

Marginal Neutrality – Neutrality and the Margin of Appreciation in the Jurisprudence of the European Court of Human Rights

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1 Introduction

There is an inherent tension between the often aspirational international commitments which states assume and the practical reality of applying them in a particular factual context. This is exacerbated by the more general tension which pervades international law, that of balancing state sovereignty with legal duties. This tension is well known to political theory and, ever since its first case focusing on Article 9, *Kokkinakis v. Greece*,¹ is well attested in the jurisprudence of the European Court of Human Rights concerning the freedom of religion or belief. Rather than seeing this tension as a hermeneutic tool through which to understand and better secure the implementation of that freedom, it has tended to be seen as a problem which needs to be addressed, if not eliminated.

In order to do so, two contrasting techniques can be found in the jurisprudence relating to Article 9, which we shall call the “first” and “second” generation approaches. The first generation approach focused on the universality of the right, seeking to find a way of resolving the inherent tension by reference to broadly construed and generally applicable overarching principles, couched in the language of neutrality. The second generation approach is focused on subsidiarity, in the guise of the margin of appreciation, and has attained prominence through the 2013 Brighton Declaration and the resulting 15th Protocol to the ECHR and, at the time of writing, in the 2018 Copenhagen Declaration.² However, little attempt has been made to

¹ *Kokkinakis v. Greece*, 25 May 1993, European Court of Human Rights, No. 14307/88.

² See https://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf (accessed 1 April 2018); https://menneskeret.dk/sites/menneskeret.dk/files/media/dokumenter/nyheder/draft_copenhagen_declaration_05.02.18.pdf (accessed 1 April 2018). At the time of completion of this article the final version of the Copenhagen Declaration was implemented on 13 April 2018. The final text is significantly watered-down and marks a departure from the radical and perhaps rather excessive approach to margin of appreciation and has focused on qualitative rather than quantitative development of margin of appreciation, judicial independence and an emphasis

reconcile these approaches, which contributes to the hermeneutical confusion which pervades the jurisprudence and the discussions of it.

The case-law contains ever more extreme examples of both techniques in operation, it often being unclear why one approach is being adopted rather than the other. But merely observing this disjuncture in the jurisprudence will no longer do: it needs to be addressed. There is increasing interest in what might be called dialogical engagement between the international and the national levels, in this instance, driven in part by the appreciation that it is better to be preventing breaches of rights than making findings of violations. If international jurisprudence is to guide the actions of states at the national level, then the national level needs to know what it must strive to achieve. Must it “be neutral” or does it have a “margin of appreciation” in relation to a given matter? At the moment, the state tends to find out afterwards – which is not really much help in securing the enjoyment of the right. Rights should not *only* be about remedies.

This tension was latent in the *Kokkinakis* case but was not really picked up in the jurisprudence which followed. The dissenting opinions in *Kokkinakis* – particularly those of Judges Martens and Valticos – laid bare the intellectual bankruptcy of the extremes of either approach: Judge Martens, in the quest for what we might now call neutrality, more or less leaving the disputants to their own devices in order to prevent the state from becoming enmeshed in matters which were nothing to do with it; Judge Valticos, in which we might now call subsidiarity or the margin of appreciation, more or less leaving it to the state to decide what to do. Whilst neither represents much rights-based thinking, they share an important common characteristic: the need for resolution at the domestic level – but informed by what? Whereas the “first generation” approach explored the logic of the neutrality approach,³ the “second generation” approach steers towards the logic of the subsidiary approach.⁴ Instead of offering

on dialogical spaces particularly along the lines of dialogues with civil society, thematic dialogues and through expanding third parties’ interventions.

³ Perhaps the culmination of that approach might be considered to be the Chamber judgement in *Lautsi v. Italy*; See also the detailed discussion about the far reaching implications of the case in Jeroen Temperman (ed.) *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom* (Leiden: Martinus Nijhoff Publishers, 2012).

⁴ See *Lautsi and Others v. Italy*, 18 March 2011, European Court of Human Rights (Grand Chamber), No. 30814/06, *S.A.S. v. France* 1 July 2014, European Court of Human Rights, No. 43835/11; *Magyar Keresztény Mennonita Egyház and others v. Hungary*, 8 April 2014, European Court of Human Rights, No. 70945/11. See also *Leela Förderkreis E.V. and others v. Germany*, 6 November 2008, European Court of Human Rights, No. 58911/00; *Savez Crkava "RijecZcvota" and others v. Croatia*, 9 December 2010, European Court of Human Rights, No. 7798/08; *Atuđer Fernández and Caballero García v. Spain*, 14 June 2001, European Court of Human Rights, No. 53072/99; *Church of Jesus Christ of Latter-Day Saints v. United Kingdom*, 4 March 2014, European Court of Human Rights, No. 7552/09; *Cumhuriyetçi Eğitim ve Kültür Merkezi Vakfı v. Turkey*, 2 December 2014, European Court of Human Rights, No. 32093/10; *Asatruarfélagid v. Iceland*, 18 September 2012, European Court of Human Rights, No. 22897/08.

a complex and robust prevention-driven balance between universality and subsidiarity, which is at the centre of the application of convention rights, and rather than engaging with the challenges of their interplay and interdependence, these recent cases have effectively used the margin of appreciation (the ECtHR's technical tool for applying a concept of subsidiarity) to avoid the difficult practical consequences of continuing to impose a requirement of "neutrality" (the ECtHR's intellectual avatar for universality).⁵ It is high time that the *modus operandi* of the Court was revisited and, rather than these unhelpful "either/ors", the reality of the central tension be acknowledged and used to inform a more sophisticated understanding of the interplay between neutrality and margin of appreciation in balancing the frictions between universality and subsidiarity.

2 Neutrality and the Margin of Appreciation – Balancing between Sovereignty and International Human Rights Commitments

Ever since *Kokkinakis* both neutrality and the margin of appreciation have been used to protect the core dimensions of Articles 9 and 10 of the Convention in functioning democracies as a form of one-directional and primarily state-driven legal and political perfectionism.⁶ Increasingly, however, Articles 9 and 10 are being approached through the lens of the margin of appreciation which is becoming a means of protecting "culture", in a manner akin to Bismark's *Kulturkampf*, Putin's Russian Commonwealth (*Ruskij Mir*) and the emerging centre-right nationalist ideologies across the Council of Europe, including from France, through Hungary and Poland to Bulgaria and Turkey. This trend is reflected in cases such as *Lautsi v. Italy*⁷ and *S.A.S. v. France*⁸ (which we will refer to as paradigm examples of "Second Generation" cases) but the contours of which can be found in many earlier cases, such as

⁵ *Ibid.*

⁶ We refer in a holistic fashion to a rich tradition of discourses in legal and political philosophy (Raz, Klimicka and Chan) which explore from different perspectives the role of the state and its interactions with non-state actors in the articulation of public reason, the ordering of society, and the meaning of the good life.

⁷ *Lautsi and Others v. Italy*, 18 March 2011, European Court of Human Rights (Grand Chamber), No. 30814/06.

⁸ *S.A.S. v. France* 1 July 2014, European Court of Human Rights, No. 43835/11.

Whitehouse v. UK,⁹ *Otto Preminger v. Austria*, *Wingrove v. UK*,¹⁰ *Leyla Sahin v. Turkey*¹¹ and *Refah v. Turkey*.¹²

Resorting to the margin of appreciation in all these “second generation” cases implies that under certain circumstances the enjoyment of the rights provided for in Article 9, and sometimes Article 10, can have the effect of undermining “the good” which the majority approach or culture represents; – “the good” potentially being anything from constitutional secularism to established state religion; from a permissive liberal to conservative moral climate or culture; from *laissez-faire* to securitized; indeed, from just about anything to anything provided it is within the scope of what might be considered possible for a democratic society to embrace. *Kokkinakis* had already hinted that there are two possible sides in the debate – the individual right versus the common good, to be umpired through a prism of neutrality according to which the state must not take sides in theological debates and religious divisions.

The problem with this approach always was that it failed to take into account that there are a broad range of approaches to the relationship between religion and the state and to the accommodation of freedom of religion or belief within states parties to the European Convention. Irrespective of the position one might take in relation to either matter, the very existence of such approaches means that there is in reality very little scope for the state to be substantively neutral since this would imply both substantive detachment from religious matters (separation of religion and state) and at the same time deep interest in religious matters in order to ensure the protection of freedom of religion or belief, reasonable accommodation etc. A state cannot be simultaneously disengaged from religion or belief yet also engaged with ensuring the enjoyment of the right from some vacuum-like position. This does not mean that the state cannot be procedurally neutral whilst engaging with religions on different levels, thus blending and balancing universality and subsidiarity within a coherent overall approach focused on securing the enjoyment of the substantive right.

Perhaps the problem has been the moderate obsession with the few remaining state churches in European states and the compatibility of this with democratic structures of governance. While these state churches (and the Church of England in particular) doubtless appear anomalous from the point of view of prevailing systems based on disestablishment and separation, they can be viewed differently. Indeed, this relationship could be viewed as an

⁹ *Gay News Ltd. and Lemon v. United Kingdom*, 7 May 1982, European Commission of Human Rights, No. 8710/79.

¹⁰ *Wingrove v. UK*, 25 November 1996, European Court of Human Rights, No. 17419/90.

¹¹ *Sahin v. Turkey*, 10 November 2005, European Court of Human Rights (GC), No. 44774/98.

¹² *Refah Partisi (Welfare Party) v. Turkey*, 31 July 2001, European Court of Human Rights, No. 41340/98.

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example of good practice regarding the coexistence of a state religion with the apparatus of secular state governance rather than as a challenge to it. Indeed, whilst the logic of several Court judgments points towards the incompatibility of state churches with neutrality in matters of religion, the Court has never said that there is an incompatibility: indeed, it has made it clear that there is not.¹³ It is certainly not the case that this model “has to go”. Nevertheless, there has been considerable focus outside the Court concerning the extent to which the existence of established or State churches might have a disproportionate impact on freedom of religion or belief what a principled *raison d’être* for this might be. This has been to the detriment of the discussion we should actually be having – which concerns what happens when a state (including secular states) place disproportionate emphasis on a particular religion or belief (including non-beliefs such as constitutional secularism) from the point of view of Convention rights and so reverses the Kantian-Rawlsian paradigm by giving priority to the collective good over the individual right? [This, of course, is precisely what is threatened by the “solution” to the “universality-neutrality” problem created by the “first generation” approach; and by the “second generation” approach with its focus on subsidiarity / margin of appreciation.]

One of the most remarkable developments in terms of recasting the concept of neutrality in the ECtHR’s jurisprudence is *Lautsi v. Italy*. The Court’s approach to the overarching tension between universality and subsidiarity has been described elsewhere as ‘oscillating between focusing upon the potential impact which the presence of religious symbols within an educational environment might have on perceptions of the impartiality of the State in matters of religion or belief, and focusing on the substantive aspects of the overall education

¹³ *Izzettin Doğan And Others v. Turkey* 26 April 2016, European Court of Human Rights, No. 62649/10; *Lemon v. UK*; *Ásatrúarfélagid v. Iceland*, 18 September 2012, European Court of Human Rights, No. 22897/08; *Buscarini and Others v. San Marino*, 18 February 1999, European Court of Human Rights (GC), No. 24645/94; *Otto-Preminger-Institut v. Austria*, 20 September 1994, European Court of Human Rights, No. 13470/87; *Wingrove v. United Kingdom*; *Darby v. Sweden*, European Commission of Human Rights, No. 11581/85; *Angeleni v. Sweden*, 3 December 1986, European Commission of Human Rights, No. 10491/83; *Cumhuriyetçi Eğitim ve Kültür Merkezi Vakfı v. Turkey*, 2 December 2014, European Court of Human Rights, No. 32093/10; *Svyato-Mykhaylivska Parafiya v. Ukraine*, 14 June 2007, European Court of Human Rights, No. 77703/01; *Holy Synod Of The Bulgarian Orthodox Church (Metropolitan Inokentiy) and Others v. Bulgaria*, 22 January 2009, European Court of Human Rights, Nos. 412/03 and 35677/04; *Metropolitan Church of Bessarabia and Others v. Moldova*, 14 December 2001, European Court of Human Rights, No. 45701/99; *Manoussakis v. Greece*, 26 September 1996, European Court of Human Rights, No. 18748/91; *Folgerø v. Norway*, 29 June 2007, European Court of Human Rights (GC), No. 15472/02; *Alexandridis v. Greece*, 21 February 2008, European Court of Human Rights, No. 19516/06; *Vergos v. Greece*, 24 June 2004, European Court of Human Rights, No. 65501/01; *The Canea Catholic Church v. Greece*, 16 December 1997, European Court of Human Rights, No. 25528/94; *Hasan & Eylem Zengin v. Turkey*, 9 October 2007, European Court of Human Rights, No. 1448/04; *Leela Förderkreis E.V. v. Germany*. See also Françoise Tulkens, ‘The European Convention on Human Rights and Church-State Relations Pluralism vs. Pluralism’, 30 *Cardozo Law Review* (2008).

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experience provided within the educational environment.¹⁴ As has also been mentioned, in some way this judgment marks a significant turning point in the jurisprudence, away from the plethora of “first generation” neutrality oriented cases concerning registration and the protection of minority religions and towards “second generation” cases attempting to reconcile state neutrality with the protection of a majority culture. The Grand Chamber implicitly endorsed the view that the principle of neutrality does not demand the absence of religious symbolism in the state educational setting and rejected the view that the “public realm” needs to be a “religiously neutral space” in order for a state to fulfill its “duty of neutrality and impartiality”.¹⁵ As has been said,

The State can be ‘neutral and impartial’ whilst ‘perpetuating’ the traditional place of religions in the public life of the country. Indeed, it can do more, since the Court expressly acknowledges that ‘respect’ implies ‘some positive obligation on the part of the state’. If this means that State support for traditional religions is now within the margin of appreciation, then much of the recent case law of the Court may need to be revisited ... the focus is now placed on the substance, rather than the appearance, of the enjoyment of the freedom of religion or belief. The Court puts it, “states have a responsibility for ensuring, neutrally and impartially, the exercise of various religions, faiths and beliefs”. It is no longer about ‘being seen to be neutral and impartial’ to the external observer.¹⁶

This form of neutrality is very different from that found in the earlier “first generation” cases. In *Lautsi* neutrality resembles an appeal to a form of sovereignty-driven political exceptionalism which is projected by the Court as being both a reflection of a subsidiarity principle and as a positive state duty. In a sense, it is asked to take a step back from its role as the “neutral and impartial organizer”: previously understood as meaning that the state was to ensure religious neutrality and impartiality within the State, it is now to ensure, neutrally and impartially, that religions and beliefs are to be enjoyed as they are found within the State.

¹⁴ Malcolm Evans, ‘Lautsi v. Italy: An Initial Appraisal’, 6:3 *Religion & Human Rights* (2011), pp. 237-244. See also Malcolm Evans, ‘From Cartoons to Crucifixes: Current Controversies Concerning the Freedom of Religion and the Freedom of Expression before the European Court of Human Rights’, 26:1 *Journal of Law and Religion* (2010), pp. 345-370; Malcolm Evans, ‘Neutrality in and after Lautsi v. Italy’, in Jeroen Temperman (ed.), *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom* (Leiden: Martinus Nijhoff Publishers, 2012), pp. 329-354.

¹⁵ *Lautsi v. Italy*, para. 60.

¹⁶ Evans, *supra* note 14 (‘Neutrality in and after Lautsi v. Italy’), p. 353.

In many ways, the recasting of neutrality in *Lautsi v. Italy* prepared the ground for *S.A.S. v. France*. This applied a similar approach towards the importance of respect for the majority culture rather than to abstract universal notions of neutrality in order to protect the secularist approach towards the delicate relationship between minority religious claims and majoritarian consensus. In a leap similar to that taken in *Lautsi*, in the *SAS* case the Court thought it within the State's margin of appreciation to approach the treatment of the full-face veil through a lens of a state-driven political perfectionism and prohibit it because of the importance of facial communication in contemporary society. And with such a leap of jurisprudence a sociological justification feeds into the broader notion of "living together", and human rights law is reduced to a reflection of pre-existing social norms.¹⁷

The ECtHR accepted that the French full face veil ban interfered with the claimant's rights to express her personality (under article 8 ECHR) and her religious beliefs (under article 9 ECHR) but felt that this might be seen as necessary to ensure '(harmonious) living together', stating that 'the barrier raised by a veil concealing the face could be perceived by the respondent State as breaching the minimum requirements of living together'.¹⁸ However, and far from offering an enthusiastic endorsement of its own new concept of "living together", the Court immediately expressed its concerns about using such a malleable idea as a justification for restricting Convention rights.¹⁹ In a strange rationale, a social expectation for a minimal form of social interaction has been transformed into a legal prescription which, ironically, probably achieves precisely the opposite of what "living together" was supposed to achieve in terms of harmonious coexistence, enhancing social cohesion, and improving social integration of minority groups. But at least French secular culture is preserved...

This blurring of differences between socially driven and rule of law driven normativity bears witness to emerging fragmentation of international human rights approaches and a move towards more state sovereignty driven approaches. State neutrality is no longer seen as an hermeneutic tool which balances the inherent overarching tension between universality and subsidiarity, but is associated with that universality and so loses its traction as a tool with the move towards subsidiarity and, in European terms, a margin of appreciation acting as a vehicle for the transforms of social norms into legal doctrines.

¹⁷ Myriam Hunter-Henin, 'Living Together in an Age of Religious Diversity: Lessons from Baby Loup and SAS', 4:1 *Oxford Journal of Law and Religion* (2015), pp. 99-100.

¹⁸ *S.A.S. v. France*, paras. 121 and 122 See also Henin, *ibid.*

¹⁹ *S.A.S. v. France*, para. 122.

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One might say that this amounts to a “hostile takeover” of the rights-based approach in the interests of established societal interests, which marginalises and trivialises the complex interdependencies between the political and the social. Taken a step further, the requirements of living together could easily justify the State pursuing a policy of “cultured neutrality”, to be achieved through the legal enforcement of social conventions.²⁰

In such “second generation” judgments something which is perceived sociologically as a common value acquires an independent normative status when confronted with a “deviant” minority practice, justified on the basis of an understanding of state neutrality which legitimates withdrawal from rather than engagement with its international rights obligations. These judgments transform culture into dominant normative viewpoints and blurs the distinction between social and legal norms.²¹ In practice, these judgments sanction another form of a “cultured state neutrality” shaped by a sovereignty (and State)-driven political perfectionism²² which privileges those whose positions accord with traditional societal expectations of life in the public square.²³ Neutrality thus becomes compatible with an *exceptionalist* project which departs from mainstream Convention approaches but which derive from the constitutional traditions of the country, usually significantly pre-dating the State’s ratification of the Convention and its assumption of Convention obligations. Looking at it from the Court’s point of view, it amounts to a significant departure from its earlier jurisprudence.²⁴

Ever since the Court’s controversial judgment in *Refah Partisi v. Turkey*, it has largely been taken for granted that the overarching aim of the “Convention Project” has been to ensure that the Convention is interpreted and applied in accordance with the principles of democracy

²⁰ Hunter-Henin, *supra* note 17. See also Michel Troper, ‘French Secularism or Laïcité’, 21 *Cardozo Law Review* 1267 (1999-2000), at p. 1268.

²¹ In *Magyar Keresztény Mennonita Egyház and others v. Hungary*, para. 91, the ECtHR seems to move away from its jurisprudence on state interference and registration of religious associations. In this case the Court proposed that there is no right under the Convention, for the communities, to claim a specific legal status.

²² In *Leela Forderkreis E.V. and others v. Germany*, the ECtHR assumed that labeling religious associations as sects had involved an interference with Article 9 rights, as the terms used to describe the applicant movement may have had negative consequences for them. But it held that no violation of that article had taken place, as States are entitled to verify whether a movement or association carries on activities which are harmful to the population or to public safety. See also *Magyar Keresztény Mennonita Egyház and others v. Hungary*, dissenting opinion of Judge Spano joined by Judge Raimondi.

²³ *Ibid.*, para. 100.

²⁴ See *Savez Crkava "RljecZcvota" and others v. Croatia*, para. 89: ‘the conclusion of agreements between the State and a particular religious community establishing a special regime in favour of the latter does not, in principle, contravene the requirements of Articles 9 and 14 of the Convention, provided that there is an objective and reasonable justification for the difference in treatment and that similar agreements may be entered into by other religious communities wishing to do so’. See also *Atujer Fernandez and Caballero Garcia v. Spain*; *Church of Jesus Christ of Latter-Day Saints v. United Kingdom*; *Cumhuriyetçi Eğitim ve Kültür Merkezi Vakfı v. Turkey*, stating that there was a violation of Article 14 taken in conjunction with Article 9; *Asatruarfélagid v. Iceland*, para. 34; *Magyar Keresztény Mennonita Egyház and others v. Hungary*, para. 113.

and toleration – and, indeed, this resonates with the motivations of the founders of both the Council of Europe and the drafters of the ECHR itself.

In the context of Article 9, this meant that political and religious ideas perceived as undermining the constitutional order of a member state might not be protected by the Convention, something which is also expressly provided for by Article 17. Such an approach has also sat uneasily alongside an understanding of neutrality in which the state is the “neutral organizer” sitting on the fence, as it were, while “holding the ring” whilst others engage in the articulation of public reason in a free and open market of ideas (one of many plausible forms of the exercise of neutrality). For neither the Convention nor the Court has been coy when it comes to defending political beliefs which, rightly or wrongly, are considered foundational to the relevant constitutional order, or confronting beliefs which, again rightly or wrongly, are considered to threaten them.

Seen through such a lens, neutrality becomes a device for defending those things which, rightly or wrongly, are considered central to the existential state, rather than as an approach to the unbiased adjudication of a particular rights-driven legal issue. This is particularly prone to happen when the issue at hand involves questions of religion or belief. Some meta narrative of perceived cosmic battles between the religious and the secular (whatever secular might be taken to mean) tend towards the secular being seen as intrinsic to the forms of constitutional democracy essential for the preservation of convention rights) whereas the religious and belief-based viewpoint is not.²⁵

The reason neutrality has the potential to be biased and protectionist is partly related to the way neutrality and margin of appreciation interact. The Court is prepared to allow a broad margin of appreciation, and thus giving member states “the benefit of the doubt” when it comes to an increasing array of Article 9 adjudication. The limits it sets are largely related to outright state interference into internal religious autonomy and potentially secessionist projects.²⁶ What the court has paid less attention to is the exercise of state neutrality in a way which demonstrates disproportionate concern for the protection of secular or cultural paradigms to

²⁵ This is irrespective of whether some societies with an established religion (like the UK) may be more liberal and accommodating to different voices in the public sphere than other societies (like Russia, France and Turkey) which operate within the framework of (sometimes nominally) secular constitutions.

²⁶ *Communist Party (KPD) v. the Federal Republic of Germany*, 20 July 1957, European Commission of Human Rights, No. 250/57; *Kalaç v. Turkey*, 23 June 1997, European Court of Human Rights, No. 20704/92; *Yanasiç v. Turkey*, 6 January 1993, European Commission of Human Rights, No. 14254/89; *Karaduman v. Turkey*, 3 May 1993, European Commission of Human Rights, No. 16278/90; *Dahlab v. Switzerland*, 15 January 2001, European Court of Human Rights, No. 42393/98; *Herri Batasuna v. Spain*, 30 June 2009, European Court of Human Rights, Nos. 25803/04 & 25817/04; *Vatan v. Russia*, 7 October 2004, European Court of Human Rights, No. 47978/99; *Artyomov v. Russia*, 7 December 2006, European Court of Human Rights, No. 17582/05 (Admissibility).

the detriment of the exercise of erstwhile Convention rights, and for the maintenance of established and political projects to the detriment of the novel and the challenging.

In such “second generation” cases we see an easy linkage being made between spirituality and threats to national security as well as blasphemy amounting to a threat to the constitutional order.²⁷ The appeal to neutrality when coupled with a broad margin of appreciation is incapable of restraining either of these extremes. The post-Brighton Declaration ECHR has been increasingly generous with its margin of appreciation as it seeks to accommodate the contemptuous rejection of its jurisprudence by some states, and an emerging skepticism about its role in the light of its perceived overly- interventionist jurisprudence by others.²⁸

In the light of this, this question is how to relate neutrality to the margin of appreciation in cases where a state is attempting to bolster its secular constitutional order by disproportionately restricting Convention rights in the name of bolstering its constitutional and democratic order. Once it has yielded the margin to one state, it is difficult to reclaim it in relation to others with consistency and integrity.

In the past the Court has dealt in fairly short order with cases concerning both political and religious movements which are thought to give rise to potential political insurgencies, recognising a margin of appreciation appropriate to deal with such threats.²⁹ But can it then address states which choose to embrace and impose disproportionate restrictive measures in order to maintain and project what is a non-neutral, or at least not necessarily liberal, self-identity? The seemingly ever broadening of the margin of appreciation post- Brighton and post-Copenhagen in the name of subsidiarity seems to exacerbate, rather than address, this emergent problem. And the Court, it seems, does little to challenge this: indeed, it seems to embrace it as a means of solving its own crisis of legitimacy: but at what (and at whose) cost?³⁰ It is, in effect, permitting the interplay between neutrality and the margin of appreciation to permit multiple forms of exceptionalism within Council of Europe member states and within the Council itself. This emerging exceptionalism exploits the perennial tension between universality and subsidiarity which has been embedded in the Convention from the very start but it does not attempt to engage with this tension as something of central importance for the

²⁷ See D. Robertson, ‘The Legal Protection of Religious Values in Europe’, in J. Rodriguez (ed.), *Religious Liberty and Secularism* (Vatican City: Libreria Editrice Vaticana, 1998), pp. 175-192.

²⁸ This is reflected in Brighton Declaration 2013 and Draft Copenhagen Declaration 2018.

²⁹ This case mirrors a number of early English cases starting as early as 1676 which viewed blasphemy as high treason, as an attack against the established religion of the land and against the constitutional foundations of the State. See D. Robertson, *supra* note 27, at p. 177.

³⁰ Brighton Declaration 2013.

interpretation and adjudication of Convention rights, which, as Lord Hoffmann once observed, are universal in abstraction, but national in application.³¹

It might be more honest and more effective if the Council of Europe were to embrace a fully-fledged US style doctrine of political exceptionalism **driven by well functioning democracies**, with independent Courts operating in accordance with the rule of law **and capable of protecting** human rights through their existing domestic institutional frameworks.³²

This would itself require the development of comprehensive safeguards and transparent means of determining exceptionalism might be acceptable. But even today, much of the Council of Europe does not look like a family of states capable of exercising political exceptionalism in the adjudication of matters concerning human rights at the domestic level. Indeed, the entire point of an international human rights regime is that it ought to be exercising oversight of such applications – not absenting itself from the field on the grounds that it does not appear to be necessary. And the arbitrary application of the margin of appreciation, unbalanced against the universal norm it is legitimating departure from (for this is what the margin actually does – no matter how else it is described) only strengthens the trend towards “**sovereintism**”. A number of the larger states within the Council of Europe (including Russia, Turkey, France and at times the UK) continue to adopt ever more skeptical perspectives concerning the international legal order and try to shift the focus of human rights away from the protections of individuals from the state, towards the protection of the state from individuals. A number of smaller Council of Europe states have enthusiastically followed suit, though it is not always clear why. It is in precisely these situations that the Court has to act as the ultimate independent arbiter to ensure that states are truly acting in the interests of the rights holders, or else the very values which states purport to be protecting will be undermined. This calls for the development of urgent strategies towards recalibration of the work of the Court already outlined by the Brighton Declaration and the draft Copenhagen Declaration which must involve developing a richer legal understanding and culture of neutrality which engages in an appropriate fashion on various possible levels in which public reason keeps a dynamic balance between universality-

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³¹ Lord Hoffmann, ‘The Universality of Human Rights’, available at <<https://www.judiciary.gov.uk/announcements/speech-by-lord-hoffmann-the-universality-of-human-rights/>> (accessed 20 November 17).

³² A recent empirical study of margin of appreciation and subsidiarity suggested that there is a substantial evidence to suggest that the Court is more inclined to allow greater margin of appreciation for established rather than for emerging democracies which also implies greater confidence in established rather than emerging independent judicial systems. See Mikael Rask Madsen, ‘Rebalancing European Human Rights: Has the Brighton Declaration Engendered a New Deal on Human Rights in Europe?’, *Journal of International Dispute Settlement* (2017), pp. 1-24.

neutrality and the margin of appreciation in the crafting of a comprehensive rights-driven political exceptionalism.

3 Civic Schisms: Neutrality in “First” and “Second Generation” Article 9 Judgments

The approach taken to neutrality in the first generation Article 9 cases was fairly consistent, and gave the state little scope for interference with the exercise of personal or associational religious autonomy under the cover of a broad margin of appreciation. The second generation cases, however, evidence an emerging and perhaps worrying trend that certain forms of state sponsored political and cultural perfectionism, when couched in the language of Article 9, are increasingly likely to benefit from a broader margin of appreciation than similar claims made by applicants. In what follows, the roots of this problem are explored and the question of whether this is linked to unresolved conceptual tensions within the ECtHR jurisprudence is considered.

We have examined some of the features of neutrality and its relationship to margin of appreciation in previous publications and this chapter continues by considering how much has now changed.³³ Our previous text explored, among other things, the then well-developed ECtHR jurisprudence which had established a clear blueprint for the interpretation of the duty of neutrality and impartiality, and which could be summarised along the following lines: the right to freedom of religion or belief as guaranteed under the Convention excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate.³⁴

³³ Malcolm Evans and Peter Petkoff, ‘A Separation of Convenience? The Concept of Neutrality in the Jurisprudence of the European Court of Human Rights’, 36:3 *Religion, State & Society* (2008), pp. 205-223; Malcolm Evans, ‘Neutrality in and after Lautsi v. Italy’, in Jeroen Temperman (ed.), *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom* (Leiden: Martinus Nijhoff Publishers, 2012), pp. 329-354. In the meantime a number of fine contributions have immensely enriched the debate about the scope of state neutrality in religious freedom adjudication. These include: Leni Franken, *Liberal Neutrality and State Support for Religion* (Dordrecht: Springer International Publishing, 2016), pp. 75-89; Jordi Ferrer Beltrán, José Juan Moreso, and Diego M. Papayannis, *Neutrality and Theory of Law* (Dordrecht: Springer, 2013); Julie Ringelheim, ‘State Religious Neutrality as a Common European Standard? Reappraising the European Court of Human Rights Approach’, 6:1 *Oxford Journal of Law and Religion* (2017), pp. 1-24. Another earlier text worth mentioning is Wojciech Sadurski, *Moral Pluralism and Legal Neutrality* (Dordrecht: Springer, 1990).

³⁴ *Hasan and Chaush v. Bulgaria*, 26 October 2000, European Court of Human Rights, No. 30985/96, para. 78; *Metropolitan Church of Bessarabia and Others v. Moldova*; and *Serif v. Greece*, 14 December 1999, European Court of Human Rights, No. 38178/97.

The cases which have shaped the ECtHR jurisprudence in this area include a number of landmark cases dealing with contested leadership of religious associations. These cases affirm that the role of state authorities in such circumstances is to act as neutral arbiters, who are not to remove the causes of tension within religious associations by eliminating pluralism, but are to ensure that the competing groups tolerate each other.³⁵

Has this approach been affected by moves towards “sovereignism” in Article 9 jurisprudence, as reflected by the recommendations calling for greater emphasis to be placed on subsidiarity, the margin of appreciation and for the creation of dialogical spaces for the ECtHR and national courts?³⁶ Given the absence of a broad consensus concerning the scope of, and approaches to, the freedom of religion or belief this has always been a potential challenge for a consistent and coherent Article 9 jurisprudence. Historically, such tendencies have been tempered by the assumption that the democracy-driven infrastructure of the Convention would not allow wide-spread forms of “human rights exceptionalism” to develop. Indeed, it was widely assumed that any such tendencies would disappear after the reconsolidation of the Council of Europe after the fall of the Berlin Wall, as all new member-states recalibrated their legal systems to fully accord with the Convention. That this might not in fact be happening was flagged as long ago as 2002 in a Report of the Parliamentary Assembly of the Council of Europe on ‘Religion and Change in Central and Eastern Europe’ which observed that ‘the need to guarantee religious rights and freedoms has brought the central and eastern European countries, which had no previous experience of democracy, face to face with the highly delicate problem of deciding just how far religions freedom should be allowed to go in a democratic society’.³⁷

Since our last consideration of this, there has been a marked turn towards a state driven perfectionism, in which the margin of appreciation is used to permit facilitating the emergence of a concept of neutrality which is driven by principles of subsidiarity, rather than by other

³⁵ *Hasan and Chaush v. Bulgaria*; *Metropolitan Church of Bessarabia*; *Supreme Holy Council of the Muslim Community v. Bulgaria*, 16 December 2004, European Court of Human Rights, No. 39023/97; *Sindicatul “Păstorul cel Bun” v. Romania*, 9 July 2013, European Court of Human Rights (GC), No. 2330/09; *Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and Others v. Bulgaria*; *Orthodox Ohrid Archdiocese (Greek-Orthodox Ohrid Archdiocese of the Peć Patriarchy) v. FYROM*, 16 November 2017, European Court of Human Rights, No. 3532/07; *Biserica Adevarata Ortodoxa din Moldova and Others v. Moldova*, 27 February 2007, European Court of Human Rights, No. 952/03; *Cha'are Shalom Ve Tsedek v. France*, 27 June 2000, European Court of Human Rights (GC), No. 27417/95; *Comingersoll S.A. v. Portugal*, 6 April 2000, European Court of Human Rights (GC), No. 35382/97; *Maestri v. Italy*, 17 February 2004, European Court of Human Rights (GC), No. 39748/98; *Mirolubovs and Others v. Latvia*, 15 September 2009, European Court of Human Rights, No. 798/05; *Viasu v. Romania*, 9 December 2008, European Court of Human Rights, No. 75951/01.

³⁶ See the text of the Brighton Declaration.

³⁷ Parliamentary Assembly Committee on Culture, Science and Education, Report of 27 March 2002, Doc 9399, para. 73.

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more universally-oriented hermeneutic principles such as proportionality and reasonable accommodation. The result is that neutrality has become to be seen more in terms of the neutrality of the Convention to the approaches taken by States to resolve tensions, rather than a call for neutrality in how those tensions are to be addressed by States themselves. Moreover, the most recent cases (which are also often driven by concerns about the ECtHR’s caseload and the need to rethink relationships with member states’ courts)³⁸ the Court seems to have accepted the legitimacy of applying the neutrality test in this fashion not so much in relation to questions concerning religious autonomy and religious schisms but in relation to what could be described as perceived *civic schisms* – that is, clashes between religious and civic allegiances, an obvious example being the *S.A.S.* case.³⁹ In such contexts the results of “neutrality” are – predictably – very different. Applying such an understanding of the principle of neutrality to such *civic schisms* almost inevitably means that the Article 9 rights of individual applicants will be defeated. They will be trumped by acceptance by the Court of the State’s assertion of its policy preference under the guise of the margin of appreciation, even though it was the assertion of that policy preference which gave rise to the application in the first place. The Court, in effect, buckles before the interests of the state, potentially to the detriment of any number of belief or faith based conscientious objections.⁴⁰

4 Universality, Subsidiarity and Thin and Thick concepts of Neutrality

One of the central features of the *Kokkinakis v. Greece* case which often remains hidden are the underlying tensions not only between universality and subsidiarity but also between liberal internationalism and constitutional politics, between neutrality and accommodation, between right and good, between neutrality and political perfectionism. As has already been indicated, many of these tensions are best identified in the separate and dissenting opinions.

³⁸ See Brighton Declaration 2013, section B; and Draft Copenhagen Declaration 2018

³⁹ *S.A.S. v. France*; Similar features also emerge via different routes in *Konrad v. Germany*, 11 September 2006, European Court of Human Rights, No. 35504/03; *Osmanoğlu and Kocabaş v. Switzerland*, 10 January 2017, European Court of Human Rights, No. 29086/12, para. 105 and Joint Partly Dissenting Opinion of Judges Nussberger and Jäderblom, para. 14; cf. *Supreme Holy Council of the Muslim Community*, Dissenting Opinions in *Kokkinakis v. Greece*; *Dahlab v. Switzerland*; *Dogru v. France*, 4 December 2008, European Court of Human Rights, No. 27058/05; *Ebrahimian v. France*, 26 November 2015, European Court of Human Rights, No. 64846/11. *Leyla Şahin v. Turkey*, 10 November 2005, European Court of Human Rights, No. 44774/98; *Folgero and others v. Norway*, 29 June 2007, European Court of Human Rights, No. (15472/02).

⁴⁰ Though not couched in quite these terms, this would appear to be a good summary of the result of the decisions by the Court in cases such as *Lautsi v. Italy* and *Eweida v. UK*.

Some of the dissenting opinions in *Kokkinakis* clearly view proselytism as an aggravated threat and support the rationale of the Hellenic Constitution and the Hellenic Criminal Code for penalizing such conduct. As in *Whitehouse v. Lemon* and *Lemon v. UK* in relation to blasphemy, the argument is that proselytism undermines the constitutionally protected religion and so such activities may be punishable by law.⁴¹ The similarity is not accidental. Sherrard has reflected on the similarities between the constitutional status of the Church of Greece in the Hellenic Constitution and that of the established Church of England and how its constitutional status has more in common with the reforms of Henry VIII than with its Byzantine Heritage, resulting in its being described as a ‘quasi-established church.’⁴²

The tensions found in the dissenting judgments foreshadow the subsequent challenges faced by the Court in advancing state neutrality as a hermeneutical framework within which to consider issues arising from the existence of established or quasi-established religions in a number of Council of Europe member states. The complexities of secular and religious constitutional architectures within Council of Europe States is well known and, within the context of the Convention, was reflected in the *travaux préparatoire* and in the reservations made by a number of member states.⁴³ In the *Kokkinakis* case it is reflected in the joint dissenting opinion of Judges Foighel and Loizou, the communitarian overtones of which implied that there was a state duty to maintain respect for established and quasi-established churches on the basis of this reflecting a norm of civilized societies.⁴⁴ Such an approach suggests that maintaining the *status quo* is something of a *conditio sine qua non* for compliance with a state’s international obligations concerning the freedom of religion or belief.⁴⁵ Just as the margin of appreciation justifies measures aimed at preserving the societal *status quo*, so

⁴¹ *Gay News Ltd. and Lemon v. United Kingdom*, 7 May 1982, European Commission of Human Rights, No. 8710/79.

⁴² The 1833 Ecclesiastical Constitution of the newly established autocephalous Church of Greece was largely the work of the Regent, Georg von Maurer, a German Protestant and Teoklits Pharmakidis who was heavily influenced by Protestant theology and by the works of Adamantos Korais, a commentator of Aristotle and a great advocate for the emancipation of national churches. ‘The Henrician changes, which formed the basis of the English Reformation ... substituted the idea that the State is the dominant partner in the alliance. The Greek doctrine ... of the ascendancy of the State over the Church established by the Church settlement of 1833, did much the same: it reduced the Church in Greece to a department of the State and its officers to little more than functionaries in the governmental bureaucracy.’ Philip Sherrard. *The Greek East and the Latin West: A Study in the Christian Tradition* (Oxford: Oxford University Press, 1959), pp. 197-198.

⁴³ See Carolyn Evans. *Freedom of religion under the European Convention on Human Rights* (Oxford: Oxford University Press, 2001).

⁴⁴ *Kokkinakis v. Greece*, Joint Dissenting Opinion of Mr Foighel and Mr Loizou.

⁴⁵ See *Lautsi v. Italy*; *S.A.S. v. France*; *Magyar Keresztény Mennonita Egyház and others v. Hungary*. See also *Leela Fordekreis E.V. and others v. Germany*; *Savez Crkava "RljecZcvota" and others v. Croatia*; *Atujer Fernandez and Caballero Garcia v. Spain*; *The Church of Jesus Christ of Latter-Day Saints v. United Kingdom*; *Cumhuriyeti Eğitim ve Kültür Merkezi Vakfı v. Turkey*; and *Asatruarfélagid v. Iceland*.

would it also justify upholding the constitutionally entrenched privileges of the majority faith. This would amount to a rather controversial application of a doctrine of neutrality.

Clearly, the dissenting judges did not accept the admittedly controversial distinction between proper and improper proselytism which was drawn on in the judgment and taken overall their approach highlights concerns about the protection of international human rights in democratic states with particularist constitutions. Recognising a broad margin of appreciation not only highlights the lack of a pan-European consensus on the scope of freedom of religion or belief but it also runs the risk of creating of possible blindspots concerning the practices of constitutionally entrenched beliefs. Whilst this lack of consensus does indeed merit a more contextual approach to the freedom of religion or belief which can take account of diverse constitutional traditions it must also be acknowledged that there are dangers in allowing cosmopolitan liberal internationalism to be replaced by a sovereignty-driven human rights skepticism to the claims of the constitutionally unprivileged.

5 Neutrality, the Court and the Constitution

Strasbourg jurisprudence provides a treaty-based means for human rights dispute resolution when domestic remedies have been exhausted. It is not, however, a form of judicial review which can re-align the tectonic plates of a Constitution. And yet in a colloquial fashion both the Convention and Court's jurisprudence are often perceived as being engaged in some form of "*constitutional calibration*". Instead of being seen as individual decisions which contribute to the evolution of the Convention as a whole, Court judgments tend to be seen as a means of challenging and changing constitutional, quasi-constitutional questions: that is, about how contentious issues are being addressed within the state in question.⁴⁶ This is reinforced by the increased use of Pilot Judgments which are intended to address questions of systemic concern.⁴⁷

⁴⁶ 'Conceived as regional international organs with limited jurisdiction and even more limited powers, they have gradually acquired the status and authority of constitutional tribunals.' T. Buergenthal, 'Book Review', 81 *American Journal of International Law* (1987), at 280; 'It is my firm conviction that if the Court continues in the course that it has followed since its early days it will consolidate more and more its emergent role as a European constitutional court.' R. Ryssdal, 'The Future of the European Court of Human Rights' (lecture King's College, London, Centre of European Law, 22 March 1990).

⁴⁷ Wojciech Sadurski, 'Partnering with Strasbourg: Constitutionalisation of the European Court of Human Rights, the accession of Central and East European states to the Council of Europe, and the idea of Pilot Judgments', 9:3 *Human Rights Law Review* (2009), pp. 397-453; Markus Fynys, 'Expanding Competences by Judicial Lawmaking: The Pilot Judgment Procedure of the European Court of Human Rights', 12 *German Law*

It is indeed the case that a great many Article 9 cases have been seen as a means of bringing about something of a constitutional revolution as regards approaches to the freedom of religion or belief within the Council in Europe after the fall of the Berlin Wall. As we have seen, *Kokkinakis* itself flagged emerging tensions between constitutional religious establishment and human rights protection. And whilst the “first generation” Article 9 cases often addressed particular disputes between religious associations and religious associations and the state,⁴⁸ there was also a clear sense that in these cases the Court was setting out its vision of the type of social, political and legal environment in which such rights might thrive. Although, arguably, this is something the Court always does, what was distinctive about these cases concerning the emerging democracies in the nineties was the way in which the Court’s jurisprudence acted as a form of *soft power* aimed at the development of legal cultures based on democracy, rule of law and human rights. And looking at that jurisprudence today, there seems to be an implication that the Court thought there was greater mileage than in exercising such soft power in emerging democracies than it does in the older democracies today.⁴⁹

Irrespective of whether this implication is justified, it certainly seems to be the case that States feel less inclined to comply with unwelcome Court judgments than hitherto. It is difficult to reconcile this with the idea that the Court is indeed something of a “Constitutional Court” for the member states of the Council of Europe. The Brighton and Draft Copenhagen Declarations offer a way out by seeing the Court as inhabiting a multiplicity of dialogical spaces, and engaging in enlightened interaction with national courts in order to inform reciprocal jurisprudential perspectives. Nevertheless, they identify the national courts as the primary drivers of change, albeit of change to be inspired by Strasbourg as far as their human

Journal (2011), p. 1231; Philip Leach et al., *Responding to Systemic Human Rights Violations: An Analysis of Pilot Judgments of the European Court of Human Rights and Their Impact at National Level* (Antwerp: Intersentia, 2010); Laurence R. Helfer, ‘Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime’, 19:1 *European Journal of International Law* (2008), pp. 125-159; Helen Keller, Andreas Fischer, and Daniela Kühne, ‘Debating the Future of the European Court of Human Rights after the Interlaken Conference: Two Innovative Proposals’, 21:4 *European Journal of International Law* (2010), pp. 1025-1048; Luzius Wildhaber, ‘Pilot Judgments in Cases of Structural or Systemic Problems on the National Level’, *The European Court of Human Rights Overwhelmed by Applications: Problems and Possible Solutions* (Berlin/Heidelberg: Springer, 2009), pp. 69-75; Steven Greer and Luzius Wildhaber, ‘Revisiting the Debate about ‘Constitutionalising’ the European Court of Human Rights’, 12:4 *Human Rights Law Review* (2012), pp. 655-687; Dia Anagnostou, *European Court of Human Rights: Implementing Strasbourg’s Judgments on Domestic Policy* (Edinburgh: Edinburgh University Press, 2013).

⁴⁸ *Holy Synod Of The Bulgarian Orthodox Church (Metropolitan Inokentiy) and Others v. Bulgaria*; *Supreme Holy Council of the Muslim Community v. Bulgaria*; *Metropolitan Church of Bessarabia v. Moldova*; *Hasan and Chaush v. Bulgaria*; *Dogan v. Turkey*, 26 April 2016, European Court of Human Rights, No. 62649/10.

⁴⁹ Aeyal M. Gross, ‘Reinforcing the New Democracies: The European Convention on Human Rights and the Former Communist Countries – A Study of the Case Law’, 7 *European Journal of International Law* (1996), p. 89; Robert Harmsen, ‘The European Convention on Human Rights after Enlargement’, 5:4 *The International Journal of Human Rights* (2001), pp. 18-43.

rights jurisprudence is concerned.⁵⁰ It is far from clear how such dialogical spaces will emerge and work in practice but there are certainly elements in the Declarations which resemble the relationship between the national courts and the Court of Justice of the European Union – including preliminary referrals and even hints of direct and indirect effect as ways of reflecting subsidiarity-driven approaches at a national level.⁵¹

Kokkinakis reminds us of the tension between rights and constitutional politics but also highlights that the ECtHR's jurisdiction does not directly permit the scrutiny of constitutions but is directed at protecting human rights beyond national remedies. But we seem to have arrived at a point where, in order to respond to the threat of constitutional overreach by the Court, the core jurisdictional competence of the Court is being progressively undermined through its being devolved back to the place from whence it came.

6 Preventative Approaches the Relationship between Universality and Subsidiarity

Approaching the interplay between neutrality, universality and margin of appreciation through the lens of prevention may offer a better a more robust approach to the tension between international human rights and their national implementation through domestic courts than doing so through the lens of subsidiarity.⁵² Preventive approaches draw the rights-holders at risk into the discursive matrix, to both identify the nature of the risk and the appropriate

⁵⁰ Brighton Declaration 2013, Section B; Draft Copenhagen Declaration 2018.

⁵¹ Lucia Serena Rossi, 'Same Legal Value as the Treaties: Rank, Primacy, and Direct Effects of the EU Charter of Fundamental Rights', 18 *German Law Journal* (2017), p. 771; Ester Herlin-Karnell, 'The Function of Subsidiarity in Area of Freedom, Security and Justice Law: Some Preliminary Thoughts', 1 *Europarättslig Tidskrift* (2017); Carlo Petrucci, 'Subsidiarity in Directive 2014/104 EU on Damages Actions for Breach of EU Competition Law', 23:2 *European Public Law* (2017), pp. 395-421; Paolo G. Carozza, 'The Problematic Applicability of Subsidiarity to International Law and Institutions', 61:1 *American Journal of Jurisprudence* (2016), pp. 51-67; Janneke Gerards and Joseph Fleuren, *Implementation of the European Convention on Human Rights and of the Judgments of the ECtHR in National Case-Law: A Comparative Analysis* (Antwerpen: Intersentia, 2014); Lourenço Vilhena de Freitas, 'The Judicial Activism of the European Court of Justice', in L.P. Coutinho et al. (eds.), *Judicial Activism* (Switzerland: Springer International Publishing, 2015), pp. 173-180; Takis Tridimas, *The General Principles of EU Law* (USA: Oxford University Press, 1999); Armin Von Bogdandy, 'Pluralism, Direct Effect, and the Ultimate Say: On the Relationship between International and Domestic Constitutional Law', 6:3-4 *International Journal of Constitutional Law* (2008), pp. 397-413; Sophie Robin-Olivier, 'The Evolution of Direct Effect in the EU: Stocktaking, Problems, Projections', 12:1 *International Journal of Constitutional Law* (2014), pp. 165-188; André Nollkaemper, 'The Duality of Direct Effect of International Law', 25:1 *European Journal of International Law* (2014), pp. 105-125.

⁵² Malcolm Evans, 'Challenging Conventional Assumptions: The Case for a Preventive Approach to the Protection of the Freedom of Religion or Belief', in Malcolm Evans, Peter Petkoff, and Julian Rivers (eds.), *The Changing Nature of Religious Rights Under International Law* (Oxford: Oxford University Press, 2015), pp. 25-50.

mitigating of remedial action. Taking a preventive approach would mean that the margin of appreciation would not, as in the current “second generation” cases, mean that domestic courts could just decide cases on the basis of their existing social and constitutional practices. It would not be biased in favour of the current “constitutional architecture” or the *status quo*. Rather, the neutrality of the state would be reflected in its focusing on securing the enjoyment of the right by the individuals concerned, with challenges to existing systems, structure, legislation or constitutions being entirely relevant – but only to the extent this was necessary for the effective enjoyment of the right itself and not as an abstract question of compatibility.

An approach centered around prevention also mirrors concepts such as multcentred political perfectionism,⁵³ which in this context would mean that the liberal state could not *itself* decide which social practices are of value, whether they need state support and what forms such state support take, but must do so in conjunction with those who are affected by such decisions. Prevention-driven multi-centered perfectionism may reset relationships between international organisations and their courts, national constitutional courts (who can be part of the conversation rather than as an alternative fora to ECtHR)⁵⁴ and ultimately “the minimal state” represented by the smallest group capable of effectively exercising the relevant decision-making role.⁵⁵ A civil society needs the state to structure its functioning, but the state in turn requires a strong civil society to counterbalance and contain its enormous power. There is no deep distinction between the state and civil society in so far as individuals may be vulnerable to their impact, though the magnitude of that impact may vary greatly. Indeed, each needs the other when in pursuit of perfectionist goals.⁵⁶

Prevention driven approaches are more likely to develop actionable policy points and could also be of use to the Court in determining whether to extend a margin of appreciation for deliberation in cases where inclusive political reasoning reflects an inclusive perfectionism – for example, by involving all actors. This would be that subsidiarity as reflected by a margin of

⁵³ Joseph Chan, ‘Legitimacy, Unanimity, and Perfectionism’, 29:1 *Philosophy & Public Affairs* (2000), pp. 5-42; C.L. Frank, *Spiritual Foundations Of Society: An Introduction To Social Philosophy*. Frank argues that societies operate at these levels – universality which represents forms of universal shared humanity, sociality, which represents conventional social structures and *sobornost* (solidarity, counsel) which represents the ‘I-Thou’ social level of deep dialogical social penetration of the Other. These three levels are interdependent and can only operate fully if this interdependence works.

⁵⁴ A trend which has certainly been emerging (perhaps for different reasons) through the introduction of human rights adjudication within the competences of national Constitutional Courts in countries like Turkey, Hungary and Russia. The same trend via a very different route and certainly with very different objectives emerges via the Brighton and the Copenhagen Declarations.

⁵⁵ Robert Nozick, *Anarchy, State and Utopia* (Oxford: Oxford University Press, 1974), pp. 26-27. This also emerges as one of the overarching agendas of both the Brighton and the Copenhagen Declarations.

⁵⁶ Chan, *supra* note 53, pp. 30-31.

appreciation could only be justified if it reaches down to the minimal level necessary for inclusive deliberation – rather than being simply a privilege of the state.

Such inclusive state perfectionism greatly increases the opportunities for most, if not all, major reasonable conceptions of the good in relation to the point at issue having a fair chance to be heard and reflected. While this is still a state perfectionism, it is civil society, and not the state as such that decides which options are (or are not) of value. Considered in this light, a broad margin of appreciation and state exceptionalism would only be justifiable if they provided safe dialogical spaces in which to develop comprehensive human rights cultures. Neutrality then serves to safeguard these dialogical spaces (and their outcomes) rather than act as a vehicle for the assertion of dominant social normative paradigms.⁵⁷ Neutrality ceases to be an alien intrusion into a settled social space, but a descriptor of the process through which the outcome of dialogical process is determined. It is a means of injecting the universal into the local. It informs the discussion concerning the application of the margin of appreciation, which as a consequence ceases to be the abandonment of the universal for the local. In consequence, the focus will not be so much on balancing between the liberal international order and the inherently communitarian constitutional politics but on making human rights part of the articulation of public reason, rather than being the only form of public reason or a rival to alternative forms of public reasoning.

In some ways, the Brighton and Copenhagen Declarations both point in that direction, but given the breadth of the margin of appreciation currently found in the second generation case-law, it is essential that any further extension or expansion is premised on the application of the principle of neutrality – as outlined above – as a means of ensuring an appropriate balance between universality and subsidiarity: the failure to do so may result in a further expansion of “sovereignism” which may further erode the protections offered by Article 9.

The complex interdependence between universality and subsidiarity is embedded in the very grammar of the Convention – on the one hand it is a living document which thrives and depends on liberal internationalism, on the other it is a document which protects and highlights a number of conservative values.⁵⁸ As the jurisprudence concerning Article 9 demonstrates, it can move in either direction, or, indeed, both directions simultaneously. This dual aspect has

⁵⁷ Criteria for this may range from those outlined in Section D of the Brighton Declaration, to similar criteria articulated via a different route by John Tasioulas, ‘Human Rights, Legitimacy, and International Law’, 58:1 *American Journal of Jurisprudence* (2013), p. 23.

⁵⁸ The late Lord Bingham highlighted the British conservative values built into the grammar of the European Convention through the remarkable contribution by Conservative lawyers and politicians such as Sir David Maxwell-Fyfe.

been long overlooked and the Convention has often been presented as a beacon of liberalism where liberal choices trump conservative ones. A quick glance through the *travaux préparatoires* indicates that this is certainly not the case – the Convention was drafted by conservative thinkers who sought to maintain the political status quo in a fragile western Europe by ensuring that a balance be maintained between the progressive and the reactionary, between liberal and conservative socio-political thinking. What may now be considered illiberal concepts by some – the protection of established religion, the right to family life and constitutional secularism (to name a few) – still reflect powerful strands of political thinking within the Council of Europe space and maintaining those delicate balances remains as relevant as ever for the project of ensuring political stability and liberal democracy. The Convention is not a “liberal” project *per se*. Indeed, it is increasingly clear that many in Europe have come to take for granted that the Convention is a tool of liberal transformation and in doing so have completely misjudged the resilience of political authoritarianism in its various forms (from both the political left and right). When it comes to balancing strong sovereignty driven and strong rights driven claims, it may well be that prevention driven approaches may provide a more useful grammar, providing the dialogical spaces where these more contested discourses could be articulated without being reduced to adjuncts of other political agendas. It is practical reflection of the views of those legal and political theorists who already argue that international peace and justice can only be advanced through well-governed societies.⁵⁹ The difference is that it seeks to avoid the temptation of telling the well-governed society what to do all the time. Too often human rights approaches to good governance can be boiled down to meaning “governance by us”. It is not difficult to see why this prompts a reaction.

The foundation of a humane global order is the stability provided by states that take care of their own people and respect the sovereignty of other states which do so. The complex and not necessarily uncontroversial appeal to strong sovereign states as guarantors of the international legal order is becoming rapidly a mainstream position of political theories endorsed by liberal, conservative and semi-authoritarian states. The complexity and the caveats of such an endorsement could be seen through the works of liberal thinkers like Michael Ignatieff who as a political theorist offers a strong endorsement to state sovereignty and as President of the Central European University in Budapest is presently fighting for the survival of his own institution which is challenged by a strong sovereignty-driven Hungarian

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⁵⁹ John Rawls, *The Law of Peoples: With the Idea of Public Reason Revisited* (Cambridge, Mass.: Harvard University Press, 2001), pp. 6-7.

government: 'If we want human rights to be anchored in the world, we cannot want their enforcement to depend on international institutions and NGOs. We want them anchored in the actual practice of sovereign states.'⁶⁰

The proposition that strong nation-states are crucial for the development of rights-driven legal cultures is not merely an easily recognizable communitarian platform. Taken a stage further this proposition does not have to stop at the recognition of the need for strong sovereign states. Quite the opposite, a multi-centered political perfectionism can help ensure that the emphasis on sovereignty is not simply an authoritarianism in disguise.

Tasioulas argues that such trends towards "sovereignism" projected through the lens of political exceptionalism,⁶¹ providing such exceptionalism respects commitments to democracy and the rule of law, may strengthen rather than weaken the interdependence between universality and subsidiarity. Such a project departs from communitarian proposals which simply accept that there are bound to be injustices in a sovereignty driven political project since some countries will accord more respect for human rights than others. An exceptionalism-driven sovereignty has to be rule of law and human rights compliant in order to be justifiable and the only way such compliance may be gauged is through its commitment and to multi-centered state perfectionism. Without well-governed sovereign nations – strong national communities – the global system will decay into far worse disorder, which is why there has to be a degree of interdependence between universality and subsidiarity. Strong nation-states that are solicitous of the well-being of their citizens and respectful of the sovereignty of other states may advance human dignity and prosperity in the world even if that means there is a degree of political exceptionalism. The key is that such exceptionalism is not at the cost of their international commitments: but this also means that those international commitments must be understood in a way which is compatible with such exceptionalism. Prevention-driven contextual application of generally applicable international commitments, perhaps paradoxically, may strengthen the international system, not weaken it.⁶²

⁶⁰ Michael Ignatieff, 'The Return of Sovereignty', 243 *The New Republic* (2012).

⁶¹ See John Tasioulas, 'Human Rights, Legitimacy, and International Law', 58:1 *American Journal of Jurisprudence* (2013), pp. 1-25.

⁶² Tasioulas, *ibid.*, proposes the following metrics for the justification of exercise of exceptionalism – in order for a state exceptionalism to be justified human rights-related reasons that apply to a state are not only the reasons why it has to adhere to human rights morality itself, but also its reasons for promoting such adherence by other states; both bodies of international human rights law and domestic rights jurisprudence may enjoy legitimacy with regard to a given state and finally the justification of any state exceptionalism is projected by the state's extraterritorial record in addition to its domestic record.

This in turn resembles some of the good practices for Convention compliance at a national level in Brighton

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7 Conclusions

The 25th anniversary of *Kokkinakis v. Greece* reminds us of the inherent tensions between a universal vision and a national context. In the early years of its post-*Kokkinakis* jurisprudence, the Court took a robustly universal approach, reflected in its policy preference for the state being the “neutral and impartial” organizer of religious life and calling it to account when it acted otherwise. Over time, the logic of this approach ran into the reality of the variegated nature of religious life within the Council of Europe, and then into the problems not of religious organization but of the relationships between religions and society, then the religious individual and society. At this point, neutrality was a bankrupt concept: it can inform how the state is to behave, but it cannot inform how society is to be without making a mockery of itself. When states confronted questions in relation to which they cannot be substantially “neutral”, or where neutrality flies in the face of constitutional and/or societal norms, the response of the Court has been to switch towards the margin of appreciation, increasingly rationalized as an exercise in subsidiarity. This, however, has resulted in the state being not only the source of potential violations but also the arbiter of their necessity. This has led to a series of outcomes in which the rights of individuals have been restricted on the basis of the status quo which was being challenged – or, worse, on the basis of emerging reactionary trends.

Given inherent tension in the Convention between social and political liberalism and conservatism, and the overarching tension between universality and subsidiarity, there is little obvious attraction in either a universal approach of state neutrality or the margin of appreciation. And a margin of appreciation to decide when not to act neutrally seems to be the worst possible outcome, and is roughly what we currently have.

Against this background, this chapter has argued that neutrality can in fact play a valuable role in determining when it is appropriate for a state to be able to draw on the margin of appreciation in the context of Article 9. This is when the approach of the state to the application of that margin of appreciation is reflective of inclusive debate grounded in public reason aimed at the prevention of the alleged wrong – rather than on the unchallenged

Declaration 2012, Section 9 which in turn may justify wider margin of appreciation and subsidiarity-driven approaches. These include: Independent National Human Rights Institutions (9)(c)(i)); Scrutiny of primary legislation by national parliaments (9)(c)(ii)); New domestic legal remedies (9)(c)(iii)); National courts to take account of Strasbourg jurisprudence (9)(c)(iv)); and Information to potential applicants on limits of ECHR protection (9)(c)(vii)).

reaffirmation of the pre-existing status quo: a neutral application of the margin of appreciation by the state to the facts of the case. No more – but no less.

