Is the Whole Point of Human Rights Their Universal Character? *A, B & C v Ireland* and *SAS v France*

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ABSTRACT

The United Kingdom Supreme Court's 2014 decision in Cheshire West concerned the question of whether living arrangements for certain mentally incapacitated persons amounted to a deprivation of liberty. In finding that the test for whether someone has been deprived of their liberty is the same for a disabled person as it is for everyone else, Lady Hale reminded the Court that human rights are for everyone, because '[t]he whole point of human rights is their universal character'.[1] But is there such a thing as universal human rights? This paper considers the philosophical and institutional complications faced by a universal approach to human rights. It argues that these philosophical and institutional difficulties are clearly played out in two recent decisions of the European Court of Human Rights: A, B & C v Ireland,[2] concerning the Republic of Ireland's restrictions on abortion, and SAS v France,[3] concerning France's ban on face-coverings. It concludes that the Court must not stray too far from a universal approach to human rights, lest it blot its record of success in calling out violations of rights and protecting individuals from the illiberal excesses of government.

INTRODUCTION

In the United Kingdom ('UK') Supreme Court's *Cheshire West* judgment on whether living arrangements for mentally incapacitated persons amounted to a deprivation of liberty, Lady Hale reminded the Court that '[t]he whole point of

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1 *Cheshire West and Chester Council v P and another* [2014] AC 896 (SC) [36].

2 [2010] ECHR 2032.

3 [2014] ECHR 695.

human rights is their universal character'.[4] '[H]uman rights are for everyone', Lady Hale observed, because they are 'premised on the inherent dignity of all human beings'.[5] These statements demonstrate the rhetorical power of rights as a tool to cut through complexity and bureaucratic obscurantism. As Conor Gearty has observed, legal analysis that starts from the fact of a right may achieve better outcomes for individuals than when the Court's primary focus is the conduct of the defendants.[6] However, Lady Hale's statements regarding the universal character of human rights may belie the difficulty of applying enumerated rights to individual cases. Any such difficulty is compounded by applying these rights across a fractious community of 820 million citizens in 47 countries. Nonetheless, this is the ambitious aim of the European Court of Human Rights ('Court').[7] This paper begins by considering both the philosophical and institutional complications faced by a universal approach to human rights. It then suggests that the doctrine of States' margin of appreciation lays bare the Court's difficulty in giving universal meaning to the rights contained in the European Convention of Human Rights ('the Convention'). Finally, examining the Court's decisions in *A, B & C v Ireland*[8] and *SAS v France*,[9] the paper suggests that the Court has, at times, demonstrated an excessive deference to the sensibilities of States, which is not justifiable on either philosophical grounds (relating to the nature of rights), or on institutional grounds (relating to the proper role of the Court). Demonstrating a punctilious concern for States' protection of local morals, traditions, and practices, these decisions depart from the Court's usual proportionality analysis in ways that render the reasoning process perfunctory or incoherent. The paper suggests that these cases represent unjustifiable departures from a universal approach to human rights that prevent the Court from fulfilling its original mandate of protecting individuals from the illiberal excesses of government.

[4] *Cheshire West* (n 1) [1].
[5] ibid [36].
[6] Conor Gearty, *On Fantasy Island, Britain Strasbourg and Human Rights* (OUP 2016) 136.
[7] Dimitrios Tsarapatsanis, 'The Margin of Appreciation Doctrine: A Low-Level Institutional View' (2015) 35 Legal Studies 675, 683.
[8] *A, B & C v Ireland* (n 2).
[9] *SAS v France* (n 3).

I. PHILOSOPHICAL COMPLICATIONS TO A UNIVERSAL APPROACH TO HUMAN RIGHTS

In *SAS v France*, dissenting Judges Nussberger and Jäderblom castigate the majority's acceptance of France's argument that its ban on face coverings pursued the legitimate aim of ensuring people could 'live together' as an aspect of guaranteeing the rights and freedoms of others.[10] In doing so, the dissenting judges suggest that the majority conclusion 'sacrifices concrete individual rights guaranteed by the Convention to abstract principles.'[11] On its face, this statement appears odd. What is a right, after all, but an abstract principle? This statement is a good starting point for considering some of the philosophical complications inherent in the rights enumerated under the Convention.

What Rights-Claims Should Be Recognised?

As seen in the dissenting judgment in *SAS v France*, one complication to a universal approach to human rights lies in identifying which rights-claims to recognise at all. George Letsas demonstrates this difficulty in his argument regarding the difference between *prima facie* and *pro tanto* rights.[12] Letsas criticises the Chamber's finding in *Hatton v United Kingdom*[13] (later reversed by the Grand Chamber) that Heathrow Airport's night flight-scheme amounted to a violation of the applicant's right to family life under Article 8 of the Convention.[14] 'There is no such thing', Letsas writes, 'as a pro tanto right to sleep well at night, free from the noise interference that it was reasonable to expect will affect properties near airports.'[15] Similarly, in *IA v Turkey*,[16] Letsas suggests that the Court reached a false diagnosis because it balanced a real, *pro tanto* right (to publish on religious matters) against a pseudo-right (not to be offended by blasphemous publications).[17] However, in penumbral cases, where the Court is considering whether or not to extend Convention protections to a novel claim, the utility of

[10] ibid [5] (Nussberger and Jäderblom JJ).
[11] ibid [2] (Nussberger and Jäderblom JJ).
[12] George Letsas, 'The Scope and Balancing of Rights' in Eva Brems and Janneke Gerards (eds), *Shaping Rights in the ECHR* (CUP 2014) 48.
[13] [2001] ECHR 565.
[14] Letsas (n 12) 57.
[15] ibid.
[16] [2005] ECHR 590.
[17] Letsas (n 12) 57-58.

Letsas' schema is questionable. What appears to be missing is clear guidance on how to distinguish a 'real' convention right from a 'pseudo' right.

How to Balance Competing Rights?

A second philosophical complication to a universal approach to human rights lies in the Court's need to balance Convention rights that routinely come into conflict, such as the rights to private life under Article 8 and freedom of expression under Article 10. The difficulty experienced by the Court in taking a consistent approach to such rights-balancing cases is seen in the Court's divergent (although simultaneous) decisions in *Von Hannover v Germany* (No 2)[18] and *Axel Springer AG v Germany*.[19] In *Von Hannover*, in determining the breadth of the margin of appreciation to be extended in relation to the refusal of German domestic courts to injunct photographs of the Princess of Monaco, the Court reasoned that the outcome of the application should not, in theory, vary according to whether it was lodged under Article 8 or 10, because 'as a matter of principle these rights deserve equal respect.'[20] Therefore, Germany's margin of appreciation should, in theory, be the same in relation to both articles. As the German courts had undertaken the requisite balancing process between freedom of expression and privacy by applying criteria identified by the Court for balancing those rights, the principle of subsidiarity meant that the domestic court's decision should stand.[21] However, on the same day as the *Von Hannover* decision, in *Axel Springer* the Court handed down a decision that appears to depart from the discipline imposed on itself in *Von Hannover*, finding that the media company's right to freedom of expression had been breached by an injunction preventing publication of a story about an actor's conviction for drug possession. The majority judges reached this conclusion without finding fault with the balancing process the domestic court had engaged in. *Axel Springer* shows that when a public figure is involved, judges will often rank the demands of freedom of expression higher than those of privacy, showing the artificiality of any assertion that Convention rights must carry equal weight. The Court's divergent approaches to balancing rights in these simultaneously decided cases shows how unpredictable the doctrine of margin of appreciation and its flip-side, European supervision, can be in practice.

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[18] [2012] ECHR 228.
[19] [2012] ECHR 227.
[20] *Von Hannover* (n 18) [106].
[21] ibid [106]-[107].

How to Weigh Rights-Claims Against Other Interests and Goals?

A third complication lies in the fact that in human rights jurisprudence, as in political life, it is often considered appropriate that individual rights give way to public goals such as the protection of safety, morals, economic well-being, or health. This can be seen in two examples. In *James v United Kingdom*,[22] the Court held that legislation granting long term tenants the right to buy their homes did not violate landlords' Convention right to property, and the England and Wales Court of Appeal found no violation of the same right in the context of a ban on cigarette vending machines in the case of *R (Sinclair Collis Ltd) v Secretary of State for Health*.[23] While an earlier generation of rights instruments obscured this complexity by framing rights in absolute terms (see eg the First Amendment to the US Constitution), rights under the Convention frequently wear their complexity on their sleeve by including a list of ways in which the right may be restricted where 'necessary in a democratic society'. When interpreting this phrase, as it appears in Articles 8-11 of the Convention, the Court applies a multi-stage proportionality analysis, asking: (1) whether the State's interference with the right is in pursuit of a legitimate aim; (2) whether the measure is capable of achieving that aim; (3) whether the measure is the least restrictive measure that could achieve the aim; and (4) whether the advantage of pursuing the aim outweighs the costs to the right.[24] As argued in section 4 in relation to *A, B & C v Ireland* and *SAS v France*, it is only through a thorough and careful application of the proportionality analysis that the Court can work through this third philosophical complication to a universal approach to human rights. As a deliberative process, proportionality allows the Court to give proper weight to the right itself and to appropriately sanction State laws which, even allowing for reasonable disagreement between States, clearly emerge as arbitrary or excessively burdensome on individuals.

Rights as Creatures of Intuition, Assertion and Recognition

The three philosophical complications discussed above tend toward a conclusion that rights are moral and political, rather than something that is objectively discovered by the Court using faculties of faith or reason. The content of rights, and their imperviousness or otherwise to completing claims, is a matter of

[22] [1986] ECHR 2.
[23] [2012] QB 394.
[24] Julian Rivers, 'The Presumption of Proportionality' (2014) 77 MLR 409, 412.

intuition, assertion, and community recognition. The last-mentioned characteristic can be seen in the Court's frequent reference to an emerging European consensus in vindicating rights-claims of individuals in novel circumstances.[25] The Court's survey of domestic laws under the doctrine of consensus sits uneasily with the belief that a primary function of courts is to provide a check on majority desires in defence of minorities. However, when faced with the difficulty of determining whether to condemn the actions of States for the first time, observing that a strong majority of States have turned away from a particular practice (such as, eg, criminalising homosexuality) may give judges confidence that their own intuitions are shared more broadly. In this way, the Court may plausibly conclude that a Convention right has extended (or perhaps, in some future instance, retracted) so that its content is different from that previously articulated in judicial guidance.

II. INSTITUTIONAL COMPLICATIONS TO A UNIVERSAL APPROACH TO HUMAN RIGHTS

The institutional character of the Court as a supranational tribunal presents further difficulties for a universal approach to human rights. According to Tsarapatsanis, the doctrine of States' margin of appreciation is a mechanism the Court uses to 'underenforce' human rights, short of an optimal substantive understanding of those rights.[26] This is justified, he suggests, because under the machinery of the Convention, protecting human rights is a cooperative venture between the Court and States Parties.[27] In a similar vein, the former President of the Court, Dean Spielmann, argues that the margin of appreciation is essential to protecting rights, because it provides an incentive for States to engage in the necessary Convention review, thereby building their capacity to be effective protectors of rights within their own jurisdictions.[28] Affording States a margin of appreciation regarding the content of, and necessary restrictions on, rights, is further justified, according to Tsarapatsanis, because there are some issues, such as economic policy, that the Court is not as well placed to make decisions about,

[25] See eg the Court's recognition of transgender rights in *Goodwin v United Kingdom* [2002] ECHR 588.
[26] Tsarapatsanis (n 7) 675.
[27] ibid 678.
[28] Dean Spielmann, 'Whither the Margin of Appreciation?' (2014) 67 CLP 49, 63.

given its particular technical expertise, limited resources, and constrained timelines.[29] Courts recognise that they may, just as much as governments, get things wrong ('bounded rationality') or that there might be room for reasonable disagreement.[30] These institutional factors, according to Tsarapatsanis, justify the Court's 'incremental and deferential approach' to fielding rights-claims.[31]

III. WHEN IS THE COURT'S INVOCATION OF THE MARGIN OF APPRECIATION UNJUSTIFIABLE?

The shared responsibility arguments of Tsarapatsanis and Spielmann are persuasive, given the observable reality that the Court's enforcement powers are both politically and mechanically limited. Such enforcement limitations are exemplified in high-profile refusals by States to comply with Court decisions, such as Azerbaijan's refusal to release opposition politician Ilgar Mammadov following a 2014 ruling against his detention,[32] and the UK's prolonged resistance to the Court on the issue of prisoner voting.[33] Tsarapatsanis' hypothesis that Courts take appropriate notice of their own resource limitations when asked to consider far-reaching social and economic policies is also plausible. In these circumstances, when is the Court's invocation of the margin of appreciation unjustifiable? When, in the Court's case law, has its reasoning justified the criticism of commentators that it is 'a circumlocution' (Judge Jan de Meyer in *Z v Finland*),[34]'loose',[35]'slippery as an eel'[36] (Lord Lester), and potentially 'an abdication of judicial responsibility'.[37] As noted by the majority in *A, B & C v Ireland,* although the Court considered that the margin of appreciation to be accorded to Ireland was 'crucial'[38] to the proportionality analysis of Ireland's abortion laws, that margin was 'not

[29] Tsarapatsanis (n 7) 690-691.
[30] ibid 678.
[31] ibid 684.
[32] *Mammadov v Azerbaijan* [2014] ECHR 504.
[33] See eg *Hirst (No. 2) v United Kingdom* [2005] ECHR 681; *Greens and MT v United Kingdom* [2010] ECHR 1826; *Firth and Others v United Kingdom* [2014] ECHR 874; *Millbank and Others v United Kingdom* [2016] ECHR 595.
[34] Cited in Spielmann (n 28) 54.
[35] Lord Lester of Herne Hill, 'Universality Versus Subsidiarity: A Reply' (1998) 1 EHRLR 73, 75.
[36] ibid 51.
[37] Tsarapatsanis (n 7) 697.
[38] *A, B & C v Ireland* (n 2) [231].

unlimited'.[39] What are its limits? Put another way, when will the Court extend the margin of appreciation such that it erodes the universal character of rights?

IV. ABDICATIONS OF RESPONSIBILITY? *A, B & C V IRELAND* AND *SAS V FRANCE*

Having found that Ireland's ban on abortion for health or wellbeing reasons restricted the first and second applicants' right to private life under Article 8 (given its interference with their personal autonomy, and physical and psychological integrity), the Court concluded that the restriction was nonetheless justified on the ground that it was necessary in a democratic society.[40] In reaching the latter conclusion, the Court's proportionality enquiry was, arguably, rendered otiose by its concern for the moral sensibilities of the State. The Court considered that Ireland's restrictive abortion law was in pursuit of a legitimate aim, being the need to 'protect the life of the unborn', understood as an aspect of the protection of morals exception to Article 8.[41] Here, the Court relied on the institutional argument, articulated in *Handyside v United Kingdom*,[42] that States were in a better position than the Court to give an opinion on the requirements of morals, and on the necessity of restrictions to meet them, given their 'direct and continuous contact with the vital forces of their countries.'[43] The majority repeatedly referred to the 'deep' and 'profound' nature of the beliefs held by the Irish people that abortion should be restricted, as reflected in the 1983 Constitution adopted in a referendum passed by a substantial majority.[44]

In determining whether the law was proportionate to the aim pursued, the Court noted that a State's margin of appreciation will be narrowed where a consensus tends against the measure employed. In this regard, the Court accepted that there was 'indeed a consensus amongst a substantial majority of the Contracting States (…) toward allowing abortion on broader grounds than accorded under Irish law',[45] and in particular that abortions on health or wellbeing

[39] ibid [238].
[40] ibid [242].
[41] ibid [230].
[42] [1976] ECHR 5.
[43] *A, B & C v Ireland* (n 2) [223].
[44] ibid [226].
[45] ibid [235].

grounds were available in 40 out of 47 States.[46] However, the majority continued by reasoning that States enjoy a margin of appreciation as to when life begins (in the absence of a European consensus on that point, as highlighted in *Vo v France*).[47] As the rights claimed on behalf of the foetus and the mother are inextricably linked, 'the margin of appreciation accorded to a State's protection of the unborn necessarily translates into a margin of appreciation for that State as to how it balances the conflicting rights of the mother.'[48] Thus, the margin of appreciation moves from the subject of the foetus to the subject of the mother, restricting the rights-protections that would otherwise, through the European consensus permitting abortion on health or wellbeing grounds, be afforded to her. As the dissenting judges observed, this approach represented an inappropriate conflation of the State's margin of appreciation regarding the question of when life begins (and any consequent right to life of the foetus), and the State's margin of appreciation in weighing the rights claimed on behalf of the foetus against those of the mother.[49]

The margin having been expanded in this way, the majority cited the ability of women to travel outside Ireland for legal abortions (and to receive some measure of medical care in Ireland before and after doing so) to conclude that Ireland's restriction was not disproportionate to the aim pursued.[50] This 'exit' factor was considered sufficient to overcome the first and second applicants' strong arguments regarding the substantial inefficacy of the measure (given the number of women who travel outside of Ireland to get abortions), and their 'least-restrictive measure' arguments.[51] The latter arguments were highly compelling: namely the extremity of the chosen sanction of penal servitude for life; the manner in which the Irish law amounted to a *de facto* ban on earlier, safer medical abortion; and the way in which compelling women to travel to another country for a time-sensitive medical procedure increased the anxiety and stigma felt by those who did so.[52]

Hence, despite rehearsing the strong arguments summoned by the first

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[46] ibid.
[47] [2004] ECHR 326.
[48] *A, B & C v Ireland* (n 2) [237].
[49] ibid [2] (Rozakis, Tulkens, Fura, Hirvelä, Malinverni and Poalelungi JJ).
[50] ibid [239]-[241].
[51] ibid [239].
[52] ibid [126].

and second applicants, and recognising the European consensus in favour of less restrictive measures, the Court reached the surprising conclusion that the prohibition on abortions in Ireland for health or wellbeing reasons was proportionate.[53] Reading the majority's reasoning, one is left with the strong impression that the 'morality factor' has effectively displaced the usual proportionality enquiry, although the Court still goes through the motions of the analysis. Emblematic of this problem is the Court's reliance on the strained argument that Irish women's rights under Article 8 are not disproportionately restricted because they are permitted to travel outside the State to obtain abortions.[54] Extending States an expansive margin of appreciation for protecting morals in this way risks the impression that the Court's jurisprudence is unpredictable and incoherent. As Lord Lester observes,[55] in criticising the freedom of expression decisions made in *Müller v Switzerland*[56] and *Otto-Preminger-Institut v Austria*,[57] if respect for strong moral sensibilities of States is to be the touchstone, it is difficult to see why the Court did not afford a similarly wide margin of appreciation to British and Irish legislation penalising homosexual acts between consenting male adults in the 1980's in *Dudgeon v United Kingdom*[58] and *Norris v Ireland*.[59] It would surely not have been maintainable, in those cases, for the Court to conclude that gay men's rights under Article 8 were not violated because they were free to travel elsewhere to carry out their relationships without fear of imprisonment.

A recent decision showing a similar level of deference to local sentiments is *SAS v France*. Here, the majority judges accepted France's argument that its ban on face-coverings pursued the legitimate aim of preserving the conditions of living together in society, as an aspect of protecting the rights and freedoms of others within the language of Articles 8 and 9.[60] As argued by the dissenting judges, recognising 'living together' as a legitimate aim is problematic in itself because there is no recognised right under the Convention to communicate with others in

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[53] ibid [241].
[54] ibid [6] (Rozakis, Tulkens, Fura, Hirvelä, Malinverni and Poalelungi JJ).
[55] Lord Lester (n 35) 78.
[56] [1988] ECHR 5.
[57] [1994] ECHR 26.
[58] [1983] ECHR 2.
[59] [1988] ECHR 22.
[60] *SAS v France* (n 3) [157].

public.[61] Living together may be described, in Rivers' schema, as a pseudo-right.[62] In concluding that a wide margin of appreciation should be extended to France in pursuing this aim, the majority noted that France was 'seeking to protect a principle of interaction between individuals which in its view is essential for the expression not only of pluralism, but also of tolerance and broadmindedness without which there is no democratic society'.[63] Here, as in *A, B & C v Ireland*, one can discern an unnecessarily punctilious concern for local traditions and practices. In *SAS v France*, the tradition relied on by the French government may be characterised as a muscular version of the Republican values of *égalité* and *fraternité*, expressed in an overbearing civic culture that demands equal participation in social life. As pointed out by the dissenting judges, properly understood, the principles of pluralism, tolerance and broadmindedness in fact entail that States ensure mutual tolerance between opposing groups, rather than removing the cause of the tension by eliminating pluralism.[64] As in *A, B & C v Ireland*, once the Court has elected to afford a broad margin of appreciation to the State on account of local sensitivities, the proportionality analysis that follows is deeply unconvincing. The fact that at the time, only two out of 47 European States had banned face coverings was denied any substantial weight, as was the draconian consequences for women faced with the choice of complying with the ban or retreating out of the public sphere.[65] Nor was any traction gained by the argument that less restrictive measures, such as education campaigns, could address the same (as France recognised, numerically-small phenomena) of women wearing full-face veils.[66] In *SAS v France*, the Court could have protected the neglected '*liberté*' part of the Republican formula. Instead, the decision represents a de facto endorsement of a deeply illiberal policy, directed inward at a minority, in the name of liberalism. As argued by Gearty, such outcomes are a problem because defeats in human rights cases are not neutral: they can be valuable to governments by equipping them with the riposte that regressive measures comply with human rights, and so cannot be criticised on that score.[67]

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[61] ibid [5] (Nussberger and Jäderblom JJ).
[62] Letsas (n 12) 48.
[63] *SAS v France* (n 3) [153].
[64] ibid [14] (Nussberger and Jäderblom JJ).
[65] ibid [93], [156].
[66] ibid [24] (Nussberger and Jäderblom JJ).
[67] Gearty (n 6) 118.

Each of *SAS v France* and *A, B & C v Ireland* can be distinguished from the Court's approach in *Lautsi v Italy*,[68]where the Court invoked the margin of appreciation to find that a requirement that crucifixes be displayed in school classrooms did not violate the right of a mother and her school-aged sons to education under Article 2 of Protocol 1 of the Convention. Here the Court appropriately concluded that the measure did not rise to the level of an interference with the applicants' right to education, reasoning that in the particular Italian context, the school-room crucifixes were essentially passive symbols, fundamentally different from didactic religious speech or participation in religious activities that could, through indoctrination, threaten that right.[69] The facts of this case differ substantially from *A, B & C v Ireland* and *SAS v France,* where the interference with Convention rights was demonstrably serious, demanding a careful working through of the proportionality analysis before reaching any conclusion that the interference was nonetheless justifiable.

CONCLUSION

This paper has argued that a universal approach to human rights should be pursued as a worthwhile goal, as it represents one of the most powerful tools available for protecting individuals. Universalism faces a number of philosophical and institutional complications, which are worked through by the Court by deploying its various legal tools. The Court's doctrine of States margin of appreciation recognises the institutional reality that the Court must work with States to ensure that rights are enforced in Member States in the first instance. Once a claim is made, the Court's proportionality analysis allows it to weigh an offended right against competing rights and interests in a fair and deliberate way. This paper suggests that when an acute local sensitivity is in play, whether based in a particular moral or political tradition, the Court has at times departed from its usual proportionality analysis in ways that render its reasoning incoherent and unpredictable. Such decisions represent troubling departures from universalism that blot the Court's record of success in calling out violations of rights and protecting individuals from the illiberal excesses of government.

[68] [2011] ECHR 2412.
[69] ibid [72].