MARGINS OF APPRECIATION: CULTURAL RELATIVITY AND THE EUROPEAN COURT OF HUMAN RIGHTS IN THE POST-COLD WAR ERA

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INTRODUCTION[1]

The number of states participating in the Council of Europe's system for the protection of human rights has grown rapidly over recent years. Established in 1949 with an initial membership of 10 states, the Council has now grown to a membership of 46,[2] dwarfing the EU in its geographical reach. The most significant period of enlargement has been since the end of the Cold War as the formerly Communist states from central and eastern Europe flocked to the Council of Europe seeking assistance with the process of democratisation. The Council's most prominent human rights treaty, the European Convention on Human Rights, has entered into force for all but

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[2] 'The Council of Europe's Member States' (Council of Europe) <http://www.coe.int/T/e/com/about_coe/member_states/default.asp> (14 October 2004). The most recent state to join was Monaco on the 5th October 2004.

one of the 46 member states.[3] This paper questions whether the European Court of Human Rights' recognition of a national 'margin of appreciation' has allowed these new Contracting Parties too much leeway in the way they choose to protect, or more specifically, to limit, the exercise of human rights.

It is shown below that there have been concerns about the margin of appreciation doctrine's perceived culturally relativist basis. It had been feared that the expansion of the Convention system would exacerbate the existing problems. In responding to these concerns it is argued that the variations permitted by the use of the margin of appreciation concept do not amount to cultural relativism. Instead, a view of the interaction of national and international human rights protection based upon institutional subsidiarity and a form of "ethical decentralisation" is proposed, based in part upon Michael Walzer's work on thick and thin moral concepts.[4]

The paper first sets out the parameters of the universality debate, and then goes on to introduce and evaluate some of the recent and controversial judgments of the European Court of Human Rights.

UNIVERSALITY AND RELATIVISM

[3] Monaco signed the ECHR and its protocols on the 5th October when it joined the Council, but it has yet to ratify them.

[4] M Walzer, *Thick and Thin: Moral argument at home and abroad* (Notre Dame University of Notre Dame Press 1994)

The universality of human rights is founded on the understanding that if all humans are equal, then the rights that they hold as a result of being human are the same regardless of the culture into which the individual happens to be born.[5] This is the fundamental justification for the ideals expressed internationally in the work of United Nations and also regionally by the Council of Europe.

Cultural relativists have argued that the concept of human rights is a western liberal idea and has no (or a different) value outside of the western context. They contend that universalists fail to understand their own enculturation and the resulting unconscious bias of their position. Any system of social justice grounded in a given culture is a defence of the good life as conceptualised by that system, regardless of its substantive content. The values promoted 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. The imposed system would be culturally alien and adherence to it could not be guaranteed.[6]

Even from within a human rights system the extent to which a relativist position is adopted can pose problems for the protection of human rights. The difficulty is that wherever there is a plurality of possible meanings for a given human right, then

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[5] For an introduction to this justification for human rights, and to alternative justifications, see J Shestack, 'The philosophical foundations of human rights' in Symonides (ed), *Human Rights: Concepts and Standards*, (Aldershot Ashgate / Dartmouth 2000)

[6] A An-Na'im, 'Human Rights in the Muslim World', 3 Harvard Human Rights Journal (1990) 13. This perspective informs An-Na'im's efforts to demonstrate that human rights values are in fact not alien to Islam.

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.[7] The relativist is 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. However, a careful examination of relativism's theoretical foundations exposes significant logical problems with its arguments.

Firstly, as a prescriptive theory, cultural relativism contradicts itself. As Fernando Teson has written, '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.'[8] Similarly Alison Dundes Renteln argued that relativism[9] is susceptible to the charge of self-refutation because, 'it asserts the absolute prescription that all prescriptions are relative.'[10] Moreover, in spite of their purposed opposition to universal values, relativists reserve for themselves at least one universal value – that we should follow, and be defined by, our own culture. Notwithstanding the

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[7] This type of relativism is what Teson has referred to as 'metaethical relativism'. (F Teson, 'International Human Rights and Cultural Relativism' 25 Virginia Journal of International Law (1985) 869, 886). Note however that Alison Renteln has argued that the premise of this type of relativism (labelled by her as 'ethical relativism as descriptive (factual) hypothesis') does not actually imply tolerance. (A Renteln, *International Human Rights – Universalism Versus Relativism*, (New York Sage Publications 1990)

[8] Teson (n7) 888

[9] By relativism, Renteln was referring to the particular strand she described as 'ethical relativism as prescriptive (value) hypothesis'.

[10] Renteln (n7) 72

conservative tendencies of such a position, it serves to demonstrate that the relativists have not explained the foundation of their argument.

The second main theoretical problem with relativism can be described as the 'tolerance trap'. 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. Thus we should tolerate and respect the choices made by unfamiliar systems of social justice because they promote what is valued by that particular society. The logical problem here is that relativism seeks to derive an 'ought' from an 'is' in violation of the Humean dichotomy between normative and descriptive propositions.[11] The observation that cultural values vary from society to society, and that therefore what is held worthy of protection also varies, is a description of a factual situation. The 'call for tolerance'[12] is, on the other hand, a normative judgment about what ought to be. A 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'. It is one thing for colonial invaders to recognise that the locals have a different culture to them. It is quite another to halt the invasion on that basis.

There are considerable complications to both of these arguments, but for the purposes of this paper it is sufficient to recognise that the philosophical pedigree of cultural

[11] E Hatch, *Culture and Morality*, (New York Columbia University Press 1983) 67

[12] ibid

relativism is at least questionable.[13] Of more immediate importance is the way that, in spite of its logical weaknesses, the rhetoric of cultural relativism has been high-jacked by political elites in order to repress their own population.[14] In this way culture may sometimes be motivated as a state's untouchable 'trump card' reason for failing to comply (fully) with human rights standards. Less controversially, relativism tends to be equated with a conservative view of public international law that affords greater respect to state sovereignty (which is to some extent challenged by international human rights law). This is a view that dominated socialist public international law and which could be expected to linger in the heritage of new Contracting Parties to the ECHR from central and eastern Europe.[15]

In the European context the importance of recognising tensions between universality and relativism has thus become clearer since the end of the Cold War. The resulting expansion of the Council of Europe is seen as a threat to the standards already put in place by the European Court. The former communist states have a different historical and legal background, and may seek to narrow the scope of the protected rights. The way that the Court leaves a 'margin of appreciation' to states has been singled out as

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[13] J Tilley, 'Cultural Relativism' 22 Human Rights Quarterly (2000) 501 contains a more intensive critique of cultural relativism

[14] Donnelly, *Universal human rights in theory and practice*, (New York Cornell University Press 1989) 119; Higgins, *Problems and Processes in International Law*, (Oxford OUP 1994) 96

[15] The USSR for example historically treated human rights as an aspect of their 'domestic jurisdiction' (Art. 2(7) Charter of the UN) and vigorously promoted a policy on non-interference. On the first steps towards Russia's modification of this attitude see T Schweisfurth**, '**The Acceptance by the Soviet Union of the Compulsory Jurisdiction of the ICJ for Six Human Rights Conventions' 2 European Journal of International Law (1991) 110

the means by which relativism will find its way into the Convention jurisprudence. In order to assess such arguments it is necessary first to introduce the margin of appreciation itself.

THE EUROPEAN MARGIN OF APPRECIATION

The Court allows states a certain discretion to 'do things their own way' from time to time. This 'margin of appreciation' can be distinguished from the general discretion left by the Convention to states in how to implement detailed human rights protection in their domestic law.[16] The idea of a margin of appreciation is used in the Court's reasoning to measure and police states' discretion to interfere with or otherwise limit human rights in specific instances. In essence it expresses that Contracting Parties have some space in which they can balance for themselves conflicting public goods. The practice of recognising and respecting states' margin of appreciation 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.

The margin of appreciation doctrine's implications for universality can be seen as far back as the well-known 1976 case of *Handyside*.[17] The European Court was called upon to discuss to what extent free expression could be limited in order to protect morals. The Court stated that,

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[16] As required by Art 1 ECHR

[17] *Handyside v UK* Series A No 24 (1979-80) 1 EHRR 737

> 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…. Consequently, Article 10 para. 2 leaves to the Contracting States a margin of appreciation.[18] [emphasis added]

The Court thus appeared to recognise some form of inter-temporal, European, moral diversity. Such comments have provoked hostile reactions to the continued recognition of a national margin of appreciation. For example Lord Lester has expressed his deep concern 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, 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.[19]

Lord Lester's concerns are not isolated. Eyal Benvenisti has added that,

> 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.[20]

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[18] ibid para 48

[19] A Lester, 'Universality versus subsidiarity: a reply' 1 European Human Rights Law Review (1998) 73, 76

[20] E Benvenisti, 'Margin of Appreciation, Consensus and Universal Standards', 31 New York University Journal of International Law (1999) 843, 844

These criticisms are not confined to commentators. Judge De Meyer, in his partly dissenting Opinion in the Convention case of *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 concept from its reasoning. It has already delayed too long in abandoning this hackneyed phrase and recanting the relativism it implies.[21]

These concerns have only been amplified by the expansion of the Council of Europe. For example in 1999 Paul Mahoney asked,

> 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?[22]

Likewise Lord Lester's suspicion of the margin of appreciation concept was '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.'[23]

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[21] *Z v Finland* Reports 1997-I (1998) 25 EHRR 371, Partly dissenting Opinion of Judge De Meyer, Part III. Judge De Meyer made similar comments in the footnote to his separate concurring opinion in *Ahmed & Others v UK* Reports 1998-VI (2000) 29 EHRR 1

[22] P Mahoney, 'Speculating on the future of the reformed European Court of Human Rights', 20 Human Rights Law Journal (1999) 1, 3

[23] Lester (n19) 74

The assumption seems to be that the margin of appreciation has its roots in cultural relativism. Moreover now that the Court must deal with the varying cultural and developmental situations of the new Contracting Parties, it will be compelled to tolerate practices that threaten the universality of human rights. As has already been established, a relativistic approach would be theoretically unstable, and may mask state interests.

Now that cases from central and eastern Europe are passing through the Convention system, the concerns expressed above can be addressed. The next section gives two contentious examples of cases that have arisen recently.[24]

ILLUSTRATIVE CASES

In both cases discussed here, the Court found for the respondent state. The states' margin of appreciation allows them some space within which to balance free expression against other important interests where a public figure is publicly insulted.[25] These cases are contentious and potentially problematic because they could suggest that the notion of a margin of appreciation has indeed become a

[24] The doctoral research from which this paper has developed examined all the cases concerning the new Contracting Parties from central and eastern Europe. Finland was excluded from the survey because its recent history rendered it more comparable with its western and northern European neighbours rather than the rest of the former Eastern bloc. Turkey was excluded because its situation is unique and not so directly concerned with the collapse of communism. See Sweeney (n1)

[25] J McBride, 'Judges, politicians and the limits to critical comment' (1998) 23 Supp (Human Rights) ELR 76

relativistic vehicle for subordinating human rights to local circumstances. The later part of this paper will contest such a conclusion.

In the case of *Tammer v. Estonia*[26] the applicant journalist challenged his conviction for insulting a public figure. In a published interview with another writer Tammer had used allegedly offensive words to criticise Vilja Laanaru. Laanaru and the former Estonian prime minister had an affair, and Laanaru had their child. She was unable to look after the child herself, and entrusted it to her parents. Tammer's comments related to another journalist's plans to publish a biography of Laanaru. Tammer used words which branded Laanaru as an unfit and careless mother who had deserted her children, and someone who was willing to break up another's marriage. The Estonian words have no direct translation into English.[27]

The Government accepted that there had been an interference with Tammer's freedom of expression, but argued that it was justified by reference to Article 10(2) ECHR.[28] The Court went on to hold that the interference was 'prescribed by law',[29] in pursuit of 'the protection of the reputation or rights of others'.[30] It was still important to show that the interference was 'necessary in a democratic society.'

The Court described the Government's position as follows,

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[26] *Tammer v Estonia (No. 2)* Reports of Judgments and Decisions 2001-I (2003) 37 EHRR 43

[27] 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."

[28] ibid, para 33

[29] ibid, para 38

[30] ibid, para 40

> 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….
>
> 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*.[31] [Emphasis added]

In *Tammer* the European Court eventually deferred to the opinion of the domestic courts, which had imposed upon Tammer a fine of ten day's pay. The Estonian courts had held that the words in question amounted to value judgements couched in offensive language, recourse to which was not necessary in order to express a negative opinion.[32] Tammer's choice of words had overstepped the permissible limits of criticism, particularly since the comments related to Laanaru's private rather than public life. The European Court agreed that Tammer could have formulated his criticism of Laanaru's actions without resorting to expressions that were so particularly offensive. As a result of this, the domestic authorities had not failed adequately to balance Tammer's free expression against Laanaru's reputation. Taking into account the measures imposed and Estonia's margin of appreciation, the Court unanimously considered that the domestic authorities were, in the circumstances of

[31] ibid, paras 52-53

[32] ibid, para 67

the case, thus entitled to interfere with the exercise of the applicant's right to free expression.[33]

Before turning to the implications of this judgment, a second free expression case is introduced. The applicant in *Janowski v Poland*[34] was also 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 the square because it was not an authorised place for retail. Janowski interjected on behalf of the vendors, arguing that the guards had no authority to move them. In the course of his advice, Janowski called the municipal guards 'dumb' and 'oafs'.[35]

The applicant argued that his rights under Article 10 ECHR[36] had been violated by his conviction for insulting the guards. The Court held that there had been an interference with the applicant's rights under Article 10,[37] that the interference was prescribed by law,[38] and that the restriction pursued the legitimate aim of preventing disorder.[39] In this case, as in *Tammer*, the real area of debate was on the question of

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[33] ibid, para 69

[34] *Janowski v Poland* Reports of Judgments and Decisions 1999-I (2000) 29 EHRR 705

[35] The terms used were '*głupki*' and '*ćwoki*' respectively.

[36] The applicant had also alleged violations of Arts 3, 6 and 7(1), but the European Commission declared those complaints inadmissible.

[37] *Janowski v Poland* (n34) paras 22-23

[38] ibid, para 24

[39] 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.' Following the Court's well-established methodology, 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 both relevant and sufficient.

Significantly Janowski argued 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. He felt that this might mean that future criticism of the state and its apparatus would be discouraged.[40] Such an argument clearly invited the Court and Commission to take into account the particular conditions of the newly democratic Poland.

The European Commission in *Janowski* had acknowledged that civil servants such as the municipal guards acting in their official capacity were, like politicians, subject to wider acceptable limits of criticism than private parties. In the context of the heated exchange, the Commission formed the view that those limits had not been overstepped by applicant.[41] The government responded to this, arguing before the Court that the applicant's comments had not formed any part of a public debate, 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.

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[40] ibid, para 27

[41] 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 margin had not been overstepped in this case: *Janowski v Poland* (Application 25716/94) (1997) (ECommHR)

The Court noted that it did not even have to balance public order against a wider public interest in political criticism because Janowski's remarks were not made in his professional capacity.[42] It was also important that the applicant had been convicted on the basis of his use of insulting words, and not simply for making critical remarks. Such had been confirmed by both national courts,[43] and therefore the Court was not convinced the Polish authorities' actions could be likened to censorship. Moreover the applicant's sentence had been reduced on appeal and his prison sentence quashed. For these reasons the European Court concluded that the national authorities had not overstepped their margin of appreciation in assessing the necessity of the contested measure. There was no violation of Article 10. [44]

It is difficult not to have some sympathy with Mr Janowski, who clearly felt his intervention on behalf of the street vendors was for the public good. It should therefore be added at this stage that the Grand Chamber of the Court in *Janowski* was by no means unanimous in its decision to contradict the Commission. A majority of 12 to 5 found no violation of Article 10 and the President of the Court, Judge Wildhaber, was in the minority. Space precludes detailed analysis of the dissenting opinions, although in summary each disagrees that the applicant's prosecution and subsequent fine were 'necessary' within the meaning of Article 10(2). The core of the dissentients' argument was that the criminal legislation applied to Mr Janowski was overbroad in that it protected civil servants from criticism even where they exceeded

[42] *Janowski* (n34) para 32

[43] ibid

[44] ibid para 35

their lawful authority. 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.'

These arguments are quite compelling, and should provoke discussion about the ECtHR's attitude to free expression in fledgling democracies where official authority has frequently been used in the past to disguise corruption. However, for the purposes of this article it is interesting to note the dissention did not centre upon the cultural or contextual elements to the case. The closest to such an argument is contained in the short Dissenting Opinion of Judge Wildhaber, who, in coming to the conclusion that the interference was not necessary in a democratic society, described the words used by Mr Janowski as merely "moderately insulting". By contrast, the majority had relied upon the findings of the national court that the words used constituted "offensive and abusive verbal attacks".[45] Whilst in *Janowski* the Court had used the margin of appreciation doctrine to take local conditions into account less explicitly than it was asked to in *Tammer*, the majority must have placed more emphasis on the local interpretation of the words used than did Judge Wildhaber. The Court was therefore sensitive in both *Tammer* and *Janowski* to a local interpretation of the contested words' connotations. The seriousness of the insulting words used in each case underpins, explicitly or implicitly, the Court's attempts to balance the other interests at stake.

[45] ibid para 34

ASSESSING THE CASES

These two cases present a potentially significant problem. It could be argued quite easily that allowing divergence in the way states choose to limit human rights amounts to modulation of the rights' essential character. The margin conceded in *Tammer* and *Janowski* may have allowed restrictions on human rights that would not be permitted in other Contracting Parties. This could suggest that the Court's use of the doctrine is indeed unduly relativistic, and confirms a worrying new trend in the European Court's jurisprudence.

Having identified these cases and the nature of the problem, the rebuttal of these concerns can be made in three steps. Firstly, an examination of the outcome of cases decided by the European Court in which the recognition of a margin of appreciation has played a role, and which also involve states from central and eastern Europe, shows that the Court has been far from deferential to the new Contracting Parties. Secondly, it is necessary to clarify what it really means to state that human rights are universal. If even universal human rights contain some local modifications, then the ECHR's approach is not necessarily relativistic. Thirdly, and finally, if it can be shown that the nature and basis of the margin of appreciation is not relativistic, then its use to accommodate local concerns in a limited number of cases is entirely compatible with universality. The doctrine's conceptual roots can be found in a form of ethical de-centralisation or subsidiarity[46] rather than cultural relativism.

[46] cf G Carozza, 'Subsidiarity as a structural principle of international human rights law' 97 AJIL (2003) 38

The next parts of the paper address each of these three steps in turn, in the light of the case law already introduced.

CASES CONCERNING THE NEW CONTRACTING PARTIES

The two illustrative cases should be seen in the overall context of the Court's recent jurisprudence. The Court's general approach to these states can then be compared with its attitude to the original contacting parties.

The first case the Court ever decided on its merits was *Lawless* in 1961.[47] This was eight years after the Convention came into effect. It was not until the 1968 case of *Neumeister*[48] that the Court actually found against a respondent state, disclosing a violation of Article 5(3).[49] It had taken the Court fifteen years to find against a respondent state. Compared to its present workload and robust judgments, the Court's early operation was a slow and cautious business.[50]

It is also important to recall that the margin of appreciation doctrine may not have played the same role at each point in the Convention's life. The Court's recognition

[47] *Lawless v Ireland (no. 3)* Series A No 3 (1979-80) 1 EHRR 15

[48] *Neumeister v Austria* Series A No 8 (1979-80) 1 EHRR 91

[49] Nevertheless *Neumeister* was only the third case that the Court had examined on its merits. The second, *De Becker v Belgium* Series A No 4 (1979-80) 1 EHRR 43, was struck off the list because the impugned law was altered by the time that the Court heard the case.

[50] M Janis, R Kay, A Bradley, *European human rights law*, (Oxford OUP 2000) 25

of the margin played a role in consolidating the Convention system in its infancy.[51] However since around 1979 the margin has evolved into a useful framework to facilitate heightened analysis of states' justification for interference with Convention rights.[52] The role played by the margin has developed over a period of at least twenty-five years.

Hungary was the first of the central and eastern European countries to join the Convention system, in 1990. 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*,[53] 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. Since then the Court has had a steady stream of cases concerning the new Contracting Parties, having decided cases concerning Croatia, the Czech Republic, Estonia, Georgia, Hungary, Latvia, Lithuania, FYR Macedonia, Moldova, Poland, Romania, Russia, Slovakia, Slovenia, and Ukraine. As of the 21st October 2004, no judgments have yet been issued concerning Albania, Armenia, Azerbaijan, Bosnia & Herzegovina, or Serbia & Montenegro.

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[51] Y Arai-Takahashi, *The margin of appreciation doctrine and the principle of proportionality in the jurisprudence of the ECHR*, (Oxford Intersentia 2002) 232 recognises this, but argues that as a "transitional" doctrine alone contemporary use of the margin cannot adequately be defended.

[52] H Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (The Hague Kluwer 1996)

[53] *Lukanov v Bulgaria* Reports of Judgments and Decisions 1997-II (1997) 24 EHRR 121

In the overwhelming number of cases emanating from central and eastern Europe which have been declared admissible a violation of at least one article of the Convention has been established.[54] The Court first examined the new Contracting Parties' margin of appreciation in four cases in 1999, including the *Janowski* case amongst them.[55] In each of the first three cases the Court found for the respondent state, which could certainly suggest that the Court was willing to take a more deferential approach to the new Contracting Parties, potentially in order to aid their transition to full participation in the Convention system. Whilst this would achieve historical parity with its behaviour towards the original Contracting Parties, the internal consistency of the Court's contemporary jurisprudence would be threatened.

In the fourth of the first four cases, *Dalban v Romania*, the Court found that the respondent state had overstepped its margin. Indeed since *Dalban* the Court has found for the respondent state in very few cases where the margin of appreciation doctrine was discussed, including the *Janowski* and *Tammer* cases.[56] These cases

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[54] 'Survey of activities 2003' (Council of Europe) <http://www.echr.coe.int/Eng/EDocs/2003SURVEYCOURT.pdf> (15 October 2004), 32 gives a snapshot of the Court's activities. This pattern is in line with Court's approach to the other Contracting Parties; once a complaint has been declared admissible it is often decided in favour of the applicant. In 2003 a violation of at least one Convention article was found in 521 out of the 548 cases that gave rise to a finding on the merits.

[55] *Janowski v Poland* (n34); *Rekvényi v Hungary* Reports of Judgments and Decisions 1999-III (2000) 30 EHRR 519; *Matter v Slovakia* Application 31434/96 (2001) 31 EHRR 32; *Dalban v Romania* Reports of Judgments and Decisions 1999-VI (2001) 31 EHRR 39

[56] In chronological order: *Janowski v Poland*, (n34); *Rekvényi v Hungary* (n55); *Matter v Slovakia* (n55); *Constantinescu v Romania* Reports of Judgments and Decisions 2000-VIII (2001) 33 EHRR 33; *Tammer v Estonia (No. 2)* (n23); *Gorzelik v Poland* Application no. 44158/98 (2004) 38 EHRR 4 (NB

amount to less than a third of the cases against the central and eastern European states involving supervision of their margin of appreciation.

In several of the cases where application of the margin of appreciation doctrine to one of the rights at issue resulted in a finding for the state, the Court nevertheless found a violation of another substantive Convention right. For example in *Matter v Slovakia* the Court held that the state's interference with Article 8 was justified, 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). [57]

The *Janowski* and *Tammer* cases thus fall into a very small category of cases where, having applied the concept of a margin of appreciation to one or more aspects of the case, the Court failed to find any violation of the Convention. The Court's activity in general and use of the margin of appreciation doctrine in particular has thus not displayed a marked restraint such as would suggests a weakening of the system's internal consistency. The Court has been much quicker to act against the central and eastern European states than it was against the original members of the Council of Europe.

This decision has been reaffirmed by a Grand Chamber, see *Gorzelik v Poland* Application no 44158/98 Judgment of the Court 17.2.2004); *Lesnik v Slovakia* Application no. 35640/97; 4 similar cases against Ukraine decided on 29.4.2003: *Nazarenko* Application No. 39483/98, *Dankevich* (2004) 38 EHRR 25, *Aliev*, Application No. 41220/98, *Khokhlich* Application No. 41707/98; *Blecic v Croatia* Application No. 59532/00; *Kopecky v Slovakia* Application No. 44912/98

[57] The four cases brought against Ukraine and decided on 29.4.2003 (n56) also disclosed several violations of the Convention, even though some of the complaints under Article 8 were dismissed using margin of appreciation analysis.

In respect of the original states the Court balanced human rights against state sovereignty more warily. Whilst participation in the ECHR system is still new to the Council's recently joined members, the idea of submission to an international Court is not as novel as it was for the original Contracting Parties. The Court's willingness to act against the new Contracting Parties is predicated upon its proven ability to act against the early participants in the system. For many years, the only states capable of being found in violation of the Convention were western European states. The new Contracting Parties have witnessed the European Court act decisively against the very states that initiated the system, so they may be less suspicious than the original participants that the Convention would be used merely as a political tool.

UNIVERSALITY NOT UNIFORMITY

The cases introduced above are clearly in a minority of the European Court's recent decisions. In order to analyse fully the threat to universality that cases such as *Tammer* and *Janowski* pose the nature of universality itself should be questioned. Universality is not the same as uniformity, [58] and so local variations in the Conventions standards may fall short of outright relativism. The 1993 Vienna Declaration and Programme of Action provides a useful summary of the UN's position,

> 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*

[58] J S Davidson 'Human Rights, Universality and Cultural Relativity: In Search of a Middle Way' 6 Human Rights Law and Practice (2001) 97

> *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.[59] [emphasis added]

There has been discussion of the italicised section of the quotation,[60] but it should be taken as meaning that although human rights must be understood within their cultural context, they should not be subsumed under cultural practices. It is to be expected, nevertheless, that even whilst maintaining 'universal' human rights, there may be some defensible local qualification. Critics of the margin of appreciation doctrine who believe they have identified relativism in its operation may have instead merely identified examples where the European Court has borne in mind the local and regional particularities of given states. This does not amount to a denial of universality.

Since the differences acknowledged by the recognition of a national margin of appreciation do not necessarily amount to relativism, another explanation for the Court's position is required. Michael Walzer's approach to thick and thin conceptions of morality can be adapted to elaborate on the nature of the margin of appreciation doctrine.

THICK AND THIN

[59] Vienna Declaration and Programme of Action, UN DOC. A/CONF.157/23 (12.7.1993); (1993) HRLJ 352, para 5

[60] M Freeman, 'Human rights and real cultures', 1 Netherlands Quarterly of Human Rights (1998) 25, 25

Michael Walzer[61] has argued that moral terms have 'minimal' and 'maximal' meanings; that 'thin' and 'thick' accounts of them can be given.[62] Thick and thin moralities serve different purposes at different times, working in conjunction rather than contradicting each other. They exist contemporaneously, and it is the interaction between them that is seen when the European Court applies the margin of appreciation doctrine.

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 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.[63] However, after the 'velvet revolution' [64] 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 united, they did not insist with the same passion that the rest of the world endorse or reiterate their

[61] Walzer (n4)

[62] This element of Walzer's work is not unique, though his interpretation of it is. See eg C Geertz, *The Interpretation of Cultures* (New York Basic Books 1972), chapter 1, 'Thick Description: Toward an interpretive theory of culture'.

[63] Walzer (n4) 3

[64] So called because it took place peacefully

decisions.[65] 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 insistence. In moral discourse, thinness and intensity go together, whereas with thickness comes qualification, compromise, complexity, and disagreement.[66]

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 'thick' 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.'[67]

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

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[65] Walzer (n4) 4

[66] ibid 6

[67] ibid 4

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.[68]

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

The position advocated here thus recognises a margin within which different thickly constituted efforts at the protection of human rights exist. Human rights are *generally universal*, but in becoming embedded in society some local particularities affect the substantiation of human rights and result in *specific qualifications*. It is the interaction of thick and thin concepts of human rights that recognition of a margin of

[68] Walzer also notes that even an agreed minimal morality will often be forced into the idiom of a maximal morality, (Walzer (n4) 9), which may explain why some cultures find the objective of human rights familiar but their expression as 'rights' alien.

appreciation facilitates rather than the relativist subordination of human rights to local culture.[69]

THE MARGIN OF APPRECIATION AND SUBSIDIARITY

It has so far been argued that the cases such as *Janowski* and *Tammer* belong to a very small group of cases where the European Court has used margin of appreciation analysis and found for the respondent state. Walzer's work has been used to suggest that universal human rights are poised to recognise local variations because they are in fact a concentrated product of those diffuse cultures rather than a challenge to them. This section of the paper elaborates upon how the Walzerian paradigm can be linked to the concept of subsidiarity.

The deference to action within a state's margin expresses a form of subsidiarity, where on certain types of question the Court can devolve to Contracting Parties supervised discretionary powers to balance human rights and national public interests within confined parameters. This contains elements of 'ethical decentralisation', inasmuch as decentralisation carries with it the notion of delegation where the diffuse lower authorities remain loyal to the centre.

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[69] The extent to which Walzer's work, his earlier writing in particular, is or is not relativist is moot; M Walzer, *Spheres of Justice: a defence of pluralism and equality* (New York Basic Books 1983). The position taken in this article is that *Thick and Thin* adds a universalist dimension to Walzer's idea of '*Spheres of Justice*'; cf R Bellamy 'Justice in the community: Walzer on pluralism, equality and democracy' in D Boucher & P Kelly (eds) *Social Justice: From Hume to Walzer* (Routledge London 1998)

In the European Convention context the principle of 'subsidiarity' is normally understood in its institutional sense. 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 institutions. In this sense the principle of subsidiarity is used to express that the Convention mechanisms are *subsidiary* to the activities of the Contracting Parties themselves. This observation is supported by the terms of the Convention, and has been consistently re-affirmed by the Court.[70]

The principle of subsidiarity in this institutional sense clearly results from the division of power between national and international institutions.[71] In addition to factors such as the separation of powers that affect *all* courts, the international institutional context of European Convention law thus adds another dimension.[72] This international separation of responsibilities is closely linked to subsidiarity in so far as both concern

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[70] *Handyside* (n17) para 48; *Z and Others v UK* Reports of Judgment and Decisions 2001-V (2002) 34 EHRR 3, para 103; Subsidiarity is more commonly associated with law of the European Union (Art 5 EC Treaty; Art 1 Treaty on European Union). Further discussion of the EU context of subsidiarity is outside the scope of the present paper, but is discussed in my paper 'Universal values in an expanded EU: re-assessing the case-law on derogations from the four freedoms' delivered at the Socio-Legal Studies Conference in Glasgow, April 2004 (copy with author).

[71] cf P Mahoney, 'Marvellous richness of diversity or invidious cultural relativism' 19(1) Human Rights Law Journal (1998) 1 who describes the margin itself in these terms

[72] E Brems 'The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights', 56 Zeitschrift fur Auslandisches offenthiches recht und volkerrecht (1996) 240, 293

the allocation of responsibilities, and therefore impact upon the balance between international human rights supervision and state sovereignty.[73]

It terms of the practical allocation of responsibility the Court has objected to being seen as a court of fourth instance, and it will usually respect findings of law and fact by national courts.[74] However there is another element of subsidiarity that cannot be explained on solely practical grounds. To understand this, the differing roles of the Court must be acknowledged.

The Court's most obvious or classic role is to guard against flagrant human rights abuses, but it is not its only one. Indeed the maturation of the Convention system has seen it evolve complex jurisprudence on almost all aspects of public life. The Convention therefore offers protection from human rights abuses at two levels.[75] In its classic role it protects against 'naked, bad faith abuse of power'.[76] In this sense, the Convention clearly required from the outset a standard of human rights, thinly constituted, in response to the recent horrors of WWII. However in protecting human rights the European Court also (and more frequently) 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,

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[73] Carozza (n46) 63

[74] *Edwards v UK* Series A No 247 (1993) 15 EHRR 417, para 34; R Macdonald, F Matscher, & H Petzold (eds), *The European system for the protection of human rights* (Dordrecht Martinus Nijhof 1993), 50

[75] Mahoney (n71) 2-3

[76] ibid, 4

> 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 say, only if the preliminary conditions of normal democratic governance have been shown to exist.[77]

This is quite correct, but should not be taken merely as a test for determining when the margin is allowed to operate. Instead, Mahoney's observation encourages examination of the cases' character. If the 'good faith' curtailment of human rights is a consequence of balancing between conflicting national public interests within a democracy, then it can be said to take place within the thick elaboration of human rights in particular societies. These questions are not so much to do with subsidiarity and the correct allocation of responsibilities on practical grounds, but concern respect for moral and ethical sovereignty and self determination.

The determination of the national public interest requires detailed knowledge of the domestic situation, and so a margin may *also* be conceded on practical grounds. Nevertheless the sorts of questions that must be asked and answered about conflicting public interests usually involve issues relating to rights-in-detail rather than rights in the abstract; the realisation of human rights thickly constituted. It is in response to these questions within human rights thickly constituted that the margin plays its role in the decentralisation of certain moral and ethical questions.

This is the situation exemplified in the *Janowski* and *Tammer* cases, where the respondent states accepted that they had interfered with a human right, and therefore did not seek to dispute the interpretation or relevance of the right at stake. In both

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[77] ibid

cases it was the relative weight of the right and a countervailing public interest that the national authorities sought to establish for themselves[78] when they applied the right to the case at hand. The justification for respecting the respondent state's margin is not cultural relativism. In fact it is quite the opposite; it is that the state is coming to its own conclusions within a realistic, diffuse, universal concept of human rights.

The process of decentralising is still however constrained by the Court's classic role, the protection of human rights thinly constituted. Even where a wide margin is invoked and discussed, the review function of the European Court is not ousted.[79] The principle of proportionality is a valuable tool in determining the outer limits of the margin in particular cases.[80] Whilst the Walzerian paradigm explains that the margin of appreciation doctrine may play a role in respecting some choices about balancing national public interests, a gross miscalculation of their relative weight could still amount to a violation of the Convention.

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[78] ie by supplying reasons that were both "relevant and sufficient"; See *Olsson v Sweden (no.1)* Series A No 130 (1989) 11 EHRR 259 para 68; *Lingens v Austria* Series A No 103 (1986) 8 EHRR 103 para 40

[79] For example in *Open Door and Dublin Well-Woman v Ireland* the Court found a violation of Art 10 and stated that it 'cannot agree [with the respondent state] that the State's discretion in the field of the protection of morals is unfettered and unreviewable….' This is significant because on questions of morals the margin conceded is usually relatively wide; *Open Door and Dublin Well Woman v Ireland* Series A No 246-A (1993) 15 EHRR 244, para 68

[80] Arai-Takahashi (n51) 190-205

In summary the principle of subsidiarity is already recognised as being central to an understanding of the European Court's role. It has also frequently been linked to the margin of appreciation. Within the idea of subsidiarity there is a narrow range of decisions about the correct level of human rights supervision that are moral or ethical rather than practical in nature. Whilst the concept of a national margin of appreciation may play a role in respect of subsidiarity in its practical institutional sense, it also has a role to play in respecting choices made within each European state's thickly constituted morality.

CONCLUSION

Returning to the two cases introduced above, alongside other recent cases it can be concluded firstly that they do not herald a new transitional era of excessive deference to the new Contracting Parties from central and Eastern Europe.

Secondly, since uniformity is not required by universality, the limitations permitted in the *Janowski* and *Tammer* cases do not necessarily undermine universality. Indeed on closer examination the variation which the Court used the margin of appreciation to recognise could not be described as being based upon cultural relativism at all. The cases do not suggest that, for whatever historical or cultural reason, free expression is not a value of relevance in Estonia or Poland. In neither case did the respondent state attempt to argue that the right itself was inapplicable to the situation.

Thirdly it is now clear that the two cases expose questions relating to rights-in-detail; they concern 'good-faith' interference with human rights in furtherance of other

collective interests. In these circumstances considerations of institutional subsidiarity and ethical decentralisation justify in principle the existence and use of the margin of appreciation doctrine. This, in turn, justifies the Court taking giving weight to the local meaning of the words at issue in *Janowski* and *Tammer* as part of its balancing exercise. The way that the doctrine was used in the *Janowski* and *Tammer* cases shows a careful examination of the facts of each case, so that the discretion devolved to the respondent states in each was checked in order to guarantee loyalty to the concept of human rights thinly constituted. There was no question of automatic deference. The margin of appreciation doctrine is a structured, meaningful, but ultimately conditional recognition of Contracting Parties' complex thickly constituted morality.

By examining two illustrative cases in their wider context, this paper has suggested that the European Court's continued recognition of a margin of appreciation has not resulted in a relativistic Court or the lowering of Convention standards. The doctrine's use has been presented as a valuable tool for recognising and accommodating limited local variations within a nevertheless universal model of human rights.