of a "democratic society" restrains diversity by presenting a tangible thinly-constituted standard against which to judge states' conduct.

B Distinguishing human rights and public interests

It is clear that the MoA's field of operation ought to be tightly circumscribed, and that a perceived failure to do this has led to some of its most forceful criticism. However, many references to the MOA fail to appreciate that the MoA applies to only a limited a range of circumstances. One category of questions or cases where the MoA should not be used has already been mentioned: those that relate to bad-faith or wide-scale human rights abuses. Another, discussed here, is on questions of rights' actual definition.

It is where human rights and a national public interest in a particular case appear to conflict that the MoA is a suitable tool, rather than where there is a question about the extent or meaning of a right.²⁸ Van Dijk and Van Hoof have alluded to this issue in their distinction between the “interpretation” and the “application” of the Convention.²⁹ Interpreting the Convention is a job solely for the Convention bodies, whereas in applying it responsibility is shared. This is the situation exemplified where the respondent state accepts it has interfered with a human right, and therefore does not seek to dispute the interpretation or relevance of the right at stake. In these circumstances it is the relative weight of the right and the countervailing public interest that the national authorities seek to establish for themselves.

Determining the national public interest requires detailed knowledge of the domestic situation, and is an inherently political question. Subsidiarity and the separation of powers issue discussed above resurface here, inasmuch as

²⁸ Greer, The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights (2000), *Human Rights Files No. 17*, Council of Europe Publishing: Strasbourg, p32

²⁹ Van Dijk & Van Hoof, Theory and practice of the European Convention on Human Rights, (1998) Kluwer: The Hague, p71 *et seq.* Article 32 ECHR defines the jurisdiction of the Court as extending “to all matters concerning the interpretation and application of the Convention and the protocols thereto [...]”. Van Dijk & Van Hoof refer to the pre-protocol 11 situation, where similar powers were conferred by the then Article 46 ECHR.

questions concerning the relative weight of national public interests are not suitable for judicial determination, nor should international mechanisms preempt national determinations. Moreover, the sorts of questions that must be asked and answered involve issues relating to rights-in-detail rather than rights in the abstract; the realisation of human rights thickly-constituted. However, it is *only* in response to clashes of national public interests in context of human rights thickly-constituted that the MoA can be truly defensible.³⁰ Recall also that the even where a MoA is conceded, the review function of the European Court is not ousted. A gross miscalculation of the relative weight of human rights and the national public interest could still amount to the violation of a Convention right, thus human rights, thinly constituted, are not compromised by the MoA.

C Principles of Interpretation

The following sections examine the Court's interpretation of the Convention in circumstances where the definition of rights is in question, explaining how such circumstances relate to the MoA and the preceding discussion of subsidiarity, human rights, and public interests.

C1 Autonomous interpretation

³⁰ See Greer (2000), *op. cit.*, *supra*

This section examines one of the ways in which the Court interprets the European Convention. The Court is not bound by the everyday meaning of terms used in the Convention. It is argued here that in holding that the terms of the Convention can be interpreted outside their “normal” meaning, the Court has made a conclusion about the relationship between human rights thinly and thickly constituted. It is demonstrated that the limits of autonomous interpretation, expressed through the MoA, do not result in an indefensibly vague definition of particular human rights or allow states to define their obligations for themselves.

When the Court is called upon to interpret the Convention, it does so in general by reference to its object and purpose. This, embodied in the concept of a democratic society, is the protection of individual human rights thinly constituted. For this the Court this tends to require in general terms that Contracting Parties guarantee the “effective protection” of human rights. For example in *Orhan v Turkey*, discussing Article 2, the Court made the following statement in its “general considerations”:

“The object and purpose of the Convention as an instrument for the protection of individual human beings also requires that Article 2 be interpreted and applied so as to make its safeguards practical and effective”³¹ [References omitted]

³¹ *Orhan v Turkey* (2002), Unreported - Application no. 25656/94, (Decided 18.6.2002), para. 325; See also *Soering v UK* (1989) 11 EHRR 493 (Decided 7.7.1989) para. 87

In addition, where everyday words are used, the Court applies the rule from Article 31(1) of the Vienna Convention on the Law of Treaties, giving them their “ordinary meaning”.

More interestingly, the enforcement mechanisms of the European Convention system have recognised that some of the specialist words used in the Convention have an “autonomous” meaning, which can only be authoritatively determined by the European Court.³² National law using similar terminology may be evidence of the same phrase's meaning in an ECHR context, but it cannot ultimately pre-judge the European Court's decision. In the past, problems have arisen with respect to terms such as “civil rights and obligations” and “criminal charge” in Article 6, and “association” in Article 11. For example in *Lanz v Austria*, the Court referred to its Article 6 case law in discussing whether, under Article 5(4), the requirements of a fair trial must be met in pre-trial proceedings, including the investigative process:

“According to the Court’s case-law, it follows from the wording of Article 6 – and particularly from the *autonomous meaning* to be given to the notion of “criminal

³² See Matscher, "Methods of interpretation of the Convention" in Macdonald *et al* (eds.) (1993) *op. cit.*, supra pp70-73

charge” – that this provision has some application to pre-trial proceedings [...].”³³

[Emphasis added; references omitted]

In essence, the principle of autonomous interpretation promotes a basic level of consistency in the Convention's interpretation throughout Europe. It signals the meaning of those standards laid down by the Convention. It is important that the ambiguities and open-textured language used in the Convention are seen within the overall compliance with human rights, thinly constituted.

If taken too far the notion of autonomous interpretation could erode the principle of subsidiarity and interfere with the grounding of human rights into particular societies' own consciousness. It could overreach the Court into matters that actually concern the relative weight of circumstantially relevant public interests. It must not be expected that there is an autonomous European interpretation for each detailed aspect of European human rights law, only those terms in the Convention itself that define its outer parameters. Applying the principle of autonomous interpretation the Court should not be expected to provide answers to questions that ought to

³³ *Lanz v Austria* (2002), Unreported - Application no. 24430/94 (Decided 31.1.2002), para.

be answered at the local level. The MoA presents a tool for the discussion of this issue and the resolution of conflicts arising from it.

The words used in the Convention also to some extent restrain its interpretation by national authorities, inasmuch as some rights are defined in more detail than others. When the Court interprets such elements of the Convention it is not that the Court must clarify ambiguity, but rather it denies that there is any ambiguity at all. In this fashion autonomous interpretation of such aspects of the Convention provides a lot clearer indication of the rights' actual content as well as its broad aims. This is particularly so with Articles 5 and 6, which spell out the obligations under them in much more detail than the other substantive articles of the Convention. Many of the Court's pronouncements on autonomous interpretation have been made in respect of these articles because their aims are so clear.

It can also be argued that Articles 5 and 6 deal with specific sections of society, for example prisoners, whereas for example Articles 8-11 often raise social questions that affect a larger portion of society.³⁴ As was noted in Chapter 6, where the Court deals with issues that affect broader societal

³⁴ Yourow, The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence, (1996) The Hague: Kluwer, p187

concerns or policies, such as the environment, the MoA has tended to be wider. This is another aspect of the subsidiarity principle and respect for local determinations of the relative weight of public interests. The narrower range of issues at stake in Article 5 and 6 cases is more appropriate for objective international adjudication, and therefore the autonomous interpretation of the Convention tends to be applied at the exclusion of the MoA in these cases.

An additional explanation of the Court's approach to autonomous interpretation is disputed here. It could be argued that enough of an international consensus (at least in Europe) has crystallised on even the more detailed aspects of Articles 5 and 6. The standards they contain could therefore represent an advanced form of human rights, thinly constituted. They could be deemed "advanced" in the sense that the minimalist approach to these rights is particularly stringent, leaving no room for their divergent elaboration in maximalist moralities. This position would however misunderstand the Walzerian paradigm. Thick moralities do not homogenise and inevitably become "thinner".³⁵ To do so would also suggest that other rights which at present differ in their protection will also inevitably become more uniformly protected. For example it has been demonstrated that the limitation of free expression in moral matters tends

³⁵ See Chapter 3

towards a wide MoA. The reasons for this are perfectly valid, and will not become any less valid over time. The protection of human rights should not aspire to the homogenisation of the thickly constituted moralities from which they derived. The agreement in Europe on the standards of a fair trial is better viewed as a coincidence of similar thickly-constituted moralities.

Indeed as the protection of human rights in the European system develops and becomes more refined, it is the state's justification for its interference that must become more detailed, not the definition of the right itself. To do otherwise would be to shift the burden of proof onto the Court to demonstrate what the extremities of the right are, rather than for the state to defend its actions. When human rights are at stake, the greatest achievement of international human rights protection thus far has been to require states to clarify and justify their actions. Chapter 6 demonstrated that tests applied by the European Court to determine whether an interference is justified provide a coherent structure to examine a state's actions.

It has been argued that despite the existence of autonomous interpretation, the Court still leaves Convention rights only vaguely defined. Hutchinson has argued that there are in essence only three ways of viewing the Convention in the light of the MoA. Firstly, the Convention could be seen

as a maximum standard for the protection of human rights. Hutchinson rightly discounted this approach as it is “hostile to the extensive protection of human rights”.³⁶ According to Hutchinson, this leaves only two other options. The Convention could represent a minimum standard, allowing states discretion to implement higher standards, or it could be somewhere between the two positions already described.

Hutchinson argued that the Court’s case law does not support the idea of the Convention as a “floor” or minimum standard for two reasons. Firstly, the Court rarely expresses where the “floor” is, instead stating only that the MoA has been exceeded. Secondly, the variability of the MoA means the “floor” must move. According to Hutchinson, therefore, if the MoA is defensible then the Convention must be viewed as an area of compliance within which there are various ways of protecting the rights it enshrines. This view is somewhere between the Convention as a maximum or minimum standard.

Hutchinson’s ultimate criticism of the MoA relied upon an attack upon the model of the Convention that it supposes, namely that it constitutes an “area of compliance”. In this model, which he argued more closely corresponds to what the Court actually does, there is a central norm around which exists

³⁶ Hutchinson (1999) *op. cit.*, *supra* p642

an area (the MoA) where the state's interpretation is permitted, even if it differs from that of the Court.³⁷ Hutchinson complained that this approach to the MoA means that the central norm of each Convention right must remain undefined. Otherwise the Court would be put in the position of defining the best way of protecting the right, whilst conceding that the respondent State's actions are compliant but not ideal.

Hutchinson's criticism is based upon the unfounded anxiety identified above. The Court should not be expected to define each aspect of every aspect of every right in the abstract. There is no "best way" of protecting each right. The principle of subsidiarity and respect for local prioritisation of conflicting public interests indicate that the Court should not be called upon to do this. The Court's role is to interpret the Convention so that its basic standards are clear. It is designed to re-affirm human rights, thinly constituted. Hutchinson's critique seemed to require the Court to delve into the thick elaboration of the human rights in particular societies and autonomously interpret every aspect of the Convention. The Court is neither equipped to do this, nor would it be justified in doing so. Choices made by domestic institutions in their thick moralities must command the respect of the Court, in so far as they do not undermine commitment to the Convention system as a whole.

³⁷ Ibid., p645

In summary requiring exhaustive autonomous interpretation is too focussed upon the actions of the Court rather than the actions of the respondent States. The real issue is not that the human rights at stake must be capable of precise definition in the abstract, but that states are rendered accountable for any interference they make with human rights. The MoA analysis, as it has evolved, ensures that States must provide solid reasons for their interference with the Convention rights.

C2 Principles of interpretation - Evolutive interpretation

Another feature of the European Court's interpretative style that interfaces between international definition and local application is the principle of "evolutive interpretation". Where the Court lets Convention standards evolve to a higher standard it is effectively reducing the scope of what may be seen as matters of public interest. This must be examined because of its potential to invade localised thickly-constituted conceptions of human rights and reduce the role of the MoA. It is demonstrated that the MoA in fact serves to guide the use of evolutive interpretation, and could assist in its more methodical application.

“Evolutive interpretation” serves to guarantee that the standards of the Convention do not stay rooted in the prevailing ideologies of the 1950s, when the Convention was drafted. Thus when interpreting the Convention the Court normally takes a teleological approach, so that the precise words of the Convention are not allowed to curtail the protection offered by it. The teleological or purposive interpretation of the Convention has thereby justified taking an autonomous rather than literal approach to the interpretation of Convention rights. In doing so the Court has developed certain of the rights protected under the Convention, either modifying or extending them in the light of present circumstances.

The use of evolutive or “dynamic” interpretation is apparent from even some of the earliest cases heard by the European Court. One of the most important early cases to discuss the idea was the 1978 case of *Tyrer v UK*, which concerned the “birching” of young offenders on the Isle of Man. The Court was faced with a situation where not only was the form of corporal punishment inflicted upon the applicant (for an assault he had committed) widely accepted on the island itself, but it was also perceived as an effective deterrent to others. The Court went on to hold that the practice was “degrading treatment” under Article 3 ECHR, but did not amount to torture or inhuman treatment. Whilst the corporal punishment of children had been more acceptable at the time the Convention was drafted, ideas about such

forms of punishment had moved on by the time *Tyrer* was decided.

Discussing the relevance of present day attitudes, the Court stated that it:

“ [...] must also recall that the Convention is a *living instrument* which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions. In the case now before it the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field.”³⁸ [Emphasis added]

The Court has recognised that the Convention is a “living” instrument when it has discussed changing societal mores. For example the public attitude to homosexuality has changed significantly since the 1950s, allowing the judgments in cases such as *Dudgeon*, *Norris* and *Smith & Grady*.³⁹ Likewise in the *Marckx* case, the Court was called upon to decide whether Belgium’s inheritance law, which did not provide for equal rights between for children born out of wedlock, were contrary to *inter alia* Articles 8 & 14 of the Convention, and Article 1 of Protocol 1. In order for Article 8 to apply to the relationship between the applicant and her “illegitimate” daughter, there had to be a “family”. The Court confidently held that the Convention makes no distinction between “legitimate” and “illegitimate”

³⁸ *Tyrer v UK* (1979-80) 2 EHRR 1 (Decided 25.4.1978), para. 31

³⁹ *Dudgeon v UK* (1981) 4 EHRR 149, (Decided 24.2.1981); *Norris v Ireland* (1991) 13 EHRR 186, (Decided 26.10.1988); *Smith and Grady v. United Kingdom* (2000) 29 EHRR 493 (Decided 27.9.1999)

families.⁴⁰ Such a view is clearly more liberal than the traditional view of family and home life prevailing at the time of the Convention's drafting.

Returning to Article 3, the Court has demonstrated that it will not be bound by its previous pronouncements where it feels that present day conditions demand higher standards of human rights protection than were previously attainable. Under Article 3 the Court has distinguished between "torture", "inhuman treatment" and "degrading treatment", as could be seen in the *Tyrer* case. Torture is the most serious of the possible violations under Article 3, with degrading treatment at the other end of the scale (though this is not to suggest that degrading treatment is anything other than deplorable). The 1992 case of *Tomasi v France*⁴¹ concerned police brutality towards a black suspect in custody. The violence towards him was in that case sufficient to constitute inhuman and degrading treatment. The 1999 case of *Selmouni v France* had very similar facts. The Court made the following statement in that case:

"The Court has previously examined cases in which it concluded that there had been treatment which could only be described as torture. [...] However, having regard to the fact that the Convention is a "living instrument which must be interpreted in the light of present-day conditions", [...] *the Court considers that certain acts which were classified in the past as "inhuman and degrading*

⁴⁰ *Marckx v Belgium* (1979-80) 2 EHRR 330 (Decided 13.6.1979), para. 31

⁴¹ *Tomasi v France* (1993) 14 EHRR 1 (Decided 27.8.1992)

treatment" as opposed to "torture" could be classified differently in future. It takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies."⁴² [References omitted; emphasis added]

The Court thus designated as torture that which in the past was considered to be inhuman and degrading treatment.

A sharp criticism of such evolutive interpretation is that it exposes judges to the charge of judicial creativity. In essence, this could result in a conflict with the general principle of state consent if states were continually bound by standards to which they never agreed. The idea of a MoA can be seen as a form of apology to states for this. Indeed Van Dyke and Van Hoof have argued that the MoA "can be seen as a certain counterweight to the Court's interpretative activism".⁴³ The general increase in the confidence of, and respect for, the Court has been linked to the MoA's development.⁴⁴ It is therefore arguable that when the Court has been at its most judicially active, the existence of the MoA has provided Contracting Parties with a potential

⁴² *Selmouni v France* (2000) 29 EHRR 403 (Decided 28.7.2000), para. 101

⁴³ Van Dijk & Van Hoof (1998) op. cit, supra p95

⁴⁴ See Chapter 5

means by which to argue their particular positions in the face of an increasingly expansive notion of European human rights.

It is arguable that the autonomous and evolutive principles of interpretation leave an indeterminate scope for national variation in the interpretation of Convention rights.⁴⁵ However the MoA can be used to create some consistency out of these, in the following way. It has been demonstrated that there are sound reasons for restricting state discretion when the rights to life or freedom from torture are at stake, because in a democratic society these rights ought never to be curtailed. By contrast when general policies are at stake the democratic institutions of Contracting Parties should be respected because, even in a democratic society, some general policies may defensibly impact upon the rights of some people so long as the impact is proportionate. The more serious the interference or the more it affects a particularly private aspect of the applicant's life, the more likely the Court is to restrict state discretion, interpret the Convention autonomously, or expand upon its scope.

The Court has also itself attempted to deny that its activism has left the Convention indeterminate. The Court has often sought to "extend" the protection offered by the Convention by arguing that the Convention

⁴⁵ Greer (2000) *op. cit.*, supra p18

already protected the particular manifestation of the right at stake. For example, Article 3 is most obviously applicable in the sorts of cases such as *Tyrell* or *Selmouni*, where the applicant is subject to torture or inhuman and degrading treatment by the authorities of the respondent state. From this the Court has been able to extrapolate that deportation to a state where the deportee would be subject to violence or torture could also amount to a violation of Article 3.⁴⁶ It was argued that the Convention always covered this potential, and that by recognising it in the instant case the Court was not actually extending the Convention's scope.

Evolutionary interpretation is not without its limits. Firstly, the Court will not go so far as read into the Convention obligations that simply were not there to start with. An example is the highly emotive case of the paralysed and terminally ill applicant Diane Pretty, who sought immunity from prosecution for her husband if he helped her to die. The authorities in the UK would not guarantee that her husband would be free from prosecution. The applicant argued that this constituted a breach of *inter alia* Articles 2 and 3 of the Convention. The European Court reluctantly found against the applicant, reasoning as follows:

⁴⁶ See *Soering v UK*, op. cit., supra. This is commonly referred to as the principle of "non-refoulement".

“While the Court must take a *dynamic and flexible approach* to the interpretation of the Convention, which is a *living instrument*, any interpretation must also accord with the fundamental objectives of the Convention and its coherence as a system of human rights protection. Article 3 must be construed in harmony with Article 2, which hitherto has been associated with it as reflecting basic values respected by democratic societies. As found above, Article 2 of the Convention is first and foremost a prohibition on the use of lethal force or other conduct which might lead to the death of a human being and does not confer any claim on an individual to require a State to permit or facilitate his or her death.” [Emphasis added].⁴⁷

This case demonstrated that the Court will not let the Convention evolve endlessly. There are outer limits to the Court’s activism. However, the very existence of the evolutive approach to interpretation of the Convention can be taken as evidence that the Court is open to the view that cultural and moral views are diverse and change from time to time. This is significant because it serves to indicate an ethos that informs the MoA.

It was noted in Chapter 2 that cultural relativism tends to preserve the status quo; it is ultimately conservative. The European Court’s ethos as indicated

⁴⁷ *Pretty v UK* (2002), Unreported - Application no. 2346/20 (Decided 29.2.2002), para 54.

The applicant died less than two weeks after the judgment was delivered, having declared that the “law has taken all [her] rights away”. See “Free at last’ - Diane Pretty dies” Clare Dyer, *The Guardian*, Monday May 13, 2002.

by the principle of evolutive interpretation cannot be described in this manner. This again suggests that the Court is unreceptive to relativism, and that when it uses the MoA rather than an evolutive approach the Court is merely respectful of the local context of its operation. Unlike relativism, the Court's approach has transformative potential which the MoA does not undermine.

C3 Evolutive interpretation and consensus analysis

An important limitation on evolutive interpretation is the “consensus analysis” undertaken by the Court when it attempts to determine the width of the MoA in a particular case. The Court tends to make its pronouncements on both autonomous interpretation and the evolution of European standards by reference to the practice of members of the Council of Europe. As discussed in Chapter 6,⁴⁸ where there is a greater consensus between European states the MoA tends to be narrower and the Court is more likely to recognise the evolution of higher human rights standards.

The *Pretty* case⁴⁹ can be seen as an example of the consensus principle providing a limit to the Court's evolutive interpretation of the Convention,

⁴⁸ See Chapter 6, Section B3(ii), “European consensus or common ground”

⁴⁹ *Pretty v UK*, op. cit., supra

and which respects the principles inherent in the MoA. The issue of euthanasia or assisted suicide is the subject of intense debate in Europe. Some states, such as the Netherlands and Sweden, have decided that in limited circumstances it should be allowed. The UK has not. These states are all European democracies and members of the Council of Europe, but their difference of approach suggests that there is no uniform European consensus. The question of euthanasia is one that is closely linked to religious and moral issues that tend to be both fiercely held and multitudinous in their appearance. Thus, in the same way that the Court tends to give a wider MoA in matters relating to moral controversy, it is less willing to promote an evolutive interpretation of the Convention when there is ongoing debate. Respect for the principle of subsidiarity dictates that where there is no consensus it is for the democratic institutions of each Contracting Party to determine an appropriate response to the issue.

This could be problematic where a state finds itself in the minority whilst most other states share consensus. The minority state may have very good reasons (cultural or otherwise) for maintaining its isolated position in the face of the Court's evolutive interpretation. The consensus principle, Eva Brems has argued, makes too strong a presumption against such states:

“Thus the consensus approach may hamper one of the functions of margin of appreciation analysis: the accommodation of cultural relativist claims”.⁵⁰

It has been consistently argued that the MoA does not actually accommodate relativist claims. It simply allows for accommodation of certain cultural differences. A truly relativist claim would seek to undermine the relevance of the human right at issue to the society in question, replacing the right with some more appropriate local value and fundamentally weakening the basic concept of human rights. By contrast the MoA allows cultural difference to be accommodated *within* the framework of the European Convention.

Nevertheless elements of Brems’ point remain, inasmuch as she saw consensus analysis working against the preservation of cultural diversity rather than for it. This would conflict with the argument made in Chapter 6 of this thesis that consensus analysis is a valuable reminder of European cultural pluralism. These differing interpretations of consensus analysis arise because the Court thus finds itself on the axis of prescription and description. Its actions are constrained by state consent, and so rather than make proud statements on evolving human rights standards, the Court has

⁵⁰ Brems (1996), op. cit., supra p285-286

tended to take an incremental approach, purportedly justified by significant state practice.⁵¹

On some matters the Court can be seen to have led European states to a gradually improved protection of human rights, prescribing that in the light of evolving standards certain rights are guaranteed in particular ways. For example this could include persuading Ireland and the UK in *Norris* and *Dudgeon* respectively that the laws criminalising homosexual conduct were anachronistic in spite of their local popularity. The Court was attempting to suggest that there was a European consensus that the types of homosexual behaviour at issue ought not to be criminalised, thereby working against the local view that they should.

However it could be argued that the impugned criminal laws' existence in *Norris* and *Dudgeon* was evidence that there was no consensus at all. Since it is said that the law of the European Convention derives from law of its Contracting Parties, the Court is in a sense descriptive. For this reason, the moment the Court disapproves of a national law it appears to contradict the source of its authority. In response to this, the criticism of Alison Renteln's

⁵¹ See Benvenisti, "Margin of Appreciation, Consensus and Universal Standards", (1999)

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additive universality introduced in Chapter 2 is applicable here.⁵² It is precisely where human rights are not observed (i.e. where the respondent state argues that there is no consensus that they should be), that it is often the most important they are protected. If the Court could only advocate the protection of human rights where they are already demonstrably protected, it would play no significant role at all.

In conclusion, the existence of consensus analysis allows the recognition that on some matters different localities in Europe will always disagree. It is not inevitable that adherence to the European Convention will eventually lessen the cultural or moral diversity of Europe. Whilst the Convention aims at the universal protection of human rights, it does not require uniformity in all matters. In other words, the existence of consensus analysis allows the Court to accommodate respect for choices made within a thickly constituted conception of human rights. Establishing whether a local condition undermines human rights, thinly constituted, can be achieved by linking consensus analysis to the other factors contributing to the width of the MoA and the principles that underpin its existence. The significance of consensus analysis in this context is simply that it acknowledges there *are* outer parameters to the uniform protection of human rights required by the

⁵² See Chapter 2, Sections B2 and B3; Renteln, International Human Rights – Universalism versus Relativism, (1990) Sage Publications: New York.

Convention. The position of those parameters in a given case can only be established by reference to the other factors that also affect the width of the MoA, because no one factor is ever decisive. Thus in *Norris and Dudgeon* the intimate nature of the interference superseded the respondent states' isolated moral position on that particular question.

D Conclusion

This chapter has clarified the factors that underpin the MoA's existence and their relationship with other principles of interpretation used by the Court. The view of MoA presented here can therefore be seen as relating to a particular appreciation of the Convention's purpose and structure.

It was argued that the subsidiary nature of the Convention's enforcement mechanisms recognises that certain questions about human rights ought to be answered at the local level. Such questions concern the countervailing public interests, which are appropriate in the first place for local determination. This carries with it the recognition that the MoA does not permit discretion as to the overall interpretation of human rights, but only of their relationship to identifiable public interests. Such a view of the Convention is borne out by examining the principles of autonomous and evolutive interpretation and their relationship to consensus analysis. It is

clear that none of these principles suggest that the Court should attempt to define Convention rights exhaustively in the abstract.

Conclusions of Part Two: European Human Rights Law and the

Margin of Appreciation

The aim of this thesis is to prove that the MoA does not allow the European Court to concede a level of deference to Contracting Parties that would amount to cultural relativism. In order to do so it is necessary to enquire into the universality debate as well as into the operation of the MoA itself, otherwise there would be no standard against which to judge the MoA. Part Two has examined the operation of the MoA in the light of the conclusions drawn in Part One, since it is necessary to understand the MoA as well as the universality debate in order to discuss the recent operation of the Court.

The specific charge made against the MoA was that it prohibits the European Court from maintaining an adequately universal standard of human rights protection. Chapter 5 examined the history and evolution of the MoA, recognising that its operation has evolved from a trust-building level of deference to a structure upon which to hang ever-greater requirements of justification for interference with human rights. Chapter 6 then divided criticism of the MoA into two component elements; concerns over the means used to identify its width in particular cases; and concerns that the MoA was without an outer limit. It was demonstrated that coherent principles govern the width of the MoA, and that even where the margin is

wide the Court's jurisdiction is not excluded. These prevent the Court from sliding into relativism. Finally, Chapter 7 clarified the factors that underpin the MoA and the Convention itself, completing the argument that the MoA is not flawed in principle.

In essence it has been argued that the MoA indicates a view of human rights consistent with allowing respect for different thickly-constituted conceptions of human rights. The matters discussed concerned incommensurable public interests that genuine democracies may still prioritise differently. The level of variety permitted by use of the MoA only goes as far as recognising the principle stated in the Vienna Declaration that human rights are "universal, indivisible and interdependent and interrelated" but that the "significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind".⁵³

Significantly in the cases where the MoA is invoked the respondent state is not engaged in a process of attempting to argue that the specific human right at issue does not apply to them. Cultural relativism as discussed in Chapter 2 tends towards prioritisation of local conditions over universal human rights in such a way as to erode their integrity and relevance. When the

⁵³ Para. 5, Vienna Declaration and Programme of Action, UN DOC. A/CONF.157/23 (12.7.1993); (1993) HRLJ 352

Court finds a state's actions are within its MoA it does not begin to suggest that the right at issue, thinly constituted, is alien to that society. The underlying relevance of human rights is not disputed, therefore in applying the MoA the Court simply shows respect for different thickly constituted conceptions of human rights. This was precisely the identified advantage of locating discussion on the form or interpretation of human rights within the elaboration of a thickly-constituted concept of human rights: it leaves no room for lingering objections to the universality of human rights, thinly-constituted.⁵⁴ This can equally be expressed as permitting some discretion as to the local form and interpretation of human rights, but defending the universality of their substance.

Part Two has gone a substantial way to answering the identified criticisms of the MoA. However it was also suggested that even if the MoA was defensible in principle, its ability to cope with the Council of Europe's expansion could call it into question. Part Three turns to this issue.

⁵⁴ See Chapter 3, Section D, "Conclusion"

Part Three - The Margin of Appreciation in the Expanded Council of

Europe

Introduction

The principal justification for embarking upon an examination of the margin of appreciation (MoA) at present is the passing of the first decade since the end of the Cold War. In this time the Council of Europe has expanded in membership rapidly, and Convention case law has begun to emanate for the first time from central and eastern European states.

This development adds another tier upon any examination of the MoA. It is not enough to examine the MoA in principle, even where this is wedded to a detailed approach to the universality debate. In order to refute criticism of the MoA it is necessary to analyse recent case law deriving from the new Contracting Parties and examine developing patterns. If this process failed then use of the MoA would have become a relic of the European Court's Cold War jurisprudence. By contrast it is argued that the Court's use of the MoA has recognised the cultural and historical backgrounds of the new Contracting Parties, whilst ensuring a consistent standard between old and new contracting parties that has not decreased overall. The remainder of this introduction clarifies the issues discussed in Part Three.

The most immediate question is whether a human rights system designed for a limited number of states from western Europe can protect human rights outside that context.¹ Both Eva Brems and Howard Yourow² have observed that there were already various cultures and backgrounds represented in the Council of Europe. These included common law and civil law states, federal and unitary states, and states based to varying degrees upon differing religions. However Brems was concerned that the newer Contracting Parties from Central and Eastern Europe had developed separately from Western Europe for the past 50 years. This, she stated, "is bound to have profoundly affected their societies' structures, value judgment etc."³ Similarly Richard Kay has noted that the Council of Europe's expansion brought within its scope societies and individuals with very different histories and traditions, and basic ethics about the values underlying Convention rights.⁴

¹ Seymour, "The extension of the European Convention on Human Rights to Central and Eastern Europe: Prospects and Risks", (1993) 8 Conn. J. Int'l L 243, p244

² Brems, "The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights", (1996) 56 *Zeitschrift fur Ausländisches offenthiches recht und volkerrecht* 240; Yourow, The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence, (1996) The Hague: Kluwer, pp4-5

³ Brems (1996), op. cit., supra p308

⁴ Kay, "Symposium: Human Rights in Theory and Practice: A Time of Change and

One of the dangers of the Council of Europe's expansion into new areas is that the Court's steady consolidation of its position, moving towards greater assertiveness, could be weakened if in western Europe it played a strong role whilst reverting to its earlier deference in the East. Such would result in a two tier approach to human rights protection in Europe. More worryingly, a two-tier approach could be avoided if the whole system became based upon a lower level of human rights protection than had previously been demanded, which would be an even worse outcome. As Paul Mahoney asked in 1999,

“Will the ECHR standards be diluted, not just to accommodate the problems of the fledgling democracies [of central and eastern Europe], but generally, across the board for the whole of the ECHR community? Will the principles painstakingly built up over the years in the jurisprudence of the Commission and Court be left by the wayside?”⁵

A number of commentators have identified the MoA as being particularly troublesome in this regard. For example Lord Lester's suspicion of the MoA

Development in Central and Eastern Europe: The European Convention on Human Rights and the Authority of Law”, (1993) 8 Conn. J. Int'l 217, p220

⁵ Mahoney, “Speculating on the future of the reformed European Court of Human Rights”, (1999) 20 HRLJ 1, p3. In particular, Mahoney suggests that the principle of “evolutive interpretation”, discussed in Chapter 7, could be the vehicle for a downward slide in the protection of human rights in Europe.

was documented early in Chapter 5, to which it can be added that his concern with the MoA:

"is increased by the fact that the Court's territorial jurisdiction is being rapidly widened to cover the inhabitants of some forty European countries of diverse political cultural backgrounds and traditions [...]"⁶

Richard Kay has been less concerned with the MoA's fundamental legitimacy, but in the light of the Council of Europe's expansion to include diverse states was concerned that that margin permitted should not expand indefinitely.⁷ However, Kay has also advocated that, since it was the Court's initial careful approach that contributed to its success in western Europe, a similar "restrained and deliberate" approach should be taken for the new states.⁸ As suggested above, the internal consistency of the Convention system could now be disrupted if the MoA was called upon to play both of its historical roles contemporaneously.

Brems has also been concerned that the Court might not insist on the same standards for newer states, using the MoA to accommodate cultural differences whilst "risking thereby to slow down the human rights progress

⁶ Lester, "Universality versus subsidiarity: A reply", (1998) 1 EHRLR 73, p74

⁷ Kay (1993) op. cit, supra p220

⁸ Ibid., p224

amongst the new members".⁹ Mark Janis has described the accession of Russia and the other central and eastern European states as "the price of success".¹⁰ Janis predicted that Russia's accession in particular would eventually lead to the Convention being openly flouted, reducing the overall credibility of the Convention system. It was also likely, Janis argued, that there would be "a strong temptation for the Strasbourg institutions to fashion a two-tier legal order", which would have lower standards for Russia.¹¹ As suggested above, separate levels of human rights protection for eastern and western Europe should be avoided, except insofar as respect should be accorded to choices made within human rights, thickly constituted.

In summary Part Three addresses several serious concerns about the expansion of the Council of Europe and the MoA's continued use. The MoA must be sensitive to the domestic context of a much wider range of states whilst not lowering human rights standards. With its expansion since 1989 the Council of Europe is no longer a collection of relatively homogenous states (even if it ever was), but has become one in which serious questions about the precise interaction of human rights and local

⁹ Brems (1996), *op. cit.*, supra p310

¹⁰ Janis, "Russia and the 'legality' of Strasbourg law", (1997) 8 EJIL 93, p97

¹¹ *Ibid.*, p98

conditions must be answered. Examinations of the MoA have tended to be parochial, but now the dangers of relativism that have previously been considered a threat only to the UN system of human rights protection must be discussed in the European context.

Chapter 8 examines the background to the Council of Europe's expansion and significant features of the Court's general activity. Chapter 9 examines aspects of the Court's recent jurisprudence in detail. Chapter 10 concludes the thesis by evaluating whether the MoA's use in cases from central and eastern Europe still maintains a practically and philosophically defensible approach to the universality of human rights.

Chapter Eight

Expansion of the Council of Europe and the judicial response

Introduction

The present chapter provides a background to Part Three by introducing international human rights protection in central and eastern Europe during the Cold War. The chapter then charts the Council of Europe's expansion and the level of the Court's activity with respect to the new Contracting Parties. The particular central and eastern European countries (CEECs) from which cases are to be examined are identified, and it is then argued that the Court has been quicker to act against these states than against the earlier members of the Council.

A Background¹²

¹² The section focuses upon the international protection of human rights prior to 1989. For information on human rights protection generally (i.e. historically and domestically) see Forsythe (ed.) Human Rights in the New Europe: Problems and Progress, (1994) University of Nebraska Press: London; Gomein, "The Implementation of International Human Rights Law in Eastern and Central Europe" in Alkema, Bellekom, Drzemczewski & Schokkenbroek (eds.), The Domestic Implementation of the European Convention on Human Rights in Eastern and Western Europe: Proceedings of the Seminar Held in Leiden 24-26 October 1991, *All European Yearbook Vol. 2*, (1991) N P Engel: Strasbourg

In terms of human rights in central and eastern Europe the most significant of the European regional groupings prior to the Council of Europe's expansion was the Conference on Security and Co-operation in Europe (CSCE). This still exists, now called the Organisation for Security and Co-operation in Europe (OSCE).¹³ The CSCE was always a less formally structured organisation than the Council of Europe; a series of high level political meetings rather than a consistent international entity. The move towards a becoming a fully-fledged international institution is reflected in its change of name from the CSCE to the OSCE.¹⁴

The CSCE was not a strictly European organisation, with both the US and Canada as members. The CSCE process was launched in 1972 and led to the adoption of the Helsinki Final Act in 1975. The Act is not a treaty, but, in line with the CSCE's role a political organisation, it was a political statement of the CSCE process's aims. These include statements on acceptable relations between participating states, with the intention of

¹³ See <<http://www.osce.org/index.php3>> for general information provided by the OSCE itself (Accessed 4.2.2003).

¹⁴ The structure of the OSCE has become formalised over recent years. It now has some permanent institutions, and has some of the privileges and immunities commonly associated with an international organisation. See Sands & Klein, Bowett's law of international institutions (2001), (5th ed.), Sweet & Maxwell: London, p201

guaranteeing peace and security, and improving economic, cultural and human rights co-operation. Principle VII of the Helsinki Final Act declares that participating states should respect human rights and fundamental freedoms, including in particular the freedom of thought, conscience and belief.¹⁵ It was also clear from the Helsinki Final Act that human rights were not to be considered as solely domestic affairs. It was thus through the CSCE that western governments were able to persuade the governments of the Soviet Bloc that in order to trade successfully with the West, human rights must be protected.¹⁶ This political will to protect human rights was not accompanied by any binding international standard, nor any form of complaints mechanism.

Whilst human rights were clearly an important issue for the CSCE, its main goal was security. However Forsythe has noted that alongside the efforts of particular individuals,¹⁷ the political pressure exerted by the CSCE had a “moderate” influence on human rights protection in central and Eastern Europe, and undermined the legitimacy of the communist regimes. However, when faced with serious human rights issues such as the violent

¹⁵ CSCE, Helsinki Final Act, 1 August 1975, <<http://www.osce.org/docs/english/1990-1999/summits/helfa75e.htm>> (Accessed 3.2.2003)

¹⁶ Forsythe, “Human rights and multilateral organisations in the New Europe” in Forsythe (ed.) (1994) *op. cit.*, supra p176

¹⁷ See below for more details of the anti-Communist revolutions.

collapse of the former Yugoslavia, the CSCE was reluctant to act. It has been thus suggested that whilst the CSCE was instrumental in the conflict between liberalism and communism, the more difficult task of rebuilding eastern Europe in the face of considerable ethnic conflict might be too much for the OSCE.¹⁸ Despite the lack of any formal human rights complaint mechanism, the political efforts of the CSCE to promote human rights can be seen as paving the way for the Council of Europe's increased involvement in the early 1990s.

Prior to the revolutions of the late 1980s, the Council of Europe, along with other international organisations played a small but significant role in promoting democracy in the CEECs, though this role increased in importance once the states gained independence or embraced democracy. Other international organisations with an interest in the CEECs included the European Community and Union, the United Nations, and also NATO.¹⁹ All of these did, and still do, promote the protection of human rights. The EC has developed a strong human rights dimension in its external relations in particular and, being based on democracy and the rule of law, the CEECs which aspire to its membership must conform to human rights as well as

¹⁸ See generally Forsythe, (1994) *op. cit.*, *supra*

¹⁹ *Ibid.*

economic standards in order to gain membership.²⁰ However, even before the fall of the Iron Curtain, it was the Council of Europe that presented the clearest picture of a human rights agenda for the rebuilding of central and eastern Europe. More localised than the UN, and more explicitly human rights oriented than the EC and NATO, it was poised to encourage the protection of human rights in central and eastern Europe.

B The fall of the Iron Curtain

Winston Churchill used the phrase “The Iron Curtain” in 1946 to describe the ideological and military barrier that had come to separate communist central and eastern Europe from the liberal West.²¹ It was the anti-communist revolutions of the late 1980s that led to the Council of Europe’s rapid expansion. This section details briefly the factors that led to those

²⁰ Many of the eastern European states are now involved in the Commonwealth of Independent States, an organisation of economic unity with Russia as its key member. These states are unlikely to seek membership of the EC / EU in the near future. By contrast the states of central Europe such as Poland are in the next round of EC membership. For this reason, the Council of Europe (which already has members from both the EC and CIS) is able to exert pressure on a greater number of member states and prospective member states. The significance of distinctions between central and eastern Europe is discussed in the next section.

²¹ Rose, What is Europe? A dynamic perspective (1996), Harper Collins: New York, p39

revolutions, and the inter-regional groupings created as a result. This is not designed to be a full socio-political examination of the Cold War's end, but rather as a means of identifying the different contexts of the states that are now under the jurisdiction of the European Court of Human Rights.

The dominant influence of the USSR on the states of central and Eastern Europe was a result of their liberation by the Red Army in World War II, because (with the exception of Austria) in each state regimes linked to USSR were progressively installed.²² They became one-party states with command economies, which contrasted greatly with the democratic and free-market oriented western Europe. According to Istvan Pogany,

“[The] rule of law, the separation of powers, political pluralism and democratic accountability (in any meaningful sense) became (or remained) alien concepts excluded by the advent of socialism.”²³

The totalitarian aspects of the USSR's vision for central and Eastern Europe were most vigorously promoted by Stalin,²⁴ up until his death in 1953. Whilst his successors Khrushchev and then Brezhnev were both quite

²² Wilson & van der Dussen (eds.), The history of the idea of Europe (1995) (Revised Edition), Routledge: London, p154

²³ Pogany “A new constitutional (dis)order for Eastern Europe”, in Pogany (ed.), Human Rights in Eastern Europe (1995), Edward Elgar: Aldershot, p233

²⁴ Rose (1996), op. cit., supra p47

moderate by comparison, they were both also committed to communist rule throughout the Warsaw Pact region.²⁵

The effect of Soviet domination in central and Eastern Europe was to reduce the significance of the area previously referred to as “central” Europe. In the inter-war period and before, states such as Austria, Poland and Hungary had been in central Europe; a buffer between the West and the East. Under Soviet influence eastern Europe effectively “spread” as far as partitioned Berlin.²⁶ The Soviet powers thus reversed the role of the central European states, using them as a potential buffer against future aggression by the West.²⁷

The USSR’s considerable military power ensured that its neighbours maintained not only communism, but a particularly Soviet form of communism. For example in Czechoslovakia in spring 1968, the local ruling communist party implemented radical reforms designed to bring about “communism with a human face”.²⁸ This form of communism sought to embrace social justice and the arts. Russian forces quelled it in August of

²⁵ Ibid.

²⁶ Wilson & van der Dussen (eds.) (1995), op. cit., supra p154

²⁷ Pogany in Pogany (ed.), (1995) op. cit., supra, p 231

²⁸ Steiner, European Democracies, (1991) London: Longman, p21

the same year, demonstrating the extent to which the USSR was prepared to intervene in the affairs of its neighbours to maintain communist supremacy.²⁹ Jürg Steiner has speculated whether the eventual revolutions would have occurred if each of the central and Eastern European states had been able to pursue an idiosyncratic or localised version of communism rather than be subject to constant Soviet supervision. The USSR was quite prepared to use Warsaw Pact troops to quell revolutionary tendencies in any of the states over which it exerted influence.³⁰

Wilson *et al.* observed that Soviet strategy was also based upon the principle of “divide and rule”. In other words the states under its sphere of influence were to be directly dependent upon the USSR, having minimal contact with each other. In terms of the ECHR’s case law, this is important because it helped preserve the “national peculiarities” of those states.³¹ Nevertheless, as Pogany has noted, after Stalin’s death the manifestations of communism began to differ.³²

²⁹ Ibid.; Rose (1996) *op. cit.*, supra

³⁰ Rose (1996) *op. cit.*, supra p47

³¹ Wilson & van der Dussen (eds.) (1995) *op. cit.*, supra p157

³² Pogany in Pogany (ed.), (1995) *op. cit.*, supra p235

The catalyst for significant change in the region was Mikhail Gorbachev becoming President of the USSR in 1985. His attempts at reform were interpreted as a licence for central and eastern European states to shirk Russian influence. The satellite states began to “do it their way” as a result of what has been termed Gorbachev’s “Sinatra” doctrine.³³ Unlike his predecessors Gorbachev did not use military might to restrain the political changes taking place in the USSR’s satellite states. Rose has argued, however, that these were unintended consequences of Gorbachev’s plan to actually preserve Soviet hegemony.

Hungary was the first of the CEEC’s to join the Council of Europe³⁴, on the 6th November 1990. Its transition to democracy is notable for the involvement of the communist party itself in the process. Its own reform wing was largely responsible for the pursuit of pluralist democracy,³⁵ and general elections for Parliament were held in 1990. Likewise Poland’s transition to democracy was relatively peaceful, albeit motivated by the government’s desperation at finding a solution to the economic malaise that

³³ Rose (1996), op. cit., supra p50; Steiner (1991) op. cit., supra p21

³⁴ For details of the application procedure see Drzemczewski, “The Council of Europe’s Co-operation and Assistance Programmes with Central and Eastern European Countries in the Human Rights Field” (1993) 14 HRLJ 229

³⁵ Halmai, “The protection of human rights in Poland and Hungary” in Pogany (ed.) (1995) op. cit., supra; Rose (1996), op. cit supra pp22-23.

had beset the country. The communists legally recognised the formerly banned trade union “Solidarity”, led by Lech Walensa, and began a complex process of gradually allowing free elections. This has led to the communists’ loss of power. Poland joined the Council of Europe on the 26th November 1991.

The most potent symbol of central and eastern Europe’s changing context was the opening of the Berlin Wall on the 9th November 1989. The changes in East Germany (the German Democratic Republic) were spurred on by the developments in Hungary and Poland, in particular the news of reforms in those states and the opening of Hungary’s borders to East Germans so they could travel to the West. Again designed to stabilise the communists’ position rather than weaken it, when free elections were held the communists lost power and on the 3rd October 1990 Germany was formally reunified. Whilst the importance of German reunification for European integration is clear, the case law analysis in Chapter 9 will not deal with the complex questions arising from it.

After this, many of the other CEECs that had previously been subject to Soviet influence moved towards democracy and joined the Council of Europe. These included the three Baltic states of Estonia, Latvia and Lithuania, which had each been absorbed into the USSR in 1940 and whose

transition was thus not only a matter of democracy but also independence. Lithuania declared its independence in 1990, with Estonia and Latvia following in 1991. Lithuania and Estonia joined the Council of Europe on the 14 May 1993, and Latvia did so on the 10th February 1995. The Ukraine also declared independence from the USSR in 1991, and became a member of the Council of Europe on the 9th November 1995.

The clearest signal that the Cold War was over was when the USSR itself collapsed in 1991, following the failed coup against President Gorbachev and the secessionist movements that had begun to flourish in some of its outlying republics. Russia, under the leadership of Boris Yeltsin, became a new, independent state, as did the other former soviet socialist republics that had comprised the USSR. Along with the Ukraine and Belarus, Russia formed the Commonwealth of Independent States (CIS), an organisation of economic union in which Russia no longer had the absolute power it once did under the USSR.³⁶ Whilst all the former soviet republics except the

³⁶ The CIS does at least formally protect human rights. Article 2 of its basic document affirms the states' commitment to protecting human rights. Moreover, in 1995 the states signed a CIS Convention on Human Rights and Fundamental Freedoms. It entered into force on the 11th August 1998, after three ratifications (the Russian Federation, Tajikistan and Belarus). Resolution 1249 (2001) of Council of Europe's Parliamentary Assembly, on "Coexistence of the Convention on Human Rights and Fundamental Freedoms of the Commonwealth of Independent States and the European Convention on Human Rights",

three Baltic states discussed above have now joined the CIS³⁷ only some of its members have joined the Council of Europe. As noted above, the Ukraine joined the Council of Europe in 1991, followed by the Russian Federation on the 28th February 1996, Moldova on the 13th July 1997, Georgia on the 27th April 1999, and Azerbaijan and Armenia on the 25th January 2001.

Also amongst the first of the formerly communist states to join the Council of Europe were the Czech and Slovak republics (previously united as Czechoslovakia, and which separated formally on the 1st January 1993). The new republics joined on the 30th June 1993, subsequent to the Velvet Revolution that had ousted communist power. In contrast to the relatively

expressed concern with the quality of the CIS Convention. The Parliamentary Assembly stated that “The CIS convention offers less protection than the ECHR, both with regards to the scope of its contents, and with regard to the body enforcing it [..]”. It therefore recommends that Council of Europe members or applicant states which are members of the CIS do not ratify the CIS Convention. In recommendation 1519(2001) the Parliamentary Assembly of the Council of Europe also stated that the CIS mechanism should not be considered “another procedure of international investigation or settlement” for the purposes of Article 35(2)(b) ECHR on the admissibility of complaints to the European Court of Human Rights.

³⁷ At present the CIS comprises: Azerbaijan, Armenia, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, Turkmenistan, Uzbekistan and Ukraine. See <<http://www.cisstat.com/eng/cis.htm>> (Accessed 3.2.2003).

calm return to democracy of Poland, Czechoslovakia and Hungary, the dictatorship of Ceausescu was violently overthrown in Romania. Romania joined the Council of Europe on the 7th October 1993. Unlike many of the other states that underwent such rapid evolution in late 1980s, Romanian communism remained a powerful force in politics until elections in 1996. Bulgaria, which also shed soviet influence without abandoning communism completely, joined the Council of Europe on the 7th May 1992

In addition, a number of Balkan states, most of which were in the past were associated with the former Yugoslavia, have joined the Council. Slovenia became a member of the Council of Europe on the 14th May 1993, Albania joined on 13th July 1995, the Former Yugoslav Republic of Macedonia on the 9th November 1995, and Bosnia and Herzegovina on the 24th April 2002. The membership of these states owes as much to the conclusion of intense civil wars in the former Yugoslavia as it does to the end of the Cold War, though it is arguable that the latter led to the former. These states therefore present not only the post-communist context but also a situation marred by persistent ethnic tension. However, it is important to notice that the original members of the Council of Europe had themselves been opponents in war only a few years before Council's creation. Nevertheless the Balkan states, as with central European states such as Romania and Hungary, face serious

questions about the protection of ethnic minorities and the potential for instability resulting from secessionist organisations.

As a result of the Iron Curtain's fall, another twenty states have so far joined the Council of Europe. These can be grouped together as the historically "central" European states previously under Soviet influence (Hungary, Poland, Romania, Bulgaria and the Czech and Slovak republics), the Baltic states (Estonia, Latvia and Lithuania), the former USSR (Russia, Moldova, Ukraine, Georgia, Azerbaijan and Armenia), and the Balkan states (Albania, Slovenia, FYR Macedonia, Bosnia & Herzegovina). The Council of Europe now has forty-four member states,³⁸ far exceeding its original membership and also the membership of the European Union.

In the study of the recent cases in Chapter 9 it is important to bear in mind the different contexts of the new Contracting Parties to the European Convention, acknowledging that each has had a different path to democracy.

³⁸ Finland joined the Council of Europe in 1989. Whilst it is certainly located at the east of Europe, its history is significantly different from the Baltic states of those of the former USSR. It gained independence from the USSR in 1917, and became a member of the EU in 1995. As such its situation is more broadly comparable to the states of western Europe, and so its joining the Convention mechanisms was perceived as less of a threat to the system's integrity. San Marino and Andorra joined the Council of Europe in 1988 and 1994 respectively, but are sufficiently western in their location not to warrant further discussion.

Some in violent revolution, and yet others made the transition peaceably. The deep distrust of the *ancien regime* in each of these states, along with the fragility of new democratic arrangements must be considered. What unites the different states is that they each experienced communism and its hostility towards basic human rights, something which affects the states' ability now to protect them, and the population to rely upon them. In addition, the issue of national minorities which had been an issue in inter-war Europe is clearly back on the agenda.

C The European Court's activity since the fall of the Iron Curtain

One of the most direct consequences of the Council of Europe's expansion was the reform of the enforcement mechanisms themselves through Protocol 11 of the ECHR, which came into effect in 1998. Technically Protocol 11 created a wholly new European Convention, but it retained the substantive human rights that were included in the original Convention such that the reforms of Protocol 11 can be seen as primarily institutional. Protocol 11 abolished the European Commission on Human Rights, and instituted a new permanent European Court of Human Rights with new rules on procedure and admissibility. The right of individual petition was rendered compulsory. The judicial role of political Committee of Ministers was removed, and the composition of the Court was altered. Part Three of this

thesis goes on to discuss the circumstantial changes that the Convention system has had to cope with, rather than these albeit very significant procedural reforms and their efficacy.³⁹

An examination of the European Court's database of its judgments provides a useful comparison between its activity in respect of the early members and the newer members.⁴⁰ As of the 1st September 2002 there have been twenty three cases where the MoA was involved in cases emanating from central and eastern Europe.

Chapter 5 noted that the first case the Court ever decided on its merits was *Lawless* in 1961. This was eight years after the Convention came into effect. It was not until the 1968 case of *Neumeister*⁴¹ case that the Court

³⁹ On Protocol 11 see Brazta & O'Boyle, "The Legacy of the Commission to the New Court Under the Eleventh Protocol", (1997) 3 EHRLR 211; Drzemczewski, "The Internal organisation of the European Court of Human Rights: The Composition of Chambers and the Grand Chamber", (2000) 3 EHRLR 233; Rowe & Schlette, "The protection of human rights in Europe after the eleventh protocol to the ECHR", (1998) 23 *European Law Review*, Supp HRS 3; Schermers, "The Eleventh Protocol to the European Convention on Human Rights", (1994) 19 EHRLR 367

⁴⁰ The Court's jurisprudence can be searched at <<http://hudoc.echr.coe.int/hudoc>> (Accessed 24.1.2003). This database contains all decisions of the Court in English and French, whether reported or unreported elsewhere.

⁴¹ *Neumeister v Austria* (1979-80) 1 EHRR 91 (Decided 27.6.1968)

actually found against a respondent state, in that case disclosing a violation of Article 5(3). It had taken the Court fifteen years to find against a respondent state. It must be noted however that *Neumeister* was only the third case that the Court had examined on its merits.⁴²

As noted above, Hungary was the first of the CEECs to join the Convention system, in 1990. Of the CEECs though, it was Bulgaria (which joined the Council of Europe in 1992), that first had a case against it decided on the merits. In the 1997 case of *Lukanov v Bulgaria*,⁴³ concerning the arrest and detention of a former Prime Minister of Bulgaria, the European Court found a violation of Article 5(2). Thus it was only five years between Bulgaria's joining the system and it feeling the full force of the Court.⁴⁴ Since then the Court has had a steady stream of cases concerning the CEECs, having decided cases concerning Croatia, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, FYR Macedonia, Moldova, Poland, Romania, Russia, Slovakia, Slovenia, and Ukraine. As of the 1st September 2002, no

⁴² The second, *De Becker v Belgium* (1979-80) 1 EHRR 43 (Decided 27.3.1962), was struck off the list because the impugned law was altered by the time that the Court heard the case.

⁴³ *Lukanov v Bulgaria* (1997) 24 EHRR 121 (Decided 20.3.1997).

⁴⁴ Since 1997 a further 11 cases concerning Bulgaria have been decided, of which two were the subject of friendly settlements. In each of the other 9 cases, the Court found a violation of the Convention.

judgments have been issued concerning Albania, Armenia, Azerbaijan, Georgia or Bosnia & Herzegovina.

In the overwhelming number of recent cases emanating from central and eastern Europe a violation of at least one article of the Convention has been established. Even more importantly for this thesis is the Court's use of the MoA in these cases. Chapter 5 demonstrated that prior to 1979 the MoA played more of a consolidating role, but since then has been a useful tool to facilitate heightened analysis of states' justification for interference with Convention rights. It had taken a period of at least twenty-five years for the MoA to evolve into the form in which it presently exists.⁴⁵ The Court first examined the MoA in respect of CEECs in four cases in 1999, *Janowski v Poland*,⁴⁶ *Rekvenyi v Hungary*,⁴⁷ *Matter v Slovakia*⁴⁸ and *Dalban v Romania*⁴⁹. In each of the first three cases the MoA resulted in a finding for the respondent state wherever it was invoked.⁵⁰

⁴⁵ See Chapter 5.

⁴⁶ *Janowski v Poland* (2000) 29 EHRR 705 (Decided 21.1.1999)

⁴⁷ *Rekvenyi v Hungary* (2000) 30 EHRR 519 (Decided 20.5.1999)

⁴⁸ *Matter v Slovakia* (2001) 31 EHRR 32 (Decided 5.7.1999)

⁴⁹ *Dalban v Romania* (2001) 31 EHRR 39 (Decided 28.9.1999)

⁵⁰ In *Matter v Slovakia* op. cit., supra, whilst the MoA was used to show that there had been no violation of Article 8, a violation of Article 6(1) was found without reference to the MoA. This case is discussed further below.

From the first three cases it appeared that the MoA was being used to grant considerable deference to the new Contracting Parties. This could show a similarity to the Court's approach in respect of the original parties when the Convention mechanisms began to operate. However, the internal consistency of the Court's case law at present could be threatened if it was perceived that the Court was systematically being more deferential to the newer Contracting Parties. However with the benefit of hindsight and access to more recent judgments it can be shown that this risk has been avoided. In the most recent of the first four MoA cases mentioned above, *Dalban*, the pattern of apparent deference was interrupted when the Court found against Romania whilst still using MoA analysis. *Dalban v Romania* is therefore the first case concerning a CEEC in which the Court applied MoA analysis in order to find against the respondent state.⁵¹ As noted above, Romania joined the Council of Europe in 1993 and so it was only a matter of six years before the Court began using the MoA against it. The *Dalban* case was also only the third case concerning Romania that the Court considered, though it had found against Romania in the first two cases without reference to the MoA at all.

⁵¹ The circumstances of this case, and the others, are examined in more detail in Chapter 9.

Dalban and subsequent cases demonstrate that the Court did not develop a steady pattern of automatic deference to the circumstances of the new states. Indeed of the twenty-three cases concerning CEECs and in which the MoA has been invoked there have been only six cases where this has resulted in a finding for the respondent state.⁵² Moreover in two of those the Court nevertheless found a violation of another substantive Convention right to which the MoA was not applied. As noted above, in *Matter v Slovakia* the Court sympathised with the state's interference with Article 8, but found a violation of Article 6(1). Likewise in *Constantinescu v Romania* the Court upheld the respondent state's interference with Article 10, but found a violation of Article 6(1).

This means that in total there have been only four instances⁵³ where, having applied MoA analysis to one or more aspects of the case, the Court has failed to find any violation of the Convention by the CEECs. As regards the CEECs the Court's activity in general and use of the MoA in particular has

⁵² In chronological order: *Janowski v Poland*, op. cit., supra; *Rekvényi v Hungary* op. cit., supra; *Matter v Slovakia* op. cit., supra; *Constantinescu v Romania* (2001) 33 EHRR 33 (Decided 27.6.2000); *Tammer v Estonia (No. 2)* (2001) 10 BHRC 543 (Decided 6.2.2001); *Gorzelik v Poland* (2001), Unreported - Application no. 44158/98, (Decided 20.12.2001). All of these cases are examined in detail in Chapter 9.

⁵³ In chronological order: *Janowski v Poland* op. cit., supra; *Rekvenyi v Hungary* op. cit., supra; *Tammer v Estonia* op. cit., supra; *Gorzelik v Poland* op. cit., supra

thus not displayed a marked restraint such as would suggest a weakening of the system's internal consistency. Moreover, as a result of this, it seems that the Court has been much quicker to act against the CEECs than it was against the original members of the Council of Europe, for which the intrusion into domestic jurisdiction that international human rights protection presents was too much of an affront to state sovereignty. Whilst participation in the ECHR system is new to the CEECs, the idea of submission to an international Court is not as novel as it was in the 1950s. It would appear therefore that the Court's ability to act against the new member states is predicated upon its proven ability to act against the earlier members of the system.

This is closely related to an argument introduced in Part One. Some states that are suspicious of human rights' ideological heritage feel that the notion is used only to criticise non-western states. Because human rights are a western construct, states in the West tend to comply with the standards they have themselves set, whereas non-western states are instantly branded as violators of human rights. This, it was demonstrated, is a mistaken view of human rights' role. It is important for all states to realise that human rights abuses exist in all cultures and therefore in all states.⁵⁴ The idea of human rights is not simply a tool used to cloak further neo-imperialist criticism of

⁵⁴ See Chapter 2, Section B2, "Human rights abuses occur in all cultures"

non-western states. The success of the European Court with respect to the CEECs can be explained by virtue of the fact that, for many years, the only states capable of being found in violation of the Convention were western European states. The CEECs have witnessed the European Court act decisively against the very states that initiated the system, so it can be argued that they are less suspicious that the Convention will be used merely as a political tool to further criticise their efforts at rejoining the international community.

D Conclusion

This chapter has described in brief the processes that led up to the Council of Europe's expansion. Space precludes a more detailed examination of recent European history, but an understanding that the expansion of the Council of Europe is linked to the end of the Cold War is vital. The states which are to be considered central and eastern European have thus been identified by reference to their recent history.

It has been demonstrated that the Court has acted quite quickly against human rights violations in the new Contracting Parties in general and in MoA cases. The following chapter explores the MoA cases in detail, in order to examine the extent to which the MoA has been used to take into account the local conditions and characteristics of CEECs.

Chapter Nine

The MoA and the states from central and eastern Europe

Introduction

This chapter provides a detailed analysis of European Convention cases emanating from states in central and eastern Europe which have involved use of the margin of appreciation (MoA). It is acknowledged that the discussion is concerned with the continued viability of the MoA in the changed context of the Council of Europe, and not the continued efficacy of the Court in all its activities. The aspect of the MoA examined is its use in respect of local conditions peculiar to the relatively newly democratic central and eastern European countries (CEECs).

The cases discussed can be divided into four categories. First examined, in Section A, are cases concerning the due process articles of the Convention, where it is demonstrated that the Court has maintained consistency with its earlier case law. The second category examined concerns Article 8, where the Court seems to have de-emphasised its previous acknowledgements of European diversity. Neither of these categories address the specific and unique circumstances of the CEECs and are therefore not discussed in great detail.

Far more significant is the Court's examination of the defensible limitations upon of free speech in a democratic society. The specific issue that has arisen is the extent to which individuals are allowed to engage in public criticism of people in positions of power. This is explored in Section C. Section D follows from this to discuss rights of political and religious association and expression. In respect of both these issues the Court has had to grapple with the only recently democratic nature of the CEECs.

It is argued that even in these most controversial of cases the Court has maintained a balance between respecting thickly constituted conceptions of human rights and maintaining an adequate overall level of human rights protection. The substance of universal human rights remains unaltered.

A The MoA and Articles 5, 6 and 13

The cases in this section are not discussed in depth since they are amongst the least controversial instances where the Court has referred to the MoA in its case law emanating from central and eastern Europe. These are cases in which the MoA has been mentioned directly in respect of the Articles 5, 6 and 13, and not cases in involving those Articles that also involved discussion of the MoA concerning separate allegations of violations. Local

conditions have played no significant role in the Court's deliberations in these cases.

In both *Varbanov v Bulgaria* and *RD v Poland* the respondent states attempted to invoke the MoA but the Court refused even to discuss it. In *Varbanov* the Bulgarian government argued in respect of Article 5 that the authorities should be afforded a MoA in the assessment of the medical condition of a person believed to be of unsound mind, and in respect of the need for a compulsory examination.¹ In the *RD* case the applicant was complaining of a violation of Article 6(1) read in conjunction with Article 6(3)(c) because although he had been given free legal aid in first instance and appeal hearings concerning his criminal culpability for receiving bribes, he had been denied legal assistance in proceedings for cassation. The Polish government argued that the Wroclaw Court of Appeal that had made this decision had done so in accordance with the law and had "not gone beyond the margin of appreciation left to the domestic courts in such matters".² It has already been argued that the scope of a state's MoA in respect of the due process articles of the Convention is very narrow, if it exists at all.

¹ *Varbanov v Bulgaria* (2000), Unreported - Application no. 31365/96, (Decided 5.10.2000), para. 41

² *RD v Poland* (2001), Unreported - Application nos. 29692/96 ; 34612/97, (Decided 18.12.2001), para. 41

Accordingly the Court did not entertain the respondent states' arguments in either *Varbanov* or *RD*, and found a violation of Article 5 and Article 6 respectively.

The seriousness of Articles 5 and 6 and the Courts' reluctance to concede a MoA can be seen clearly in *Ilowiecki v Poland*. The case concerned the applicant's multiple applications for *habeas corpus*. He had been charged with forgery and attempting to obtain a large loan by false pretences, and was detained on remand. The Court stated that the complexity of the case and the multiple applications for release,

“did by no means absolve the judicial authorities from conducting the habeas corpus proceedings complained of in a manner compatible with Article 5 § 4. Even if a detainee has made several applications for release, that Article does not give the authorities either a “margin of discretion” or a choice in respect of which of them should be handled more expeditiously and which at a slower pace. All such proceedings are to run “speedily”.”

The Court went on to hold that there was a violation of Article 5(4).

The only case that appears to depart from the Court's reluctance to concede a MoA in respect of Articles 5 and 6 is *Kreuz v Poland*. Here the Court examined the right of access to a court, guaranteed by Article 6(1). The Court acknowledged that Contracting Parties have some discretion in the

precise means used to determine litigants' "civil rights and obligations", but stated that the ultimate decision as to compliance with the Convention nevertheless rested with the European Court.³ The Court then referred to earlier case law from around Europe where it had permitted limitations of an applicant's right of access, but stated that in each case the "very essence" of the right was not impaired.⁴ The Court stated that it would review the respondent state's limitations pursuant to their "power of appreciation",⁵ but ultimately concluded that there was a violation of Article 6 in this case.

A similarly strict approach was taken in respect of Article 13 in *Kudla v Poland*,⁶ which simultaneously reaffirms the subsidiary nature of the Convention. The respondent state attempted to argue that Article 13 (guaranteeing an effective remedy in domestic law for the violation of a Convention right) did not apply to complaints of failing to have had a case heard in a reasonable time, a right protected by Article 6(1). The Court argued that if it accepted the state's arguments then individuals would,

³ *Kreuz v Poland* (2001) 11 BHRC 456 (Decided 19.6.2001), para. 53

⁴ *Ibid.*, para. 54

⁵ *Ibid.*, Para. 56

⁶ *Kudla v Poland* (2002) 35 EHRR 11 (Decided 26.10.2000)

“systematically be forced to refer to the Court in Strasbourg complaints that would otherwise, and in the Court’s opinion more appropriately, have to be addressed in the first place within the national legal system.”⁷

However in the French judgment the Court reminded the Polish authorities that Contracting Parties have consistently been afforded a MoA in the means chosen to comply with Article 13.⁸ In the English judgment the margin was expressed as “some discretion” to choose the means.⁹ The Court went on to hold that there had indeed been a violation of Article 13 in this case. The case nevertheless reaffirms the subsidiarity principle (which in other circumstances gives rise to the MoA) by emphasising that remedies for a violation of a Convention right should in the first place be provided at local rather than European level.

⁷ Ibid., para. 155

⁸ *Kudla c. Pologne / Kudla v Poland* op. cit., supra, para. 154. The same pattern is revealed in *Hassan et Tchaouch c. Bulgarie / Hasan and Chaush v Bulgaria* (2002) 34 EHRR 55 (Decided 26.10.2000). In *Hasan* the French judgment in para. 96 refers to a “marge d’appréciation” whilst the English judgment simply notes that Contracting Parties have “some discretion as to the manner in which they discharge their obligations under Article 13”, (para. 96 [emphasis added]).

⁹ *Kudla v Poland*, op. cit., supra para. 154

Each of these cases¹⁰ has demonstrated consistency between the Court's approach to these matters in the old and new Contracting Parties, in that the use of the MoA is either non-existent or very strict. This begins to suggest that a lower standard has not been applied to the newer Contracting Parties. What these cases have not touched upon are the different local or cultural conditions of the newer Contracting Parties. For that, it is necessary to examine Article 8.

B The MoA and Article 8

The cases in this section are particularly interesting because in them the Court has consistently refused to acknowledge local differences in the role of the family and state intervention in family affairs, even where in the past it has. Thus in these cases whilst it cannot be said that the MoA was used to accommodate local conditions, it seems that the Court chose specifically to ignore them.

¹⁰ Reference to the MoA was also made in the dissent and the separate concurring opinion to two other cases in this category; *Witwold Litwa v Poland* (2001) 33 EHRR 53 (Decided 4.4.2000) and *Kalashnikov v Russia* (2002), Unreported - Application no. 47095/99, (Decided 15.7.2002) respectively. Neither case presents any novel issue.

To illustrate the issue, a case from one of the states not classed as a CEEC is necessary as a baseline. Chapter 8 distinguished Finland from other states in the east of Europe because of its long independence and membership of the EU. In *L v Finland* the Court considered whether Finland's action in taking some vulnerable children into public care constituted permissible restrictions to their father and grandparents' rights under Article 8. It was complained that taking the children into care was itself too drastic a measure, and also that since then not enough had been done to reunite the family. The Court applied the methodology described in Chapter 6,¹¹ and the case hinged upon whether the restrictions were necessary in a democratic society. At this stage it was stated that,

“the Court will have regard to the fact that perceptions as to the appropriateness of intervention by public authorities in the care of children *vary from one Contracting State to another, depending on such factors as traditions relating to the role of the family and to State intervention in family affairs* and the availability of resources for public measures in this particular area.”¹²

The Court went on to hold that there had been no violation of Article 8, but that aspects of the process had violated Article 6(1). Almost identical language was used in *Johansen v Norway*,¹³ *K & T v Finland* (original

¹¹ See Chapter 6, Section B1

¹² *L v Finland* (2001) 31 EHRR 30 (Decided 27.4.2000), para. 118

¹³ *Johansen v Norway* (1997) 23 EHRR 33 (Decided 7.8.1996), para. 64

decision of the Chamber)¹⁴, *K & T v Finland* (decision of the Grand Chamber)¹⁵, and *Kutzner v Germany*.¹⁶ It would appear clear therefore that as a general principle of European human rights law a wide MoA is conceded in respect of state measures taken for public intervention in the care of children because there is significant variety in the views of European states on this matter.

The Court's approach in *L v Finland* can be contrasted with its approach in *Mikulic v Croatia* and *Ignaccolo-Zenide v Romania*, both of which concern access to children. The first concerned the adequacy of Croatia's efforts to expedite the applicant's paternity suit, and the second concerned an application for alteration of parental responsibility between two former spouses (one of whom had moved to the USA with the children). Each of these cases, like *L v Finland* is very complex on the facts and space precludes detailed analysis of the Court's decision or reasoning. However, conspicuous by its absence is any reference to the multiplicity of defensible views in Europe about the intervention of public authorities into the well-being of children.

¹⁴ *K & T v Finland* (2001) 31 EHRR 18, (Decided 27.4.2000), para. 135

¹⁵ *K & T v Finland* [2001] 2 FLR 707 (Decided 12.7.2001), para 154

¹⁶ *Kutzner v Germany* (2002) 35 EHRR 25 (Decided 26.2.2002), para. 66. The Court also restated the principle from *Johansen* in *Scozzari & Giunta v Italy* (2002) 35 EHRR 12 (Decided 13.7.2000)

It is unwise to make strong conclusions from the Court's omissions as opposed to its actions, but this potential anomaly in the Court's jurisprudence suggests that it has not consciously embarked upon a culturally relativistic programme of action since the Council of Europe's expansion. This is significant because, since the Court had previously accepted local differences in this matter, it could be expected to extend its recognition. However, the following discussion shows that the Court has nevertheless been quite receptive to discussion of local conditions in other matters and has done so without lowering the standards of the Convention overall.¹⁷

C Article 10 and the limits of acceptable criticism

In each of these cases the applicant argued that their right to free expression under Article 10 ECHR was violated when they were in some way sanctioned for insulting another person. It has been the European Court's task to determine whether the applicants' insults or comments overstepped

¹⁷ The Court also examined Article 8 in *Matter v Slovakia* (2001) 31 EHRR 32 (Decided 5.7.1999). This case concerned the applicant's detention on mental health grounds. In this case the Court applied its standard methodology and did not consider the local conditions of Slovakia, therefore the case is not discussed here.

the boundaries of acceptable criticism and were capable of justifiable restraint under Article 10(2). The first sub-category of cases examined is those where use of the MoA resulted in a finding for the respondent state. The second is where a violation of the Convention was established.

C(1) No violation of Article 10 ECHR

The cases discussed in this section are amongst the most controversial of the MoA cases dealing with the newer Contracting Parties. In each case the MoA was used as a means of finding for the respondent state. This section goes on to demonstrate that despite this, these cases do not amount to an unduly deferential approach to the local or cultural conditions of the CEECs. Each of the three cases falling into this category is examined in chronological order, with the earliest first.

The first of the Article 10 cases discussed in this section is the 1999 case of *Janowski v Poland*.¹⁸ The applicant in *Janowski* was by profession a journalist. He was convicted of insulting two municipal guards in a public square. Janowski had seen the municipal guards attempting to move some street vendors from a square in Zdunska Wola, allegedly on the basis that the municipal authorities had not authorised retail in that particular place.

¹⁸ *Janowski v Poland* (2000) 29 EHRR 705 (Decided 21.1.1999)

The street vendors were ordered to move their makeshift stands to a nearby market square. Overhearing this exchange, the applicant remonstrated with the guards, informing the vendors that the guards did not possess the legal authority to move them to the market square. The applicant became agitated in his attempts to encourage the street vendors to stay where they were, and called the municipal guards “dumb” and “oafs”.¹⁹ It is important to note that such phraseology is, in English, hardly offensive in the extreme.

Before the European Court the applicant argued that his rights under Article 10 ECHR²⁰ had been violated by his conviction. The Court held that there had been an interference with the applicant’s rights under Article 10,²¹ that the interference was prescribed by law,²² and that the restriction pursued the legitimate aim of preventing disorder.²³ In this case, as in the others discussed in this section, the real area of debate was on the question of

¹⁹ The terms used were “*glupki*” and “*cwoki*” respectively.

²⁰ The applicant had also alleged violations of Articles 3, 6 and 7(1), but the European Commission declared those complaints inadmissible.

²¹ *Janowski v Poland*, op cit., supra paras. 22-23

²² Ibid., para. 24

²³ Ibid., paras. 25-26. The government also contended that their aim was to protect the “reputation and rights of others”, namely the municipal guards. Having examined the facts of the case and the reasoning of the domestic courts, the European Court felt the aim of preventing disorder was the dominant aim.

whether the interference was “necessary in a democratic society”. As established in Part Two, in order to be “necessary” the interference would have to answer a “pressing social need”, be proportionate to the legitimate aim invoked, and be supported by reasons that were relevant and sufficient.

The most important aspect of the case was Janowski’s argument that, since he was a journalist, his conviction had been taken by others as a sign that the authorities were re-introducing censorship such as had been common under communism, and therefore that future criticism of the state would be discouraged.²⁴ Such an argument clearly invited the Court and Commission to take into account the particular conditions of the newly democratic Poland. The European Commission had acknowledged that civil servants acting in their official capacity were, like politicians, subject to wider acceptable limits of criticism. In the context of the heated exchange, the Commission formed the view that those limits had not been overstepped by applicant.²⁵ The government responded to this, arguing before the Court that the applicant’s comments had not formed any part of a public debate,

²⁴ Ibid., para. 27

²⁵ It must be noted that the Commission was split 8/7 in favour a finding a violation of the Convention. There was therefore a significant minority of Commissioners that felt the boundaries of the state’s MoA had not been overstepped in this case. See *Janowski v Poland* (1997), Unreported - Application no. 25716/94 (Decision of the European Commission of Human Rights, 3.12.1997)

but were confined to the particular situation. In the light of this they argued that the applicant's profession as a journalist was irrelevant.

The Court agreed with the government. In doing so, the Court seems to have considered the sensitive nature of Poland's democracy, but not in the way that Janowski had intended. The Court stated that:

“[C]ivil servants must enjoy public confidence in conditions free of undue perturbation if they are to be successful in performing their tasks and it may therefore prove necessary to protect them from offensive and abusive verbal attacks when on duty”.²⁶

The Court took this as its most important consideration, noting that it did not even have to balance this against a wider public interest of public criticism because Janowski's remarks were not made in his professional capacity.²⁷ It was also persuasive that the applicant had been convicted on the basis of his choice of words, and not simply for making critical remarks. Such had been confirmed by both national courts.²⁸ For these reasons the European Court concluded:

²⁶ *Janowski v Poland*, op. cit., supra para 33

²⁷ Ibid.

²⁸ *Janowski v Poland*, op. cit., supra para 32

“[I]t cannot be said that the national authorities overstepped the margin of appreciation available to them in assessing the necessity of the contested measure.

There has consequently been no breach of Article 10 of the Convention.”²⁹

It seems that the Court used the MoA to take local conditions into account only to a limited extent. The Court recognised that, because of their appreciation of local conditions, domestic authorities are in a better position to determine whether a particular utterance is, in the context, insulting. The Court was therefore sensitive to a local interpretation of the contested words’ connotations in a newly democratic society.

The second case in this category, *Constantinescu v Romania*, was decided in June 2000. In *Constantinescu* the applicant was a teachers’ trade union leader who had been convicted of insulting previous leaders of the union. Constantinescu believed that three former union officials had refused to

²⁹ *Janowski v Poland*, op. cit., supra para. 35. The Court was not unanimous in its decision – a majority of 12 to 5 found no violation of Article 10. Space precludes detailed analysis of the dissenting opinions, though in summary each disagrees that the applicant’s prosecution was “necessary” within the meaning of Article 10(2). Judge Bonello was particularly concerned that in approving the Polish authorities’ position, “the Court [...] broadcast a signal that it deems the verbal intemperance of a choleric to be more open to disapproval than the infringement of the rule of law by those who are assigned to defend it.” Apart from these comments, none of the dissenters argue that Poland was give undue deference because of its status as a new member of the system.

return union property and accounting documents when the new leadership took office in June 1992, and had used the materials to form a new union. Proceedings were commenced against the three former officials, but despite subsequent requests for information about the resulting investigation, on behalf of the union, the applicant received no reply. By now Constantinescu was concerned about the length of the investigation, it being six months since the union had first lodged its complaint.

In February 1993 the public prosecutor discontinued proceedings against the three former officials. The applicant, again acting as representative of the union, then sought the return of certain subscription fees from the three officials in a civil action. It was shortly after this that a journalist interviewed the applicant, during which he complained about the slowness of the criminal investigation. The interview was published in March 1993, where the applicant was reported as having stated that:

“We will be lodging a complaint against the police and the public prosecutor's office, who are engaging in anti-union activities by slowing down the criminal investigation in respect of certain *delapidatori* [persons found guilty of fraudulent conversion], [the applicant then named the officials].”³⁰

The crux of the problem under Article 10 ECHR was that Constantinescu was then prosecuted in criminal libel proceedings for referring by name to

³⁰ *Constantinescu v Romania* (2001) 33 EHRR 33 (Decided 27.6.2000), para. 13

the union officials as if they had already been found guilty of the crimes he alleged (i.e. by describing them as “*delapidatori*”). He was convicted on appeal. Before the European Court the applicant successfully argued that the trial procedure violated Article 6(1) because when the appeal court reversed his original acquittal he had been denied the right to be heard, and the sentence had been handed down in his absence. The MoA came into play with respect to the applicant’s separate contention that his freedom of expression under Article 10 ECHR had also been violated.

Just as had been the case in *Janowski*, the Court quickly established that there had been interference with the applicant’s right to free expression.³¹ With respect to Article 10(2) the applicant accepted that the interference was prescribed by law.³² It was also clear that the interference pursued the legitimate aim of protecting “the reputation and rights of others”, *viz.* the three former union officials. The real question was, again, whether the interference was necessary in a democratic society.³³

When it examined the necessity of the restriction the Court stressed that its role was not to take the place of the national authorities, but to review the

³¹ *Ibid.*, para. 66

³² *Ibid.*, para. 68

³³ *Ibid.*

decisions they took pursuant to their “power” of appreciation.³⁴ The Court separated the applicant’s complaint against the criminal investigation’s slowness from his assertion that the three former trade union officials were persons guilty of fraudulent conversion. He had been prosecuted only for the latter category of comments, and therefore the applicant’s complaints under Article 10 could only apply to restrictions of his free expression on that subject. The Court went on to examine whether in referring to the three officials in such a manner the applicant had overstepped the limits of permissible criticism. According to the Court, the applicant could have expressed his point without using such terms and so his conviction on appeal, with the aim of protecting the reputation of those to whom he had referred in the newspaper interview, did not interfere with his right to contribute to the public debate on how quickly the criminal investigation progressed. The state’s MoA was not overstepped and there was no violation of Article 10.³⁵

In the *Constantinescu* case the meaning or significance of the word used by the applicant was not open to as much interpretation as it had been in

³⁴ Ibid., para. 69

³⁵ This decision was taken by a majority of 6 votes to 1, with Judge Casadevall attaching a partly dissenting opinion. His contention was that Constantinescu’s comments were not unfounded, and had been made in good faith.

Janowski, though its cumbersome translation into the language of the case (French) and then into English has no doubt diluted its precise denotation. The European Court's foremost concern was nevertheless that the three union officials had the right to have their reputation as being innocent of the crimes of which they were accused maintained until proven otherwise. The use of the word (or phrase, as translated) clearly implied that the officials were guilty of the crime at a time when they were wholly innocent.

At no stage in *Constantinescu* did the Court refer to the democratic situation in Romania, though there are parallels with the approach taken in *Janowski* inasmuch as the applicant was conscious of the state's potential to embark upon "anti-union practices" as it had in the past. Though alerted to this potential, the Court did not find that the respondent state was reverting to such practices. The *Constantinescu* case is thus the least contentious of the three discussed in this section.

The third of the three cases in this section was decided in February 2001 and is the most controversial. In the case of *Tammer v. Estonia*³⁶ the applicant journalist challenged his conviction for insulting a public figure. In a published interview with another journalist Tammer had used offensive

³⁶ *Tammer v Estonia (No. 2)* (2001) 10 BHRC 543 (Decided 6.2.2001)

words to describe a Ms Laanaru, now married to the former Prime Minister of Estonia, a Mr Savisaar.

In 1989 Laanaru had a child by Savisaar. This was one year before Savisaar became Prime Minister, and whilst he was married to his first wife. Laanaru was unable to look after the child herself and entrusted it to her own parents. In 1995 compromising secret recordings made by Laanaru were released to the public and Savisaar (who was now Minister of the Interior) was forced to resign. Laanaru also resigned, and began writing her memoirs.

Laanaru was initially assisted in her endeavours by a journalist, a Mr Russak, but came into disagreement with him. Both then attempted to publish rival books about Laanaru's turbulent past, with Laanaru alleging that Russak had stolen material from her. It was at this stage the applicant interviewed Russak, questioning whether his decision to write about Laanaru would glorify an unsuitable figure. Tammer asked:

“By the way, don't you feel that you have made a hero out of the wrong person? A person breaking up another's marriage (*abielulõhkuja*), an unfit and careless mother deserting her child (*rongaema*) [...]. It does not seem to be the best example for young girls.”³⁷

³⁷ Ibid., para. 22. The case report contains the following footnote: “The translation of the Estonian words “*abielulõhkuja*” and “*rongaema*” is descriptive since no one-word equivalent exists in English.”

It was Tammer's subsequent prosecution and conviction for these comments that formed the basis of his complaint that the Estonian authorities had violated his right to free expression under Article 10 ECHR.

The Government accepted that there had been a *prima facie* interference with the applicant's freedom of expression, but argued that it was justified by reference to Article 10(2) ECHR.³⁸ Following the scheme described in Part Two, the Court went on to hold that the interference was "prescribed by law",³⁹ in pursuit of one of the legitimate aims listed in Article 10(2) – namely, "the protection of the reputation or rights of others".⁴⁰ It was, once again, still important to show that the interference was "necessary in a democratic society".

The Court described the Government's position as follows:

"The Government stressed that the applicant had not been convicted for describing the factual situation or for expressing a critical opinion about Ms Laanaru's personality or about her private or family life. His conviction was *based on his choice of words* in relation to her which were considered to be insulting. [...]"

³⁸ Ibid., para. 33

³⁹ Ibid., para. 38

⁴⁰ Ibid., para. 40

The Government noted that the expressions [used] had a *very special meaning in the Estonian language, and that they had no equivalent in English. When interpreting the words and their meaning their specific nature within the Estonian language and culture should also be taken into account.*"⁴¹ [Emphasis added]

These comments isolate the *Tammer* case from the other two considered. It was observed that the phrases used in *Janowski* did not appear particularly offensive outside the context in which they were expressed, but that the respondent state did not motivate relativistic arguments to bolster its position. In *Constantinescu* the meaning of the phrase in the context was hardly disputed at all; whichever way the word was translated it still inaccurately described the status of the three former union officials. By contrast in *Tammer*, even though the Court was asked to consider the same issue of acceptable limits of public criticism, it had to deal with words to which the respondent state drew particular attention.

In *Tammer* the European Court deferred to the opinion of the domestic courts, which had held that the words in question amounted to value judgments couched in offensive language, recourse to which was not necessary in order to express a “negative” opinion. *Tammer*’s choice of words had overstepped the permissible limits of criticism. The Court agreed that *Tammer* could have formulated his criticism of Laanaru’s actions

⁴¹ *Ibid.*, paras. 52-53

without resorting to expressions that were so particularly offensive in an Estonian cultural context. As a result of this, the domestic authorities' interpretation of what was needed in order to protect Laanaru's reputation, according to the supervision carried about by the Court, was within their MoA. The Court unanimously considered that the domestic authorities were, in the circumstances of the case, thus entitled to interfere with the exercise of the applicant's right to free expression.⁴²

This case is particularly controversial because the Court appears to have allowed interference with an individual human right, on the ground that, *inter alia*, the government had presented compelling evidence that there was a cultural issue at stake – and the medium for discussing this had been by reference to the MoA. As previously noted, this differentiates the case from the others discussed in this section, where the respondent state did not explicitly invoke relativistic argumentation to justify its interference with Article 10.

The central concern with the *Janowski*, *Constantinescu* and *Tammer* cases is the level of deference accorded the respondent states' authorities. However in *Janowski* the respondent state did not draw attention to the cultural context, and in *Constantinescu* the phrase was not open to debate. Those

⁴² *Ibid.*, para. 69

cases were decided largely by following long-standing principles of Convention jurisprudence as applied to the earlier members of the Convention system. Nevertheless it is true that the critical expressions used in *Janowski* and *Tammer* do not seem particularly offensive in the abstract. From this it can be implied that the Court has deferred to their meaning in the local context, whether the state emphasised the local meaning or not. Recognition by the European Court that the content of permitted limitations to human rights might not be the same for every Contracting Party at all times presents an obvious problem for the universality of human rights. A plurality of limitations, it could be argued, logically amounts to a plurality in the meaning, or level of, human rights protection in different European states.

It was in *Tammer* that the Court's resolve was most explicitly tested, and so it is important to demonstrate that it dealt with the respondent state's claims in a coherent manner. The strength of the Court's approach to *Tammer* is the fact that the applicant was able to dispute the significance imputed to the terms he had used. There was no question of automatic deference to the respondent state's claims, or that the Court had blindly accepted the state's version of culture over a more authentic "real" culture. In examining the arguments of both *Tammer* and the respondent state, the Court thus avoided one of the serious side effects commonly associated with cultural relativism;

the conflation state cultures and real cultures.⁴³ To this extent it can be argued that not only is the MoA theoretically differentiated from cultural relativism, but it is also capable of avoiding some of the practical faults that often accompany it. Nevertheless, in *Tammer* the Court ultimately balanced the applicant's arguments against those of the state, and found in the state's favour. The Court's approach to deciding *Tammer* dealt openly with the questions of culture about which it is still necessary to have discussion, even in the context of universal human rights protection.

The differences between states acknowledged in the *Janowski* and *Tammer* cases do not corrode the universality of human rights, and therefore do not by extension prevent attempts at protecting universal human rights internationally – in fact they assist those attempts. This of course relates to what is meant by “universality”. Having addressed these questions in Part One, it was accepted that some qualification is necessary to universality, but that qualification is not same as radical relativity. The types of qualifications to universality that should be permitted as a result of respect for a state's MoA in the ECHR system are precisely the sorts of questions of detail that are part of a particularised thickly-constituted account of human rights, rather than the universalisable thin account.

⁴³ See Chapter 3, Section B1 “Real cultures and state cultures”

Using the MoA to respect different answers to questions of detail in the protection of human rights does not necessitate respect for attacks on the overall relevance of human rights, and therefore does not diminish the importance of international human rights. In each of the three cases discussed in this section the respondent state accepted that Article 10 applied to the situation, and that they had limited the exercise of the rights contained in it. Thus as suggested in the conclusions to Part Two, the overall relevance of free expression to each of the societies considered remained undiminished, and the substance of the right to free expression, thinly constituted, remained undisputed. The MoA had simply provided a template for discussing purportedly culturally-justified variations in the understanding of the form and interpretation of limitations to human rights. Using the MoA is still only a way of constraining qualifications to a universal concept of human rights, rather than tending towards cultural relativism. The emphasis is remains on universality, not on the qualifications.

The conclusions reached in this section are borne out by an examination of the cases where the MoA led to a finding that the applicant's criticism *did not* overstep the boundaries of acceptable criticism and where, subsequently, there was a violation of the Convention.

C2 Violation of Article 10 ECHR

These cases demonstrate the cases discussed in Section C1 do not signify a general trend whereby the CEECs are granted undue deference in matters relating to the restraint of public criticism. Indeed it is in this category of cases that local conditions are more explicitly taken into account than in the previous category, and are thus used to promote a *higher* standard of human rights. In other words, the assumption that taking into account local conditions will lower the standards of the Conventions is proven to be unfounded. Each of three cases is examined in chronological order.

In *Dalban v Romania* the applicant journalist was convicted of criminal libel in relation to certain articles he had written about a senator and the chief executive of state owned company. Dalban had alleged the executive and the senator were engaged in corruption concerning taxation. Before the case was heard by the European Court, Dalban died. His convictions were then quashed, which, according to the Romanian authorities amounted to an admission that Article 10 had been violated. This meant that as a matter of Romanian law Dalban's widow would be able to commence proceedings in domestic law for compensation. The European Court held that the availability of such an action did not constitute acknowledgement that the Convention had been violated because it had only happened as a result of

Dalban's death, and a fresh legal action was required in order to claim compensation.

The parts of the judgment relevant to this thesis relate to the Court's acknowledgment that many newspapers in Romania had considered the applicant's conviction as an attempt to intimidate the press.⁴⁴ This became relevant in determining whether the interference was "necessary in a democratic society".⁴⁵ The Court acknowledged that its role was to review the national authorities' decisions pursuant to their MoA. However, it also noted that the MoA was circumscribed in the interests of democratic society in enabling the press to remain as an active watchdog and to impart information of serious public concern.⁴⁶ Since the subject matter of Dalban's contentious articles was of such a character, the Court held unanimously that there had been a violation of Article 10 and that it was unreasonable to insist Dalban should have been able to prove the truth of his accusations before printing them.

⁴⁴ *Dalban v Romania* (2001) 31 EHRR 39 (Decided 28.9.1999), para. 26

⁴⁵ In para. 46 the Court noted that it was not disputed that there had actually been an interference with Article 10. It was also common ground that the interference was prescribed by law and had pursued the legitimate aim of protecting the reputation or rights of others.

⁴⁶ *Dalban v Romania* op. cit., supra para. 49

In *Dalban* the European Court had followed its settled case law with respect to the importance of a free press to a democratic society,⁴⁷ thereby achieving parity between the treatment received by old and new Contracting Parties alike. However, given concerns expressed in other sectors of the press about Dalban's conviction, the Court was able to give a clear signal that in new Contracting Parties like Romania it would carefully scrutinise curtailment of free expression. Unlike in *Janowski* and *Tammer* the aspect of the respondent state's particular circumstances was not so explicitly cultural (i.e. the meaning or significance of the words Dalban used were not particularly controversial in a Romanian context). The issue was the circumstances of Romania's violent transition to democracy, which has indirectly affected culturally expressive media such as the press.

The case of *Marônek v Slovakia*⁴⁸ was very similar to the *Dalban* case, which it followed by two years. The applicant had been allocated a state owned flat but was unable to occupy it because the husband of the state

⁴⁷ The Court cited *Bladet Tromsø and Stensaas v Norway* (2000) 29 EHRR 125 (Decided 20.5.1999) and *Lingens v Austria* (1986) 8 EHRR 407 (Decided 8.7.1986). In particular, as with the other cases considered in this section, the Court noted that there is a difference between factual statements and value judgements. The former can be proven, but the latter are not susceptible to such analysis. Journalists should not be required to demonstrate the truth of their value judgements – see *Dalban* para. 49

⁴⁸ *Marônek v Slovakia* 10 BHRC 558 (Decided 19.4.2001)

prosecutor was living there under a separate arrangement. The applicant, after instituting various legal challenges to the continued occupation of the flat that he had been allocated, wrote an open letter to the Slovakian Prime Minister, which was subsequently printed in a daily newspaper. In the letter the applicant gave the full names and professions of those with whom he was in dispute (the public prosecutor and her husband). The public prosecutor and her husband successfully sued Marônek for defamation.

Marônek claimed before the European Court that his rights under Article 10 had been violated. The Court's reasoning concentrated upon whether the interference with his rights was necessary in a democratic society.⁴⁹ The Court reiterated the importance of free expression in a democracy, and that protection under the Convention extends to information likely to shock, offend or disturb. The Court recognised the existence of the limits set in Article 10(2) and that states enjoy a MoA in this respect.⁵⁰ In deciding this case, it was the task of the Court to examine the proportionality of the measures taken to restrict Marônek's free expression, balancing his rights

⁴⁹ The parties had not disputed that there had been an interference with Article 10, that it was prescribed by law, and that it pursued the legitimate aim of protecting the reputation and rights of the public prosecutor and her husband. *Marônek v Slovakia* op. cit., supra para. 47

⁵⁰ *Ibid.*, para. 52

against the state's legitimate aim of protecting the reputation and rights of others.

It was particularly interesting that the Court recognised that the open letter was not simply designed to resolve Marônek's own situation:

“In fact, at the end of his letter the applicant called upon other persons concerned with a similar problem with a view to taking joint action. He expressed the view, apparently in good faith, that the resolution of the problem was important for strengthening the rule of law in the *newly born democracy*.”⁵¹ [emphasis added]

Given this, the applicant's statements did not appear excessive, and so the limits of acceptable criticism had not been overstepped.⁵² The European Court held that there had therefore been a violation of Article 10. In *Marônek*, like in *Dalban* before it, the respondent state's curtailment of free expression was scrutinised particularly closely because of context in which it took place - the consolidation of a fragile democracy.

⁵¹ Ibid., para. 56

⁵² The Court also found it very important that the amount of damages that the applicant was ordered to pay to the state prosecutor and her husband was excessive. Interestingly, a separate concurring opinion of three judges was prepared to find a violation of Article 10 only on the basis that the sum demanded from Marônek was excessive. These judges, Rozakis, Baka and Lorenzen took less notice of the local context than the majority. Judge Bonello partly dissented in this case, but only on the ground that the majority had not awarded any just satisfaction to the applicant under Art. 41 ECHR.

The third case in this category, *Feldek v Slovakia*,⁵³ concerned a poem written about a Slovakian politician, a Mr Slobodník. The applicant's poem had mentioned Slobodník's involvement with the Nazis in World War II – namely his membership of and training by a Nazi youth movement, the “Hlinka Youth”. The applicant also wrote a number of articles arguing that because of his background Slobodník was unsuitable to be a politician in the present day. Feldek was sued for defamation on the basis that he had exaggerated Slobodník's involvement with the Nazis. Slobodník had served time in a Soviet prison camp for his contact with the Nazis, but denied he had ever been a fascist. Such details were given in Slobodník's own autobiography. The conviction for which he had been imprisoned had now been quashed. Feldek was thus convicted on appeal, and subsequently claimed his rights under Article 10 ECHR had been violated.

The Court found it “clear and undisputed” that there had been an interference with Feldek's free expression.⁵⁴ Argumentation again focused upon Article 10(2). The applicant argued that his conviction was not sufficiently foreseeable as to constitute being “prescribed by law”, though

⁵³ *Feldek v Slovakia* (2001), Unreported - Application no. 29032/95, (Decided 12.7.2001)

⁵⁴ *Ibid.*, para. 51

the Court disagreed.⁵⁵ It was not disputed that the aim for the restriction was legitimate, inasmuch as it sought to protect Slobodník's reputation and personal rights.⁵⁶ Once again the case hinged upon whether the interference was necessary in a democratic society.

After setting out the general principles relating to Article 10 the Court stressed that the state's MoA was circumscribed by the interest of maintaining a free press. The most significant aspect of the case is the extent to which the Court took into account the context in which the applicant's comments were made:

“The applicant's statement was clearly made *in a very political context* and one that was *crucial for the development of Slovakia*. It contained harsh words, but was not without a factual background. There is nothing to suggest that it was made otherwise than in good faith, pursuing the legitimate aim of *protecting the democratic development of the newly established State* of which he was a national.

The Court finds that the applicant's statement was a value judgment the truthfulness of which is not susceptible of proof. It was made in the context of a free debate on an issue of general interest, *namely the political development of Slovakia in the light of the country's historical background*. [...]”. [emphasis added]⁵⁷

⁵⁵ Ibid., paras. 53-57

⁵⁶ Ibid., para. 58

⁵⁷ Ibid., paras. 84-85

As a result of this, the Court went on to hold that the reasons given by the Slovakian authorities were not sufficient enough to justify limiting Feldek's free expression in such a context, and thus there was a violation of Article 10.⁵⁸ Once again the local conditions had alerted the Court to the importance of free expression, and the Court proved it was willing to act decisively against the CEECs even where they had a MoA.

C3 Conclusions on the limits of permissible criticism

In *Dalban*, *Marônek* and especially *Feldek*, the Court paid particular attention to the local context of the case. Rather than challenging the settled case law of the Court, these cases enabled the Court to assert the centrality

⁵⁸ This was a majority decision of 5 votes to 2. The joint dissenting opinion of judges Fischbach and Lorenzen stressed that it was not for the Court to usurp the role of the domestic authorities and review the facts of the case in detail. In this sense the dissent can be taken as the advocacy of a wider MoA. However the dissenting judges undermine their argument by embarking upon the sort of lengthy analysis of the facts which they had argued was not required by the European Court, concluding that the domestic authorities' reasons were relevant and sufficient. In the same case the applicants had also argued that they had been the subject of discrimination based upon their political opinions, and that there had been therefore a violation of Article 14 ECHR. On this matter the Court held unanimously that there was no violation of the Convention.

of free expression in the new democracies. Instead of granting undue deference to the states in order to gain their trust the Court took the approach of explaining its previous case law and the importance of free expression, attempting to mould the respondent states' approach to free expression. The Court was able to accept the applicants' concerns that new democracies were susceptible to mistakes in their handling of the concept of free expression.

This can be viewed as an attempt by the Court to assist the respondent state in maintaining the basic thinly-constituted standard of human rights, whilst also encouraging that standard to be fully grounded in the society. As human rights are grounded in societies, so they will be understood within each society's maximal morality, a process which may reveal some permissible differences in the protection of human rights. The cases where a violation of the Convention was found can be described as cases where the limitation of human rights overstepped the boundaries of variety permitted within a thickly-constituted conception of human rights.

It can be recalled that in the *Janowski* case, the Court did not accept the applicant's claim that his prosecution was aimed at re-introducing censorship and gagging the press. The Court thus appears to have begun a policy of considering on a case by case basis whether the context of the case

militates towards particular concern over its only recently democratic status. There is no general policy of deference, but, moreover, the Court has demonstrated that it will not find a violation in every case where an applicant alleges disproportionate curtailment of their free expression evidences a step back to totalitarianism. This is important in establishing and maintaining the credibility of the Convention's institutions.

It can be concluded that local historical-cultural differences have played a far greater role in the MoA cases where a finding has been made against the respondent state than where the respondent state has pleaded local conditions to justify interference with a Convention right. Importantly, even in the *Tammer* case where the Court was compelled to deal with criticisms made within a particular cultural framework it embarked upon a sensitive and thorough analysis of the competing claims made. The Court ensured that the variation in human rights it permitted was of the order that derives from the natural process of elaborating human rights, thickly-constituted, in given societies. Thus the substance of the right to free expression remained intact.

D Political expression and (religious) association in fledgling democracies

The fourth category of cases examined again raises complex references to the local conditions of CEECs. The cases therefore have more in common with those discussed in Section C than in Sections A and B.

The Court has long understood the close links between Article 10 and Article 11. It is therefore important that some consistency is seen between the two, demonstrating that the Court's approach under Article 11 is as defensible as under Article 10. Four MoA cases concerning political expression under Article 10 or (religious) association under Articles 9 and 11 have been decided so far, *Rekvenyi v Hungary*, *Stankov and the United Macedonian Organisation Ilinden v Bulgaria*, *Gorzelick v Poland* and *Metropolitan Church of Bessarabia v Bulgaria*. They are examined in turn.

D1 No violation of Articles 9, 10 or 11

Rekvenyi v Hungary,⁵⁹ decided in May 1999, was the first of the CEEC cases in which the conditions of a fledgling democracy were taken into account whilst using the MoA to assess limits placed upon political association and expression. It is also the case in which those considerations seem to have affected the final decision of the Court to the greatest degree.

⁵⁹ *Rekvenyi v Hungary* (2000) 30 EHRR 519 (Decided 20.5.1999)

In *Rekvenyi*, the applicant was a police officer who complained that a Hungarian law prohibiting police officers from engaging in political activity unduly restricted his rights to free expression and association under Articles 10 and 11 ECHR.⁶⁰ With respect to Article 10 the government agreed that there had been an interference with the applicant's right. However, they argued that the interference was justified under Article 10(2). The Commission sided with the applicant, holding that the interference amounted to a violation of Article 10 because the Hungarian law was so vague as to fail the test of being "prescribed by law". On this point the Court disagreed, and therefore was compelled to embark upon an analysis of whether the interference also had a legitimate aim and was necessary in a democratic society.

Local conditions were taken into account as regards both the existence of a legitimate aim and the necessity of the interference. This is itself unusual, since it was demonstrated in Chapter 6 that subsidiarity and respect for local conditions tend not to play role in determining whether the state's aim is "legitimate".⁶¹ In *Rekvenyi* the Court considered the government's

⁶⁰ The Court held by sixteen votes to one that there had been no violation of Article 11. It held unanimously that there was no violation of Article 14, upon which the applicants had also sought to rely in conjunction with Article 11 (but not Article 10). The MoA played no role in either of these findings.

⁶¹ See Chapter 6, Section B1, "The Court's methodology"

argument that the impugned measure's aim was to depoliticise the police in a period when Hungary was in the process of transformation from a totalitarian regime to a pluralistic democratic society.⁶² In a form of consensus analysis the Court also noted that some other states lawfully limit police officers' political activities believing that the public should expect their police to be above political considerations in their operations. The Court stated:

“This objective takes on *a special historical significance in Hungary* because of that country's experience of a totalitarian regime which relied to a great extent on its police's direct commitment to the ruling party [...].”⁶³ [emphasis added]

As a result, the Court held that the interference did indeed have a legitimate aim, namely the protection of national security and public safety and the prevention of disorder. Whilst this part of the judgment did not refer to the MoA, it is important because it sets the scene for Court's discussion of whether the interference was necessary in a democratic society – in particular whether there was a “pressing social need”. At this stage, even before the MoA was invoked directly, the Court was sensitive to the Hungarian historical context. It seems therefore that the logic of the MoA has spread to include questions about the existence of a legitimate aim. The significance of this is discussed further below.

⁶² *Rekvenyi v Hungary* op.cit., supra para. 39

⁶³ *Ibid.*, para. 41

When it came to discuss whether the interference actually met a pressing social need, the Court reiterated the government's view of Hungary's transition to democracy, acknowledging that there had been no purge of officials during that time, as had been the case in some of the other CEECs.⁶⁴ Given this, the government argued, police neutrality was particularly important so that the public should come to trust the police as defenders of democracy rather than tools of the state. The Court accepted in principle that such a position towards police neutrality was acceptable:

"In view of the particular history of some Contracting States, the national authorities of these States may, so as to ensure the consolidation and maintenance of democracy, consider it necessary to have constitutional safeguards to achieve this aim by restricting the freedom of police officers to engage in political activities and, in particular, political debate." [emphasis added]

It was still necessary to examine the particular restriction at issue though, and so the Court detailed for itself the recent history of Hungarian moves towards democracy. The Court then went on to state:

"Regard being had to the margin of appreciation left to the national authorities in this area, the Court finds that, especially against this historical background, the relevant measures taken in Hungary in order to protect the police force from the

⁶⁴ Ibid., para. 44

direct influence of party politics can be seen as answering a “pressing social need” in a democratic society.”⁶⁵

The Court thus explicitly used the MoA to take into account the historical context of Hungary in order to conclude that the interference answered a pressing social need.

As to proportionality, the Court noted that the law in question did not prohibit political participation absolutely, and gave a long list of ways in which, under Hungarian law, a police officer could exercise his or her political will. As a result of this, the interference did not seem disproportionate. Combined with the findings above, the Court therefore concluded that the interference was necessary in a democratic society and there had been no violation of Article 10. The significance of *Rekvenyi* is discussed below, after introducing the second case in this category.

⁶⁵ Ibid., para. 48

The case of *Gorzelik and others v Poland*⁶⁶ was decided over two and a half years after *Rekvenyi*, in December 2001. The case dealt with the applicants' allegation that their rights under Article 11 were violated when the government refused to allow the registration of their association, "The Union of People of Silesian Nationality".⁶⁷ The stated aim of the Union was "the awakening and strengthening of the 'national consciousness of Silesians". Whilst not opposed to the creation of an association with such an aim, the Polish authorities had refused to register the association on the ground that the applicants' true intention was to gain official recognition of a Silesian minority in Poland and take advantage of certain provisions of Polish electoral law that benefit parties representing a recognised national minority. The Polish authorities considered that the Silesians were not a national minority, but were one of a number of ethnic groups in Poland, and that therefore if the members of the Union been recognised as a "national

⁶⁶ *Gorzelik v Poland* (2001), Unreported - Application no. 44158/98, (Decided 20.12.2001).

NB the case, originally decided by a Chamber of the Court, has now been referred to the Grand Chamber for reconsideration. See "Press Release of the Registrar" No. 381 (18.7.2002). On the case generally see Bates, Case Comment, (2002) 27 (Supp) *European Law Review* 202; Case Comment (2002) 4 EHRLR 539

⁶⁷ Initially the Katowice governor was unsuccessful in preventing registration of the association, but ultimately the Supreme Court and Katowice Court of Appeal refused registration.

minority" the enforceable privileges thereby gained would distinguish them to the disadvantage of other ethnic groups in Poland.

As in most of the other cases examined in this chapter, the parties accepted that there had been an interference with the applicants' rights.⁶⁸ The disagreement was about whether that interference was justified under Article 11(2). The European Court held that the interference was prescribed by law.⁶⁹ It then detailed conflicting arguments as to whether the restriction pursued a legitimate aim. The European Court noted that the Polish courts maintained the refusal of registration on two main grounds. Firstly, allowing the registration of the applicants' association would be contrary to Polish law because the name of the association would mislead the public, since there was no Silesian nation or nationality. The Polish courts also agreed with the government that allowing registration of the Union as an organisation of a national minority would lead to discrimination between Silesians and other ethnic groups in Poland. The European Court was therefore convinced that the impugned measure was, accordingly, taken in pursuit of the legitimate aims of "the prevention of disorder" and "the protection of the rights of others".⁷⁰ This discussion of the legitimate aim at

⁶⁸ *Gorzelik v Poland* op. cit., supra, para. 34

⁶⁹ *Ibid.*, para. 38

⁷⁰ *Ibid.*, para. 44

stake was thus less indicative of spread of the MoA's logic than in the *Rekvenyi* case, though it does show an appreciation of the local context.

As to whether the restriction was necessary in a democratic society, the European Court emphasised the importance of freedom of association to a democratic society. Given this, there was generally only a limited MoA available to states in determining necessity under Article 11(2).⁷¹ However, from time to time the rights of one group may affect the rights of another, and the balancing of individual rights and interests is a "difficult exercise".⁷² It may involve the consideration of complex political and social issues on which opinions even in a democratic society might differ. Because of their knowledge of the country, state authorities rather than the European Court were better placed to assess whether there was a "pressing social need" which would justify interference with a Convention right.⁷³ The European Court therefore declined to enter the debate upon whether there is a Silesian national minority, but noted that the authorities' concerns about the true intentions of the association did not appear unreasonable. Moreover those concerns could have been met if the applicants had made only minor

⁷¹ *Ibid.*, para. 58

⁷² *Ibid.*, para. 59

⁷³ *Ibid.*

alterations to their memorandum of association. The Court held unanimously that there had been no violation of the Convention.

The *Rekvenyi* case had seen the Court able to use the MoA to take into account the particular concerns of the Hungarian authorities in the context of their only recently democratic state. Most importantly, however, the respondent state did not dispute the relevance of human rights generally or political freedom in particular to its society, nor did the Court's failure to find a violation give any such impression. The Court dealt with the specific complaint at issue, and held that in the circumstances existing in Hungary at the time, the respondent state had not overstepped its MoA. Since such a recognition was limited to the circumstances of Hungary at this time, there was no question of the standards of the Convention in general being diluted. Moreover, since evolutive interpretation has allowed a gradual elevation of the standards required by the Convention, the Court's decision in *Rekvenyi* does not guarantee that the restrictions at issue will remain compatible with the Convention for all time.⁷⁴

The comments made in the *Gorzelik* case demonstrate one of the qualities of the MoA discussed in Chapter 7. It was noted there that states do not have a MoA in respect of defining human rights, but mainly where there is a clash

⁷⁴ See Chapter 7, Section C2, "Evolutive interpretation"

between human rights and another domestic public interest.⁷⁵ Matters of domestic public interest, including the protection of human rights of people other than the applicants in a given case, may often fall within the idea of human rights, thickly-constituted. Because of their complexity and local content such matters are best decided by the structures of the respondent state, hence the respect that the European Court tends to show for decisions of domestic political bodies. The *Gorzelik* case demonstrates that Court recognises MoA's utility as means of guaranteeing respect for solutions to problems raised in a local context.

D2 Violation of Articles 9,10 or 11

The cases in this subsection contribute to the argument that there is no general pattern of deference to the CEECs. Their very existence evidences that the two cases discussed in Section D1 are exceptional. It is also notable that in these cases where a violation was established, the Court was still able to use the MoA to find some common ground with the respondent state, in particular by applying the logic of the MoA to the question of whether a "legitimate" aim existed.

⁷⁵ See Chapter 7, Section B, "Distinguishing human rights and public interests"

*Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*⁷⁶ was decided two years after *Rekvenyi* and two months before *Gorzelick*, in October 2001. The applicant organisation was based in south-west Bulgaria. Mr. Stankov was at the time of the case the chairman of a branch of the organisation. The case arose from the Bulgarian authorities' restrictions on various attempts by the organisation to manifest its views, which the applicants alleged violated their rights to free association under Article 11 ECHR.

According to the applicants their organisation was designed to promote the interests of the Macedonian minority in Bulgaria, primarily through the celebration of certain significant festivals. The respondent state, by contrast, argued that the organisation's stated aims and purported respect for the territorial integrity of Bulgaria were at variance with the organisation's true nature. According to the Bulgarian authorities the organisation was secessionist and armed. Of particular interest is that the Court reported how the respondent Government,

“stressed that knowledge of the historical context and of the current situation in Bulgaria and on the Balkans was essential for the understanding of the issues in the present case”.⁷⁷

⁷⁶ *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria* (2001),

Unreported - Application nos. 29221/95 and 29225/95, (Decided 2.10.2001)

⁷⁷ *Ibid.*, para. 47

In the background to its judgment the Court went on to summarise the Bulgarian authorities' views of the historical context. Having dismissed the government's preliminary objections and limited the scope of the case to three particular instances of purported interference with the applicants' rights, the Court then had to consider whether in fact there had been a violation of Article 11. This matter was more complex than in *Rekvenyi* because before attending to the justifications for interference, the Court was also compelled to examine the applicability of Article 11, whether there had been interference at all,⁷⁸ and whether the interference was prescribed by law. The Court found for the applicants on each point.⁷⁹ The Court also accepted that the Government had a legitimate aim for its restriction but again went into some detail on this point. This is significant because, as in *Rekvenyi* and *Gorzelik* above, the logic of the MoA guided the Court in assessing whether the interference had a legitimate aim. The Government's argument on this point was particularly forceful, and is quoted here at length because of the emphasis it places on the local context:

⁷⁸ Importantly this was considered a factual question rather than as an attempt to argue that the right in question was alien to Bulgaria.

⁷⁹ *Ibid.*, paras. 76-82. Whilst these aspects of the case were evidently relevant to Court's general approach to the case, they did not concern the MoA directly and are not examined in here in detail.

“In the context of the difficult transition from totalitarian regimes to democracy, and due to the attendant economic and political crisis, tensions between cohabiting communities, where they existed in the region, were particularly explosive. The events in former Yugoslavia were an example. The propaganda of separatism in such conditions had rightly been seen by the authorities as a threat to national security and peace in the region.

Moreover, the national authorities *were better placed to assess those risks*. It was conceivable that the same facts *might have different implications in other States, depending on the context*. The facts of the present case had to be seen, however, against the background of the difficulties in the region.” [emphasis added]⁸⁰

The government impliedly relied upon its MoA by its argument that the Bulgarian authorities were in a “better position” than the European Court to assess the risks presented by the applicant organisation.⁸¹ In this respect the government did not refer to the MoA by name but such an argument is consistent with the application of the MoA based upon the perceived expertise and experience of local officials – an element of the subsidiarity principle discussed in Chapter 7. Moreover, the Court was invited to agree that the restrictions similar to those imposed by the Bulgarian authorities might not have a legitimate aim in cases other than this one. This is reminiscent of the Court’s own conclusions in the *Handyside* case, where it

⁸⁰ Ibid., para. 73

⁸¹ C.f. *Ireland v UK* (1979-80) 2 EHRR 25 (Decided 18.1.1978), para. 207

noted that there was no uniform European conception of morality.⁸² Having had regard to all these arguments, the Court agreed that the Bulgarian authorities had a legitimate aim, and so discussion then focussed upon whether the restriction was necessary in a democratic society for the purposes of justifying interference under Article 11(2) ECHR. In this regard the MoA played an explicit role.

The Court began by noting that Article 11 must be considered alongside Article 10, and that both rights can protect expression and association that may offend or shock those who witness it. The Court reiterated that “necessity” implied the restriction must be proportionate, and that relevant and sufficient reasons must be provided. However, the Court also emphasised that states have a MoA in this matter, and that the MoA is wider where there has been incitement to violence against an individual, a public official or a section of society.⁸³ The Court examined each of the respondent state’s grounds for restricting the applicants’ right to free association and found that, even subject to the national MoA, there had been a violation of the Convention because the requisite necessity was not evident. The MoA had been overstepped in this case.⁸⁴

⁸² *Handyside v UK* (1979-80) 1 EHRR 737 (Decided 7.12.1976), para. 48

⁸³ *Stankov (and others) v Bulgaria.*, op. cit supra para 90

⁸⁴ It is interesting to note that the Bulgarian judge in this case dissented. Instead of taking

The *Stankov* case demonstrates that there are limits to the Court's nuanced approach to the new Contracting Parties. It shows that whilst local conditions are appreciated by the European Court, their being raised by the respondent state does not oust the Court's jurisdiction or render the complaint any the less justiciable. It was argued in Chapter 5 that one of the MoA's strengths is that it has gradually required more in the way of justifications from respondent states.⁸⁵ Whilst allowing the respondent state to raise local factors and draw attention to them, the reasons given for the specific restrictions at issue were held to be insufficient in *Stankov*. Thus a parallel can be drawn with the case-law relating to emergency situations and Article 15 where the Court has demonstrated sympathy with the state's being in an emergency situation but did not agree that the measures taken as a result of it were "strictly required by the exigencies of the situation".⁸⁶ The MoA was used in *Stankov* to help justify a finding against the respondent state, but at the same time provided an outlet for the state's

the position of the Bulgarian government, which had stressed the unique historical position of Bulgaria, Judge Botoucharova attempted to draw similarities to other earlier Contracting Parties to the ECHR. She argued that the restriction of other similar demonstrations in the rest of Europe had not amounted to a violation of the Convention, and that therefore the MoA had not been overstepped in this case either.

⁸⁵ See Chapter 5

⁸⁶ See Chapter 6

concerns about the local context. It is therefore important to note that the Court's approach does not display any dogmatic assumptions that when local conditions are an issue, the Court will find for a respondent state. Moreover, for the respondent state, it should be clear that only certain responses to their local context violate the Convention, not all attempts to deal with that context.

The case of *Metropolitan Church of Bessarabia and Others v Moldova*,⁸⁷ was very similar to the *Stankov* case. In this case the applicants alleged violations of *inter alia* Articles 9, 13 and 14 of the Convention. The applicants' most important contentions were under Article 9.⁸⁸ They claimed that the Moldovan authorities' failure to register their church violated their right to religion because only religions recognised by the authorities could be practiced officially in Moldova. They also complained that their treatment was discriminatory, and that they had been denied an effective remedy. It must be noted that, despite the Moldovan authorities' repeated failure to register it, the Metropolitan Church of Bessarabia had established 117 communities in Moldovan territory. There were also three

⁸⁷ *Metropolitan Church of Bessarabia v Moldova*, (2002) 35 EHRR 13 (Decided 14.12.2001)

⁸⁸ The Court held that it was not necessary to examine Article 14 taken together with Article 9, nor the complaints under Articles 6 and 11.

communities in the Ukraine, one in Lithuania, one in Latvia, two in the Russian Federation and one in Estonia. In both Latvia and Lithuania the communities were legally recognised.⁸⁹ The MoA was examined by the Court in relation to the applicants' complaint under Article 9 which, though it deals with freedom of religion, was invoked in a similar manner to Article 11 in this context.

The Moldovan government objected to registering the applicant Church on the basis that they felt it was not a distinct church, but really a new administrative organ within the Metropolitan Church of Moldova. Since both "churches" were Orthodox Christian, the Bessarabian Church was described as a "schismatic group" within the existing Church of Moldova. As such, the Government would infringe upon its duty to remain neutral in religious matters if it intervened in the dispute within the Metropolitan Church of Moldova by recognising the Metropolitan Church of Bessarabia.

There was however another dimension to this conflict. The Metropolitan Church of Moldova was associated with the Russian Orthodox Church, whereas the Metropolitan Church of Bessarabia was attached to the Romanian Orthodox Church. Before the European Court the Moldovan government argued that the apparently administrative conflict within the

⁸⁹ Ibid., para. 12

Moldovan Orthodox Christian movement disguised a political conflict between Russia and Romania. The European Court summarised the government's concerns thus:

“were it to intervene by recognising the applicant church, which it considered to be a schismatic group, the consequences were likely to be detrimental to the independence and territorial integrity of the young Republic of Moldova.”⁹⁰

This argument became important for the Government because the Court had found that their actions constituted an interference with the applicants' rights under Article 9.⁹¹ The case therefore hinged upon whether the interference was justified. The Court went on to find that the interference was prescribed by law, in accordance with Article 9(2).⁹² It was with respect to the question of whether the interference pursued a legitimate aim that the Moldovan authorities relied most heavily upon the Moldovan historical context. This is significant because once again it shows a shift in the stage of the case at which local factors are considered and the logic of the MoA is applied.

The Moldovan authorities argued that the restriction was necessary in order to protect public order and public safety, aims which in the past have

⁹⁰ Ibid., para. 98

⁹¹ Ibid., para. 105

⁹² Ibid., para. 110

resulted in states being accorded a relatively wide MoA. These aims were cited because in the past the territory of what is presently Moldova had passed repeatedly between Russia and Romania. Moldova has an ethnically and linguistically diverse population, which had to a great extent become united through the Moldovan Metropolitan Church. According to the Government, Moldova “had few strengths it could depend on to ensure its continued existence, but one factor conducive to stability was religion”⁹³ because most of population were Orthodox Christians. According to the government,

“under cover of the applicant church, which was subordinate to the patriarchate of Bucharest [in Romania], political forces acting hand-in-glove with Romanian interests favourable to reunification between Bessarabia and Romania were working. Recognition of the applicant church would therefore revive old Russo-Romanian rivalries within the population, thus endangering social stability and even Moldova's territorial integrity.”⁹⁴

This argument does not sit easily with the Government’s earlier position that the interference was justified by its maintenance of neutrality in religious matters, but the European Court did not dwell on this apparent inconsistency. Referring to *Stankov*, the Court noted that respondent states are entitled to verify whether a movement or association carries on,

⁹³ Ibid., para. 111

⁹⁴ Ibid., para. 111

supposedly in pursuit of religious aims, activities which are in fact harmful to the population or to public safety.⁹⁵ Thus the interference did in this case pursue a legitimate aim. However, as it had in *Stankov*, whilst the Court empathised with the respondent state's aims it went on to find a violation of the Convention on the basis that its actions had not been necessary to achieve that aim.

It was again in examining the necessity of the interference, which can only be determined in the light of its legitimate aim, that MoA played its explicit role in the *Metropolitan Church of Bessarabia* case. It is interesting to note that the European Court recast the interests at stake in order to limit the scope of the MoA in circumstances which would usually result in states being allowed a wide MoA. The Court argued that the real interest at stake was the need to maintain true religious pluralism, which is inherent in the concept of a democratic society.⁹⁶ Accordingly, it argued that as a general principle,

“the role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other”.⁹⁷

⁹⁵ Ibid., para. 113

⁹⁶ Ibid., para. 119

⁹⁷ Ibid., para. 117

It seems therefore that the notion of a democratic society (including religious pluralism) circumscribed public order. Applied to the facts of the case by examining the “file as whole” (i.e. in some considerable detail) the Court held unanimously that there was a violation of Article 9.⁹⁸

In the *Metropolitan Church of Bessarabia* case the Court had once again heard detailed arguments about the local conditions of the respondent state. It had heard the government’s submissions that the historical context of Moldova should justify an interference with the right at stake, and, by careful use of the MoA and the principles that inform it sympathised with their aims without approving of the means chosen to achieve them. This is again reminiscent of the Court’s approach to Article 15. Moreover, the case shows the Court in the position of educating the respondent state about the meaning of religious pluralism in the context of Article 9, and so can be taken as a clarification to that state of a thinly-constituted conception of religious freedom. It is important that the respondent state had not denied the relevance of that right outright, so as to challenge the legitimacy of religious pluralism *per se*, but had erred in its interpretation of that right as it became embedded in the newly democratic Moldovan context.

⁹⁸ The Court also found a violation of Article 13, but decided that it was not necessary examine the complaint under Article 14.

D3 Conclusions on Political expression and (religious) association in fledgling democracies

Section D has examined the ECHR cases involving the MoA from central and eastern Europe, dealing with the subject of restrictions on political expression and (religious) association. The cases discussed have taken local conditions into account to a large degree, although the Court has used the MoA in cases where it has found against the respondent states. Indeed local factors have been just as importantly considered in cases where a violation was found as in cases where the MoA contributed to establishing that there was no violation of the Convention.

E Conclusion

This chapter has reviewed the ECHR case law emanating from central and eastern Europe, putting the cases into four broad categories. It has shown the MoA operating at the border between human rights thickly and thinly constituted.

In Section A cases concerning the “due process” articles of the Convention were identified and discussed. It was observed that the Court has maintained some consistency with its approach to the earlier Contracting

Parties. Moreover local conditions did not play a large role in these cases. This is unsurprising since the MoA has traditionally played only a minor role in these types of cases.

Section B examined Article 8 of the Convention. It was observed that in using the MoA in cases concerning restrictions upon access to children the Court has not extended its prior recognition of diversity in the role of the family in different European states. The Court therefore has not adopted an openly relativistic stance in the light of states that could present increasingly diverse definitions of the family. In these cases the MoA operated much as it has in the earlier cases, and local factors played no significant role.

The cases discussed in Section C were more controversial. These cases involved restrictions upon free expression, and local factors played an important role in the outcome of the cases. There was no general policy of allowing the new Contracting Parties a wide MoA, since the MoA was also used in cases where a violation of the Convention was ultimately established. In the cases where no violation was established the Court's approach remained consistent with an understanding of universal human rights that recognises local variations in their thickly-constitutive elaboration. It was suggested that by empathising with the state's aim, the

MoA nevertheless allowed the Court to disagree with the respondent state's chosen means to achieve it. This allows criticism of the state but does not suggest that the idea of human rights or of a particular human right is somehow alien to the culture of the respondent state.

Section D likewise concerned cases where local factors played an important role. These cases involved restrictions on political speech and (religious) association. It is interesting that in this category of cases local factors and the logic of the MoA were visible in respect of identifying whether a legitimate aim existed, as well as whether the interference was necessary. It is submitted that this matches the pattern seen in Section C, where the Court was able to find some common ground with the respondent state even where ultimately a violation of the Convention was established on the facts. This is comparable to the situation discussed in Chapter 6, where it was noted that in respect of Article 15 the Court tends to allow a wider MoA in respect of identifying whether an emergency situation exists than over the choice of means made on how to deal with it. There is therefore an existing precedent in ECHR case law for permitting discretion in these matters. Importantly, irrespective of whether a violation of the Convention was found, the Court had received from the respondent states detailed evidence about the local circumstances. The local context was not taken for granted. In this sense the "extension" of the MoA towards questions surrounding the existence of

a legitimate aim has contributed to requiring detailed evidence from the states involved. This fits the pattern of the MoA's evolution from a concession to states to a means by which ever greater justifications for interference with Convention rights are required.

In the matter of "necessity", on which the cases in Section D actually hinged, the use of the MoA remained consistent with the theoretical position identified in Part One of thesis. This therefore shows some similarity in the Court's approach in the cases discussed in Sections C and D. In particular, even in cases where local characteristics were taken into account and the interference was justified, the respondent state justified its actions within the ECHR framework rather than challenging its applicability. It is important that local factors were discussed in the cases raised in Sections C2 and D2 (where there was a violation of the Convention) since it proves that the expansion of the Council of Europe has not prevented the Court from having the final say over violations of the Convention even when the case concerns local sensitivities.

In general the cases discussed in this chapter have involved local factors arising as a result of the recent return to democracy, rather than culture *per se*. It was nevertheless noted in Part One that evolutionism led to cultural relativism. If lower standards were automatically assumed for the CEECs

because of their historical position it would amount to an assertion that those states are somehow less deserving of human rights protection. Such specious elitism would be as problematic as cultural relativism, and is therefore susceptible to the analysis proposed in terms of the Walzerian paradigm. A society's history is bound to its culture and vice-versa, so the Court's approach to the concerns of post-1989 democracies is necessarily one that must be approached with the same caution as when a state raises its culture to justify an interference with human rights. The final chapter explores this issue further offering a conclusion on the MoA's continuing defensibility.

Chapter Ten

Conclusion

This chapter not only concludes Part Three of the thesis, but also serves as a conclusion to the thesis as a whole. As such in Section A the findings of Part One and Part Two are reconsidered in the light of the case law analysis provided in Part Three. Section B looks outside the European context and indicates the relevance of this study to the wider human rights debate. Section C offers a general conclusion.

A The MoA in Europe

The thesis set out to demonstrate that by using the margin of appreciation (MoA) the European Court of Human Rights evolved a reasoned and justifiable approach to European cases that have raised multifaceted localised issues. Whilst allowing variation in European human rights protection according to local characteristics, use of the MoA has not amounted to cultural relativism.

It was submitted that the importance of embarking upon such an exercise derives from the fact that the Council of Europe's membership has expanded rapidly since the end of the Cold War, and that therefore a more

diverse range of states fall within the jurisdiction of the European human rights system than when it was originally conceived.

It was argued that in order to reach useful conclusions on the Court's recent activity, it would be necessary to examine the universality debate, the workings of the MoA, and the recent case law of the European Court. Two principal concerns were to be addressed in this tripartite approach. The first concern was that the MoA was flawed in principle, and secondly that the expansion of the Council of Europe since the end of the Cold War had undermined an otherwise defensible concept.

In respect of the first concern it had been alleged that the MoA threatened the universality of human rights. The approach taken in Part One was to argue that such criticisms of the MoA often failed to understand the universality debate or form reasoned conclusions about it. In seeking to avoid such criticism it was identified that cultural relativism was the main theoretical standpoint opposed to universality, and its dangers and logical inconsistency were explained. However Part One went on to argue that accommodating local concerns did not necessarily amount to cultural relativism, since universal human rights must carry with them some notion of local qualification. Indeed this was recognised in the Vienna Declaration and Programme of Action. It was argued that respect for local

characteristics within thickly-constituted conceptions of human rights was not synonymous with cultural relativism. Thus it was possible in theory that the MoA's respect for local values was of this order, rather than of a relativistic nature.

Whilst Part One argued that cultural relativism is logically self-refuting, such an observation does not prevent the promotion of relativism for those who either fail to grasp its logical flaws or choose to ignore them. The theoretical flaws of relativism have thus not prevented attempts at its application in practice, most often in the form of advocating a policy of non-intervention. To this extent, even a logically flawed conception of cultural relativism may be motivated to mask a state-centred approach to human rights protection. It was therefore important, flawed or not, that cultural relativism did not inform the operation of the European Court.

In order to examine whether the MoA actually accorded with the view of "qualified" universality presented in Part One, Part Two explored the background to the MoA's use, the factors that guide its width and the principles that underpin it and the European Convention itself. This was in response to many loose references to the MoA that have not fully appreciated the intricate but observable principles that guide its operation. The existence of outer limits to the MoA was proven, and it was

demonstrated that a range of observable factors interact to determine its width. These contributed to dispelling the suggestion that the MoA was flawed in principle, since it could no longer be argued that the MoA permitted an unlimited and unsystematic amount of deference to local conditions which would amount to relativism. Having thus explored the operation of the MoA in some detail, Part Two went on to examine the nature of the Convention itself, arguing that, by reference to the principle of subsidiarity in particular, the MoA operated at the interaction of thick and thin conceptions of human rights. It was argued that the MoA does not, in principle, concede so much to local conditions that its use amounts to unrestrained cultural relativism. Cultural relativism ultimately results in a state-centred approach to human rights. The MoA, by contrast, can be used to actively police the boundary between what is rightly in the province of states' domestic jurisdiction and what is instead a matter for international human rights law. Moreover, the use of the MoA can assist in determining whether cultural values asserted by states are genuine and actually affect the case in question, and are thus not "state cultures" or dogmatic generalisations. The types of variation permitted by the MoA can be characterised as respect for human rights as protected within different thickly constituted moralities, and take place the level of form and interpretation but not substance.

Part Three of the thesis was designed to examine the recent jurisprudence of the Court having explored in detail the issue of universality and the operation of the MoA in Parts One and Two. Founded upon a balance between knowledge of the universality debate and the operation of the MoA, Part Three was thus aimed at the second main criticism of the MoA; that even if it was defensible in principle it could not cope in an expanded Council of Europe. A number of problems were foreseen in this regard. If the Court was to continue complying with the view of qualified universality established in Part One, it would have to be responsive to the local conditions of the new states. However, in doing so it was alleged that the influx of new states could result in the MoA contributing to a decrease in the standards of the Convention overall or the creation of a lower tier of human rights protection specifically for the central and eastern European states. This is what some writers have suggested would constitute conceding too much to cultural relativism.

It is clear from the cases discussed in Chapter 9 that the Court has been faced with different democratic and cultural contexts than it has in the past. However only a minority of cases from central and eastern Europe have involved the MoA, and not all of these have involved specifically local issues. It is equally clear that when it has dealt with these issues the Court has operated on a case by case basis, and has not lowered standards

wherever a local issue has been raised by the respondent state as a justification for its interference with a Convention right. It has discussed each case in detail, neither taking for granted the state's presentation of the issue nor failing to recognise its genuine concerns. The Court's appreciation of the local conditions of the CEECs could hardly be considered as demonstrating an idealisation of the status quo in their post-communist situation. Indeed the cases where local issues have played their strongest role have been where a violation of the Convention was found. The Court has thus taken the opportunity to stress the importance of Convention rights in the context of the new Contracting Parties rather than take an evolutionist approach that they are not ready yet for fully European human rights protection.

In cases where the Court has eventually found against the respondent state, the Court has been able to foster some agreement or common ground with the respondent state, thereby continuing to use the MoA as means to consolidate the system's credibility. Particularly interesting in this context is the recognition that states have a MoA in determining whether an aim is legitimate in locally resonant circumstances. However this has a parallel in the Court's long standing approach to Article 15.

Moreover in cases where no violation of the Convention was established the Court did not act relativistically and hold that the right in question did not apply to the situation. In each case the Court found there was a prima facie interference with a Convention right, but that it was justified in the limited circumstances at issue. In this way the substance of the right remained intact, even where the Court held that its differing form or interpretation in different thickly-constituted local conceptions of human rights was acceptable. None of the cases where the Court found for the respondent state can be taken as undermining the suggestion that human rights, thinly constituted, are universal. It can therefore finally be concluded that the MoA is not flawed in principle, nor has its use in respect of the CEECs threatened its integrity.

B Looking Outwards

The stated aims of this thesis were to explore the issue of margins of appreciation and cultural relativism in the MoA's original context; the jurisprudence of the European Court of Human Rights. In doing so it was necessary to ensure that the discussion did not remain parochial, and thus when discussing the universality debate reference was made consistently to examples from outside Europe. This leaves a very important question that is nevertheless outside the main scope of this thesis.

The question is whether the MoA as used in Europe is capable of being applied outside the specific institutional context of the Council of Europe. This would enquire firstly as to whether another *regional* human rights system could use the MoA, or secondly whether the UN's *international* efforts at human rights protection could benefit from using the MoA. This element of the discussion would examine whether the interrelationship of international, regional and national human rights mechanisms provides a structure for guaranteeing respect for universal human rights, thinly constituted, whilst ensuring respect for subsidiarity and local characteristics.

Certainly at present the African and Inter-American systems for human rights protection have not adopted the MoA in anything like the way that it has come to dominate European human rights protection.

In the context of the Inter-American system for the protection of human rights this is because the cases dealt with so far have concerned wide-scale abuses of human rights protection rather than the “good faith” interferences with which the MoA is associated in Europe.¹ Moreover in terms of human

¹ Harris, “Regional human rights protection: The Inter-American Achievement”, in Harris & Livingstone (eds.) The Inter-American System of Human Rights (1998), Clarendon: Oxford, p12

rights activity the promotional role of the Inter-American Commission is regarded as being as significant as the role of the Inter-American Court of Human Rights.² Judicial concepts such as the MoA are therefore less important. It would nevertheless be an interesting study to compare the Council of Europe's democracy building projects in central and eastern Europe with the Organisation of American States' efforts in Latin America. Likewise the clarification of both the MoA and the issue of universality presented by this thesis paves the way for a clearer investigation into whether Inter-American judicial mechanisms actually adopt a principle similar to the MoA (howsoever named), and whether its operation there is defensible.

In the African regional human rights system³ the MoA does not tend to be used. Rachel Murray has noted this specifically in respect of matters relating to family and private life where the European Court would usually

² See generally Harris & Livingstone (eds.) (1998), *Ibid*; Rehman, International Human Rights Law (2003), Pearson: Harlow, pp203-234; Steiner & Alston, International Human Rights in Context (2000), (2nd Ed), OUP: Oxford, pp868-920

³ See generally, Evans & Murray (eds.) The African Charter on Human and Peoples' Rights: The System in Practice, 1986-2000 (2002), Cambridge University Press; Cambridge; Murray, The African Commission on Human and Peoples' Rights in International Law (2000), Hart: Oxford; Rehman (2003) *op. cit supra.*, pp 235-266; Steiner & Alston (2000), *op. cit. supra*, pp920-937

recognise a MoA.⁴ Since there is no official derogation provision in the African Charter on Human and Peoples' Rights (ACHPR) a MoA has not arisen there either.⁵ In respect of limitations in peacetime African states are permitted some discretion, but not in terms of the MoA. Indeed the African Commission has construed any limitations very narrowly. Coupled with recognition that the ACHPR allows of no derogation it has been argued that in theory it offers greater protection to individual rights than the ECHR.⁶ In contrast to Murray's own views Pityana has sought to clarify the challenges that culture presents to the African system, arguing that some version of the MoA must be used in order to balance between universality and relativism.⁷ However, Pityana saw the MoA as a form of "applied cultural relativism",⁸ which distinguishes his views from those expressed in Parts One and Two of this thesis. Again, the material presented in this thesis could provide the background to much further study on the relationship between international, regional and local human rights in the African human rights system. If the MoA is a product of the distribution of powers between national and

⁴ Murray (2000), p45

⁵ Ibid.

⁶ Ibid., p 127

⁷ Pityana, "The challenge of culture for human rights in Africa: The African Charter in a comparative context", in Evans & Murray (eds.) (2002), op. cit. supra

⁸ Ibid., p245

international enforcement mechanisms then some kind of principle, be it the MoA or not, is likely to develop.

Returning to the UN's efforts at human rights protection, the Human Rights Committee (HRC) operating under the International Covenant on Civil and Political Rights (ICCPR) has actually used the MoA, but not as prolifically as the European Court. This has led to disagreement between commentators as to whether it can be considered an element of the HRC's decision-making at all. Rehman has identified⁹ that in the *Hetzberg, Mansson, Nikulka and M & T Putkonen* case¹⁰ the HRC made reference to the MoA. In respect of *M & T Putkonen*¹¹ the HRC was called upon to examine interferences with the applicants' right to free expression, guaranteed by Article 19(2) ICCPR. The applicants had participated in the production of a television programme that sought to raise awareness and understanding of various minority viewpoints, including Jews, Gypsies and homosexuals. The Finnish authorities¹² required removal of all references to homosexuality, and the

⁹ Rehman (2003), op. cit., supra p120

¹⁰ *Hertzberg, Mansson, Nikula & Putkonen v Finland*, Communication No. R.14/61 (7.8.1979), UN Doc. Supp. No. 40 (A/37/40) at 161 (1982)

¹¹ Space precludes discussion of each of the separate but related complaints, though the references to the MoA indicated below applied equally to the complaint made by the applicant Nikula.

¹² Acting through a television company in which they had a 90% stake

applicants complained that it was almost impossible to make a Finnish television programme that did not refer to homosexuals as depraved or sick.

In paragraph 10(2) of the Opinion the HRC adopted a methodology that was very similar to that used by the European Court. The HRC accepted firstly that there had been a restriction of rights protected under Article 19(2). It was then recalled that Article 19(3) permits restrictions such as are provided by law and are necessary for the protection of public order or public health or morals. The Finnish government motivated the “legitimate aim” of protecting morals. The HRC went on to state,

“It has to be noted, first, that public morals differ widely. There is no universally applicable moral standard. Consequently, in this respect, a certain margin of discretion must be accorded to responsible national authorities”.¹³

The HRC went on to hold that there had been no violation of the Covenant in this case. This rare example of using the MoA is significant, but a more detailed study of the HRC’s jurisprudence could seek to identify patterns in its approach to the limitation of human rights in peacetime. This is a significant task because the HRC’s approach to the MoA does not seem to be consistent. In his introduction to the Inter-American system David Harris has stated in passing that the HRC does not apply the MoA, since it is

¹³ *Hertzberg (and others) v Finland*, op. cit., supra, para. 10(3)

open to abuse.¹⁴ This conclusion could certainly be drawn from the HRC's approach in a complaint concerning the rights of Sami reindeer farmers to enjoy their own culture under Article 27 ICCPR. In *Länsman*¹⁵ the HRC considered threats to the Sami culture deriving from economic plans of the Finnish authorities and stated,

“A state may understandably wish to encourage development or allow economic activity by enterprises. The scope of its freedom to do so is not to be assessed by reference to a margin of appreciation, but by reference to its obligations under Article 27.”¹⁶

It seems therefore that the two (coincidentally Finnish) cases give alternative impressions of the MoA's use by the HRC. Neither can be taken as indicating a general pattern of approval or disapproval of the MoA's use. The MoA is certainly not as clearly observable in the opinions of the HRC as in the jurisprudence of the European Court, but more work needs to be conducted to establish what role (if any) it plays, by the name “margin of appreciation” or any other name, and whether that role amounts to a relativistic approach to the interrelationship of human rights and local characteristics.

¹⁴ Harris & Livingstone (eds.) (1998), op. cit., supra p10, fn. 52

¹⁵ *Länsman et al v Finland*, Communication No. 511/1992, UN Doc. CCPR/C/52/D/511/1992 (1994)

¹⁶ *Ibid.*, para. 9.4

Despite the apparent lack of a MoA in human rights systems other than the ECHR, there are other potential means of allowing qualifications to human. Reservations to and derogations from human rights treaties could arguably perform this role. However, these do not to limit interaction to qualifications arising from the elaboration of a thick account of human rights. They do not foster discussion, and do not differentiate between genuine and duplicitous references to culture.

Chapter 6 discussed Article 15 ECHR on derogation from the Convention in times of public emergency. Likewise Article 4 of the International Covenant on Civil and Political Rights (ICCPR) provides that in a time of,

“public emergency which threatens the life of the nation and the existence of which is publicly proclaimed, [States Parties] may take measures derogating from their obligations [under the Covenant]”.

In one sense derogations such as this allow for some responsiveness to particularly difficult local circumstances that may indeed have cultural roots. However, derogations are specifically designed to deal with emergency situations that are “exceptional and temporary”.¹⁷ The local circumstances of states to which international human rights bodies ought to

¹⁷ See Human Rights Committee (HRC), General Comment 5(13), para. 3 (31.7.1981)

be sensitive are by no means static, but neither can they always be classed as an emergency. The medium of derogation can never deal adequately with the interaction of human rights thinly and thickly constituted in normal circumstances. Moreover even when the derogation is supervised by an authoritative body, the making of it is a unilateral action by the state – there is no element of negotiation with those whose rights are suspended. Thus unless the derogation is accompanied by the MoA, as is the case in Europe, it is not an adequate means for discussing respect for local conditions.

Reservations to human rights treaties can also be seen as ways of permitting some qualification to human rights. When a state reserves from a treaty it limits the obligations it assumes. This links to the universality debate when the reason for the reservation is grounded in local values. Reservations from the UN's Convention on the Elimination on All Forms of Discrimination Against Women (CEDAW) are often cited as controversial examples of cultural or religious-based reservations.¹⁸ For example Bangladesh has reserved from certain aspects of CEDAW in so far as they conflict with Shariah law.

To this extent, it would appear that the law of reservations is very similar to a European state's assertion that a particular interference with a human right

¹⁸ See Steiner & Alston (2000), *op. cit.*, supra pp439-446

is within its MoA. In each circumstance the state attempts to preserve, within the object and purpose of the treaty, some deference to its own assessment of the situation. Notwithstanding these apparently functional similarities with the MoA, the law of reservations is an inefficient mechanism for finding agreement about the content of human rights as a general idea, or the content (or even aims) of a particular treaty. Reservations and their acceptance or otherwise constitute the antithesis of discussion or dialogue. Given the various questions surrounding the legal effect of a reservation potentially contrary to the object and purpose of a treaty, the problem of authoritatively establishing what the object and purpose of the treaty is,¹⁹ and the failure of states to oppose questionable reservations, the medium of reservation becomes simply a unilateral assertion of a state's own interpretation of their commitments under the treaty in question. Furthermore, whether the normal regime of reservations to treaties is even applicable to human rights treaties is worthy of lengthy discussion in itself.

¹⁹ In particular the Human Rights Committee (HRC) has found its role with regard to the ICCPR called into question when it made its General Comment 24 (52). See responses to HRC Gen. Comment 24 (52) contained in Chinkin *et al*, Human Rights as General Norms and a State's Right to Opt Out (1997), British Institute of International and Comparative Law: London

It can thus be argued that leaving questions of normative diversity to the law of reservations (and thus states themselves), results in an unsatisfactorily indeterminate and heterogeneous web of obligations assumed by states parties to the same treaty. It does not guarantee that states respect even a narrowly defined, thinly-constituted conception of human rights, even though they have publicly affirmed their support for the general idea.

Having established that the UN's HRC and the enforcement bodies of the other regional human rights systems do not at present tend to use the MoA with great frequency (if at all), but that other less useful mechanisms exist, the work provided in this thesis can form the foundations of greater clarification about the interaction between locally embedded and internationally protected human rights. So long as the other regional systems recognise that there must be respect for the qualified universality of human rights, then whether the means chosen to do so is the MoA or another mechanism is less important. On the one hand where the other means (such as reservations) could not constrain qualifications and prevent undermining the notion of human rights thinly constituted, then there would be a strong argument for advocating use of the MoA. On the other hand it may be that the idea of a margin of appreciation is itself a local response to the interrelationship between human rights thickly and thinly constituted, and that it is therefore unsuitable for exportation from its European origins.

C Conclusion

The thesis has met its aims of analysing margins of appreciation and cultural relativity in the jurisprudence of the European Court of Human Rights, providing a timely and detailed study of case law from central and eastern Europe. The defensibility of the MoA has been demonstrated against the background of a particular understanding of the universality debate and its own application. The work presented here therefore provides a valuable application of the universality debate to the European context, and also analyses some of the most important cases to emanate from the expanded Council of Europe. However if the Court's activity moved towards a conception of the MoA different from the version defended in this thesis, it could be rightly criticised for failing to comply with the version of qualified universality advocated in Part One. This thesis therefore provides a benchmark against which future developments in European jurisprudence can be judged.

This concluding chapter has also acknowledged that discussion of the MoA is relevant for human rights outside Europe. The issue is not so much the end of the Cold War, but that lessons may be drawn from the European Court's efforts to balance human rights and other public interests in

peacetime. The Court's approach recognises the importance of local qualification even within the context of universal human rights, which can be understood as mediating between human rights thickly and thinly constituted. Whilst this might not be so important in circumstances where the other human rights systems are involved in wide scale or gross violations of human rights, it may become increasingly so as such abuses become less frequent. The material presented here enables identification and analysis of the MoA, even if it was apparent under a different name, and provides a comparator for examination of any alternative mechanisms.

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