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Freedom of religion and democratic transition

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Introduction

Article 9 of the 1950 European Convention on Human Rights and Fundamental Freedoms (ECHR) protects the right to freedom of thought, conscience and religion. However the case law related to this right has only begun to develop quite recently, with the first judgment finding a violation of this article only delivered in 1993.[1] Since then a rich and often controversial jurisprudence has begun to develop,[2] including the two judgments on Turkish attempts to ban the wearing of Muslim headscarves in certain higher education establishments,[3] the fallout from the publication of cartoons of the prophet Muhammad in Denmark in 2005, and the Grand Chamber's reversal of the judgment backing a challenge to the display of the Christian crucifix in Italian state schools.[4] No doubt the Swiss attempt to ban the construction of new minarets will also give rise to some thought-provoking argumentation.[5]

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[1] ECtHR, *Kokkinakis* v. *Greece*, 25 May 1993 (Appl. no. 14307/88).

[2] See C. Evans, *Freedom of Religion under the European Convention on Human Rights* (Oxford University Press, 2001).

[3] ECtHR, *Leyla Şahin* v. *Turkey* [GC], 10 November 2005 (Appl. no. 44774/98) and discussed in K. Altiparmak and O. Karahanogullari, 'After Sahin: The Debate on Headscarves is Not Over', *European Constitutional Law Review* 2 (2006) 268 and T. Lewis, 'What Not to Wear: Religious Rights, the European Court, and the Margin of Appreciation', *ICLQ* 56 (2007) 395 and D. McGoldrick, *Human Rights and Religion: The Islamic Headscarf Debate in Europe* (Oxford: Hart, 2006).

[4] ECtHR, *Lautsi* v. *Italy*, [GC], 18 March 2011 (Appl. no. 30814/06).

[5] BBC, 'Swiss Minaret Appeal goes to European Court' (16.12.2009) available at: http://news.bbc.co.uk/1/hi/8417076.stm.

This chapter questions the approach of the European Court of Human Rights to freedom of religion in transitional societies – to what will be termed 'religion in transition' cases. The aim is to arrive at a legally sound and theoretically robust approach to these cases, which also fully respects the experiences of transitional democracies. In particular, the chapter examines the 'margin of appreciation' left to Contracting Parties where the Respondent State cites the centrality of religion to the process of democratic transition as a reason for restricting some religious freedoms in favour of protecting others. The central argument of the chapter is that the European Court must take the transitional context seriously, without itself dispensing 'transitional justice'.

Freedom of religion is protected in all the other major international and regional human rights instruments, including Article 18 of the Universal Declaration of Human Rights (UDHR), Article 18 of the International Covenant on Civil and Political Rights (ICCPR), Article 3 of the American Declaration of the Rights and Duties of Man (American Declaration), Article 12 of the American Convention on Human Rights (ACHR) and Article 8 of the African Charter on Human and Peoples' Rights (ACHPR). Throughout this chapter, some modest comparisons are made between the approach advocated to freedom of religion in the European system and these comparators.[6]

Democracy as a limit on restricting freedom of religion

Article 9 ECHR protects freedom of thought, conscience and religion. Articles 8–11 ECHR all enshrine rights in their first paragraph, and provide for possible qualifications to the right in their second paragraph. The qualifications to Article 9 are slightly different to the other personal freedoms since they pertain only to the manifestation of religion or belief (the *forum externum*), rather than the act or state of believing itself (the *forum internum*).

Interpreting the scope of Article 9(1) has been challenging and the European Commission's decision in *Arrowsmith* v. *UK*,[7] that not all actions motivated by religious belief fall within it,[8] has met with some

[6] For a more comprehensive comparison with the UN system see: P. M. Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (Cambridge University Press, 2005).

[7] EComHR, *Arrowsmith* v. *UK*, 16 May 1977 (Appl. no. 7050/75).

[8] *Ibid.*, para. 71.

criticism.[9] Many of the concerns about this case and its progeny are about identifying exactly which practices are, in fact, sufficiently motivated by religious or other beliefs to gain protection under Article 9(1).

The key characteristic of Article 9 for our purposes is the extent to which the Court has recognised a strong link between religion and democratic society. According to the Court:

> freedom of thought, conscience and religion is one of the foundations of a democratic society within the meaning of the Convention. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.[10]

In this way, Article 9 will often need to be interpreted in the light of other Convention rights, such as the Article 11 right to freedom of association and peaceful assembly.[11] Thus, interferences with Article 9 rights may be examined not only as an impingement on the applicant's own religion or beliefs, but also as an indirect impingement on the democratic fabric of society. However, as we shall see in the next section, the relationship between religion and democracy cuts both ways.

In order for a restriction upon Article 9 to be justified, it must meet the conditions specified in Article 9(2). The restriction must be prescribed by law and be necessary in a democratic society in the interest of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others. These specified 'interests' are more commonly referred to in the European jurisprudence as 'legitimate aims'.

At this stage it is important to note the approach of the other major international instruments to limiting freedom of religion. The argument below will hinge on the relationship between questions about the 'legitimacy' of restrictions and questions about their 'necessity', since these are distinct stages in the European system.

Article 18 of the UDHR does not contain a limitations clause but Article 29 states that:

> In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and

[9] Evans, *Freedom of Religion under the European Convention on Human Rights*, 115f.
[10] ECtHR, *Hasan and Chaush* v. *Bulgaria*, 26 October 2000 (Appl. no. 30985/96) para. 60.
[11] *Ibid.*, para. 62.

> of meeting the just requirements of morality, public order and the general welfare in a democratic society.

Likewise Article 3 of the American Declaration does not contain a limitation clause, but all of the rights enumerated by it are subject to a general limitation clause in Article 28, which states that:

> The rights of man are limited by the rights of others, by the security of all, and by the just demands of the general welfare and the advancement of democracy.

Both the UDHR and American Declaration thus recognise that any restriction must therefore pursue 'just requirements' or 'just demands' that, at least in the more specific formulation of the UDHR, are comparable to the ECHR's 'legitimate aims'.

Article 18(3) ICCPR and Article 12(3) ACHR are almost identical in their formulation to Article 9(2) ECHR, so that restrictions must pursue specified legitimate aims as well as be necessary.[12]

The African system is slightly different in this regard.[13] Article 8 ACHPR consists of only one clause, which in its second sentence contains the guarantee that, 'No one may, subject to law and order, be submitted to measures restricting the exercise of [freedom of religion]'. Article 27(2), in the section of the Charter on individual duties, states that, 'The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest'. The African Commission on Human Rights has held this to mean that:

> The reasons for possible limitations must be founded in a legitimate state interest and the evils of limitations of rights must be strictly proportionate with and absolutely necessary for the advantages which are to be obtained.[14]

In this way, the African system likewise separates the issue of 'legitimate state interest' from proportionality and necessity.

[12] On limitations to the ICCPR see: UN Commission on Human Rights, 'The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights', 28 September 1984, E/CN.4/1985/4; the non-derogable nature of these rights is acknowledged and discussed below.

[13] See generally, A. Allo, 'Derogations or Limitations? Rethinking the African Human Rights System of Derogation in Light of the European System', *Ethiopian Journal of Legal Education* 2(2) (2009) 21.

[14] AfComHPR, *Media Rights Agenda and Others* v. *Nigeria*, 1998 (no. 105/93, 128/94, 130/94 and 152/96) para. 69.

Restricting freedom of religion in order to promote democratic consolidation

Religious questions run behind many significant cases brought before the European Court of Human Rights involving transitional issues, but which do not necessarily hinge on Article 9 itself. In these cases, as well some involving Article 9, the relationship between religion and democracy may be used instrumentally in order to justify rights-restrictive measures.

A case in point would be the 2002 case of *Al-Nashif* v. *Bulgaria*.[15] This case involved the detention in Bulgaria and deportation to Syria of a stateless person of Muslim faith and Palestinian origin. The applicants in the case were Mr Al-Nashif and his two children, who remained in Bulgaria with their mother after their father's deportation. The European Court of Human Rights found violations of Articles 5(4), 8 and 13 ECHR. For our purposes, it is the argumentation on Article 8 that is interesting.

This element of the case centred on whether Al-Nashif's deportation to Syria constituted an unjustified interference with his and his children's right to family life, since the family had no real connection with that state, and there were economic and legal impediments to establishing a family life in Syria or in neighbouring Jordan (where the children's maternal grandparents were living). The Bulgarian government denied, inter alia, that there was an interference with family life at all due to one crucial fact: whilst living in Bulgaria Al-Nashif had entered into a second, religious, marriage with another woman.[16]

The European Court took the approach that the existence of 'family life' for the purposes of Article 8 is a question of fact. From the moment of their birth, children have a familial bond with their parents that only exceptional circumstances can change.[17] The Court held that despite the first applicant entering into a second religious, concurrent, and thereby polygamous, marriage there were no exceptional circumstances such as to break the bond between the first applicant and his children.[18]

This is undoubtedly an interesting case in terms of the apparent openness of the European Court to the suggestion that religious polygamous

[15] ECtHR, *Al-Nashif* v. *Bulgaria*, 20 June 2002 (Appl. no. 50963/99).

[16] The government also argued that Al-Nashif had not proven that his first marriage was lawful (*ibid.*, para. 107). One might argue that if polygamy was such a problem for the Bulgarian authorities, then questioning the validity of the 'first' marriage would work against their central argument; that by marrying a second woman the applicant was showing he did not have a family life with the first.

[17] *Ibid.*, para. 112. [18] *Ibid.*, para. 113.

marriage does not necessarily disrupt family life as understood in the Convention sense.[19] To the extent that it involves one of the states that joined the Convention system after the end of the Cold War, it presents features that relate to the transitional issues discussed below: the government had (unsuccessfully) argued that even if Article 8 applied to the case, the decision to deport Al-Nashif because of his alleged extremist activities was proportionate in the light of the Balkan regional context, where 'measures of active protection of religious tolerance were critical',[20] and where in Bulgaria in particular,

> owing to a number of factors – such as disruptions in community traditions caused by decades of totalitarianism – the religious consciousness of the population was currently unstable and unsettled. Communities in general, and the Muslim community in particular, were therefore susceptible to influences. It was necessary to protect them against Islamic fundamentalism.[21]

This passage illustrates that the real issue for the study of 'religion in transition' cases is the appearance of cases where the role of religion in the transitional context is cited as a justifying factor, pursuing a wider aim of democratic consolidation.

Enlargement of the Council of Europe

The early 1990s saw a massive enlargement of the Council of Europe, the parent organisation of the European Convention system. This, in turn, brought a great many new Contracting Parties to the ECHR. The wisdom of the Council's rapid enlargement and the consequent extension of the jurisdiction of the European Court of Human Rights is not universally accepted. For example in 1993 Peter Leuprecht resigned as Deputy Secretary General of the Council of Europe, protesting that the standards of the Convention risked dilution with the admission of Russia into the

[19] This is particularly surprising given the European Court's now notorious assessment of Sharia law in the *Refah Partisi* case (discussed in a different context below), where it stated that, 'sharia is incompatible with the fundamental principles of democracy, as set forth in the Convention' (ECtHR, *Refah Partisi (the Welfare Party)* v. *Turkey* [GC], 13 February 2003 (Appl. nos. 41340/98, 41342/98, 41343/98 and 41344/98) para. 123). For a critique of this judgment, see D. McGoldrick, 'Accommodating Muslims in Europe: From Adopting Sharia Law to Religiously Based Opt Outs from Generally Applicable Laws', *Human Rights Law Review* 9(4) (2009) 603–612.

[20] *Ibid.*, para. 111. [21] *Ibid.*, para. 111.

Council.[22] Several academic commentators expressed similar concerns.[23] Nevertheless, the Council of Europe took the view that participation in and supervision by the Convention system was better than exclusion from it.[24]

The Parliamentary Assembly of the Council of Europe (PACE) offered the new Member States advice on the transitional process in the form of Resolution 1096, on 'Measures to dismantle the heritage of former communist totalitarian systems'.[25] It identified four principles that should guide the transition process: demilitarisation, decentralisation, demonopolisation and debureaucratisation.[26] These general principles were accompanied by some more specific recommendations relating to criminal responsibility for acts carried out under the previous regime; the rehabilitation of people convicted of political offences under the former regime; the opening of secret service files; the restitution of property expropriated under the former regime; and the treatment of people who, whilst not the perpetrators of crimes under the former regime, held high positions within the communist apparatus and are singled out for special treatment in the new regime (such as restrictions on holding public office).[27] The 'best guarantee' of dismantlement of the former regimes was 'the profound political, legal and economic reforms in the respective countries, leading to the formation of an authentic democratic mentality and political culture'.[28] In this, the new Member States were not on their own: PACE called on consolidated democracies to 'step up' their aid and assistance to the emerging democracies.[29]

Resolution 1096 deals both with elements of what political scientists would recognise as democratic transition, and what lawyers would recognise as transitional justice. The broad theme of democratic transition

[22] P. Leuprecht, 'Innovations in the European System of Human Rights Protection: Is Enlargement Compatible with Reinforcement?', *Transnational Law and Contemporary Problems* 8 (1998) 313.

[23] E.g. M. Janis, 'Russia and the "Legality" of Strasbourg Law', *European Journal of International Law* 8 (1997) 93; R. Kay, 'The European Convention on Human Rights and the Authority of Law', *Connecticut Journal of International Law* 8 (1993) 217.

[24] See J. A. Sweeney, *The European Court of Human Rights in the Post-Cold War Era: Universality in Transition* (New York: Routledge, 2011) and J. A. Sweeney, 'Divergence and Diversity in Post-Communist European Human Rights Cases', *Connecticut Journal of International Law* 21 (2005) 1.

[25] PACE Resolution 1096 on 'Measures to dismantle the heritage of former communist totalitarian systems', text adopted by the Assembly on 27 June 1996 (23rd Sitting).

[26] *Ibid.*, para. 5. [27] *Ibid.*, paras. 7–14.

[28] *Ibid.*, para. 16. [29] *Ibid.*, para. 16.

is outside the scope of this chapter, suffice it to say that there is abundant literature on the 'waves' of democratic transition that have taken place throughout history,[30] and competing explanations as to the relationship between internal (domestic) and external (international) factors in successful transitions. Indeed the orthodoxy for much of the twentieth century was that internal factors, rather than external factors such as pressure from organisations like the Council of Europe, were the most significant.[31] It is therefore worth remembering that, as only one element of the Council of Europe, itself an external factor in each state's transitional process, the impact of the European Court of Human Rights' jurisprudence on the ultimate success or otherwise of the Contracting Parties' transition should be kept in perspective.

In addition to being part of the process of democratisation, the more specific recommendations of Resolution 1096 can be viewed within the paradigm of 'transitional justice'. Transitional justice is the 'conception of justice associated with periods of political change, characterised by legal responses to confront the wrongdoings of repressive predecessor regimes'.[32] Thus often when we think of the relationship between human rights and transitional justice we are concerned with looking at attempts to deal with the human rights violations of the previous regime. For example Teitel notes that, 'the most vigorous enforcement of human rights law occurs in transitional periods', citing the creation of ad hoc tribunals to prosecute human rights abusers from the Rwandan and Bosnian conflicts.[33] Likewise David Little's work on 'dealing with human rights violations in transitional societies' concentrates on the relationship

[30] In particular, S. Huntington, *The Third Wave: Democratisation in the Late Twentieth Century* (Norman: University of Oklahoma Press, 1991).

[31] P. Schmitter, 'An Introduction to Southern European Transitions from Authoritarian Rule: Italy, Greece, Portugal, Spain, and Turkey', in G. O'Donnell *et al.* (eds.) *Transitions from Authoritarian Rule: Southern Europe* (Baltimore: Johns Hopkins University Press, 1986) 5 and J. C. Pevehouse, *Democracy from Above: Regional Organisations and Democratization* (Cambridge University Press, 2005) 2.

[32] R. Teitel, 'Transitional Justice Genealogy', *Harvard Human Rights Law Review* 16 (2003) 69 and see also Teitel's *Transitional Justice* (New York: Oxford University Press, 2000). One might question whether the distinctive policies in Resolution 1096, employed to reckon with the past, in fact embody a modified conception of justice or, as Posner and Vermeule would argue, can be placed along a spectrum that would see them merely as distinctive, albeit fairly extreme, elements of 'ordinary justice'. It is the approach of this chapter that the measures in Resolution 1096 in fact are measures rooted in transitional justice: cf. E. Posner and A. Vermeule, 'Transitional Justice as Ordinary Justice', *Harvard Law Review* 117 (2004) 761.

[33] Teitel, *Transitional Justice*, 228.

between the opposing impulses of retribution and reconciliation in dealing with human rights offenders of the former regime.[34] In the European Convention on Human Rights, and in this chapter, this is not what we are necessarily looking at – we are looking not at the actions of the former regime, but of the current one. Transitional measures taken by the new Contracting Parties may themselves impact upon human rights.

It is important to note that from the text of Resolution 1096, and from the general approach to transitional justice of Teitel and others, that special measures justified on grounds related to the particular role of religion in transitional societies (or such societies' susceptibility to religious extremism) do not, in and of themselves, hold a privileged status as an obvious element of the transitional process. Nevertheless, the support of the Catholic Church and, in particular, Pope John Paul II, for Lech Walesa's 'Solidarity' movement in Poland[35] shows that as an intermingled internal and external factor religion may have played an organic role in at least some of the Central and Eastern European transitions.

The 'religion in transition' cases

In the case of *Metropolitan Church of Bessarabia* v. *Moldova*[36] the religious context was relevant both to the right at stake, Article 9, and to the reasons for restricting it. The Moldovan government argued that their refusal to register a religious association that they deemed a schismatic group within the Church of Moldova was justified because Moldova 'had few strengths it could depend on to ensure its continued existence, but one factor conducive to stability was religion'.[37] On this basis the government argued, and the Court accepted, that 'having regard to the circumstances of the case' the restriction pursued the legitimate aim of protecting public order and public safety.[38] In other words, the transitional context contributed to the 'legitimacy' of the aim. Nevertheless the European Court of Human Rights found that the restriction was not necessary to meet its stated aim, and therefore violated Article 9 ECHR. In this part of the judgment the Court engaged with the Respondent State's arguments that the measure

[34] D. Little, 'A Different Kind of Justice: Dealing with Human Rights Violations in Transitional Societies', *Ethics and International Affairs* 13 (1999) 65.

[35] J. Grugel, *Democratization: A Critical Introduction* (Basingstoke: Palgrave Macmillan, 2002) 200.

[36] ECtHR, *Metropolitan Church of Bessarabia* v. *Moldova*, 13 December 2001 (Appl. no. 45701/99).

[37] *Ibid.*, para. 111. [38] *Ibid.*, para. 113.

was necessary in order to uphold Moldovan law and Moldovan constitutional principles; to prevent a threat to territorial integrity; and to protect social peace and understanding between believers.[39] The European Court did not, at this stage, engage any further with the issue of whether the transitional context amplified or even impacted at all on these arguments.

The Respondent State made similar arguments about the special role of religion during democratic transition in the January 2009 case of *Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and Others* v. *Bulgaria*.[40] Again, in this case the religious context was relevant both to the right invoked and to the reason for restricting it. The case concerned a dispute arising from the first democratic Bulgarian government's attempts to replace the Patriarch imposed during the communist era (Patriarch Maxim), and the subsequent government's decision to reinstate him in order to end the ensuing confusion within the Bulgarian Orthodox Church. The government argued before the European Court that, 'the unity of the Bulgarian Orthodox Church was an important national goal of historical significance, with ramifications affecting the very fabric of the Bulgarian nation and its cultural identity', and therefore their reinstatement of Patriarch Maxim was necessary and proportionate.[41] The European Court of Human Rights disagreed, and found a violation of Article 9 ECHR interpreted in the light of Article 11.

In *Holy Synod of the Bulgarian Orthodox Church* the European Court more explicitly accepted that the transitional context was relevant both to the 'legitimacy' of the aim and to the 'necessity' of the measure.[42] However, although the Court engaged directly with the arguments about the centrality of the issue for the state of Bulgaria, it failed to distinguish clearly which legitimate aim or aims were at stake, or to separate their identification from answering the questions of necessity and proportionality.[43] The Court found that:

> [Taking] into account the margin of appreciation ... the Bulgarian authorities had legitimate reasons to consider some form of action with the aim of helping to overcome the conflict in the Church, if possible, or limiting its negative effect on public order and legal certainty.[44]

[39] *Ibid.*, paras. 123–127.
[40] ECtHR, *Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and Others* v. *Bulgaria*, 22 January 2009 (Appl. no 412/03 and 35677/04).
[41] *Ibid.*, para. 143. [42] *Ibid.*, para. 145.
[43] *Ibid.*, para. 159. [44] *Ibid.*, para. 131.

This is intriguing at a doctrinal level because the margin of appreciation is normally said to attach to the question of whether a restriction is 'necessary', rather than 'legitimate'.[45] Moreover in earlier non-transitional cases that Court had explained that the width of the margin of appreciation in each case will relate to the legitimate aim put forward by the state.[46] If the Court is to apply the margin of appreciation doctrine coherently, it must therefore always first identify the aim at stake.

In *Holy Synod of the Bulgarian Orthodox Church*, and in relation to what the Court saw as the issue before it, namely 'whether the concrete measures chosen by the authorities could be accepted as lawful and necessary in a democratic society',[47] the Court did not invoke the margin of appreciation at all, and simply determined that:

> [The] legitimate aim of remedying the injustices inflicted by the unlawful acts of 1992 and the following years, could not warrant the use of State power, in 2003, 2004 and afterwards, to take sweeping measures, imposing a return to the *status quo ante* against the will of a part of the religious community.[48]

On the one hand both *Metropolitan Church of Bessarabia* and *Holy Synod of the Bulgarian Orthodox Church* raise issues about state neutrality in religious matters that had arisen in non-transitional cases as well.[49] The European Court has consistently held that measures favouring a particular leader of a divided religious community or seeking to force the community to place itself, against its will, under a single leadership, would constitute a violation of Article 9.[50] One of the leading cases in this respect is also a Bulgarian one: *Hasan and Chaush* v. *Bulgaria*. In this case, as we shall see below, the transitional context did not play a role either in

[45] See the discussion in Sweeney, 'Divergence and Diversity in Post-Communist European Human Rights Cases', 25.

[46] See, for example, ECtHR, *Sunday Times* v. *UK*, 26 April 1979 (Appl. no. 6538/74) para. 59, where the European Court compared the aims of 'maintaining the authority and impartiality of the judiciary' and 'the protection of health or morals', concluding that there would be a narrower margin of appreciation in relation to the former than the latter.

[47] *Ibid.*, para. 132.

[48] *Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and Others* v. *Bulgaria*, para. 138.

[49] For example in ECtHR, *Hasan and Chaush* v. *Bulgaria*, 26 October 2000 (Appl. no. 30985/96).

[50] *Ibid.*, para. 78, and ECtHR, *Serif* v. *Greece*, 14 December 1999 (Appl. no. 38178/97) para. 52 and *Metropolitan Church of Bessarabia* v. *Moldova*, para. 117 and *Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and Others* v. *Bulgaria*, para. 120.

the arguments put forward by the Respondent State or in the assessment of them by the Court. However, and on the other hand, the way in which the Respondent States argued their cases in *Metropolitan Church of Bessarabia* and *Holy Synod of the Bulgarian Orthodox Church* shows that there is something else here of relevance to the study of human rights in transitional societies. The Respondent States were making a claim that certain measures that impact upon freedom of religion are justifiable in the particular circumstances of democratic transition because of the special role of religion in fragile democracies. In this respect, they are similar to the *Al-Nashif* case.

'Legitimacy' and 'necessity' distinguished

The approach of the European Court of Human Rights to the Respondent States' claims that the 'religion in transition' cases should be treated differently is intriguing. There is a notable absence of consistency in the stage at which the transitional context, including the role of religion within it, is considered. It is particularly important to develop a coherent approach to the relationship between 'legitimacy' and 'necessity' in cases such as these. At this stage there are several routes the Court might take.

One route is to argue that transitional situations themselves simply do not present substantively different issues, and therefore the Respondent State's arguments about the special status of religion in the transition should be dismissed as normatively unfounded: the impugned measure or decision could be neither legitimate nor necessary. This approach can be rejected. Convincing work has demonstrated that transitional justice may operate, usefully, in a different way to ordinary justice.[51] The real question for the European Court is about what it, as an international body, and a judicial body, should do about national transitional policies, including those that seek to use religion instrumentally in order to stabilise the transition, or those that claim the particular susceptibility of transitional societies to religious extremism.

This is where the second route begins. It might be argued that the Court should alter its own conception of justice in cases from transitional states, since transitional justice measures always outweigh considerations of ordinary justice in transitional democracies. This would recognise that

[51] Teitel, *Transitional Justice*, but note that Teitel is concerned about the possible extension of transitional justice style thinking to non-transitional contexts; see Teitel, 'Transitional Justice Genealogy'.

the new Contracting Parties are not only undergoing a transition to democracy, but also a transition to full compliance with the European Convention. The European Court would become an embodiment of an international form of transitional justice: the human rights counterpart to international criminal responses.[52] The cases in which the transitional context goes to the 'legitimacy' of a rights-restrictive measure might suggest that the Court is already doing precisely this. The implication is that via the application of a transitional form of justice, certain otherwise 'illegitimate' actions could be deemed 'legitimate'.

The bestowal of 'legitimacy' upon a restrictive measure is significant, legally and politically, even where it is found not to be necessary. It is particularly questionable when the stated aim is not one that even the most ardent advocate of transitional justice would recognise as a common transitional policy, such as establishing unity around a state church. As suggested above, allowing a margin of appreciation on the legitimacy of the restrictive aim is inconsistent with a normal doctrinal understanding of the stage at which the margin of appreciation figures in the Court's reasoning. Moreover, as demonstrated in the work of Arai-Takahashi, in order for the margin of appreciation to operate properly it must be seen alongside the question of proportionality, which is clearly more relevant to the question of 'necessity' than 'legitimacy'.[53] Furthermore, and finally, it is the argument of this chapter that altering the conception of justice and thus legitimacy to be applied to transitional democracies, and condoning less than full compliance with the European Convention, would call into question the European Court's commitment to the universality of human rights.

Yet another, third, route would be to argue that although national policies founded on transitional justice have a normative pedigree, the European Court should not change its own conception of justice. It must apply its existing standards in such a way as to respond meaningfully to the factual matrix presented by cases emanating from transitional democracies without altering its general approach. The Court may check whether a transitional measure is compliant with the rule of law; that, in regard to its legitimacy, the transitional measure pursues one of the

[52] In 'Transitional Justice Genealogy' Teitel notes the displacement of national justice by international justice as a defining feature of post-Second World War transitional justice, with the Nuremberg Trials as its most recognised symbol: Teitel, 'Transitional Justice Genealogy', 70, 72.

[53] Y. Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Oxford: Intersentia, 2002).

legitimate aims specified in the Convention; and, if it does, it may proceed to consider the necessity and proportionality of the measure in the transitional context via a detailed and coherent application of the margin of appreciation doctrine.

In this model the transitional context is far more relevant to the basis and width of the margin of appreciation than to the conceptual 'legitimacy' of the measure. This approach is preferred since, whilst the margin of appreciation in respect of necessity allows for some modulation in the Court's jurisprudence in recognition of the transitional context (as it does in relation to the idiosyncrasies of older Contracting Parties), it does not (need to) disturb the universality human rights.[54] It is tempting to think of this as a 'transitional margin of appreciation', or similar, but this would be misleading because it would imply that the transitional margin is different, conceptually, to the regular margin of appreciation. It is not. Instead, the European Court should apply (and sometimes has applied) its regular, even formulaic, approach to 'religion in transition' cases whilst remaining fully cognisant of the conceptual relationship between domestic transitional justice policies and the international supervision of human rights protection. In order to understand this approach, it is now necessary to revisit the key cases.

Revisiting the 'religion in transition' cases

The first stage in any of the transitional cases is to ensure compliance with the formal rule of law. Whether a rights-restrictive measure interferes with Article 9 rights or other Convention rights on the basis of a claimed relationship between religion and democratic stability (or susceptibility to extremism), the Respondent State must demonstrate that it is acting through law. Thus, in the *Al-Nashif* case introduced above, when the European Court examined whether the interference was justified, it found that the legal regime surrounding the applicant's deportation did not meet the Convention's requirement of lawfulness,[55] so it did not need to examine whether the interference pursued a legitimate aim or was actually proportionate.[56] The impugned actions in the *Hasan and Chaush*

[54] J. A. Sweeney, 'Margins of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War Era', *ICLQ* 54(2) (2005) 459.
[55] *Al-Nashif* v. *Bulgaria*, para. 128.
[56] *Al-Nashif* v. *Bulgaria*, para. 129.

case also fell at this first hurdle.[57] If a rights-restrictive transitional measure is to survive scrutiny from the European Court it must, at the very least, be 'prescribed by law'.

The second stage is legitimacy. This could be (and often is) a short step. For Articles 8–11, the legitimate aims are listed exhaustively in the Convention itself. For others that might be relevant in religion cases, such as Article 14 or Article 3 of Protocol 1, the Court has fashioned a slightly different approach, albeit one which still carries with it an assessment of whether the aim of the measure is legitimate. As an aside, it might be noted that the Court could perhaps be a little less taciturn in its assimilation of myriad national policies to the Convention's 'legitimate aims'. For the approach advocated here it is vital not to give the impression that the only reason a measure is held to be 'legitimate' is that it was imposed in the transitional context. Otherwise the impression could be created that an alternative, transitional, form of justice is being applied by the European Court. Instead, the national transitional policy should be shown to correspond clearly to a Convention 'legitimate aim', leaving the impact of the transitional context as a factor to be considered when assessing the means chosen to achieve the aim. Of course if the transitional policy did not correspond to a Convention legitimate aim then, whether or not it might have some stabilising effect in a fragile democracy, it would be in conflict with the Convention. By joining the Council of Europe, and signing and ratifying the ECHR, it may be that states have thereby disbarred themselves from employing some transitional policies, in favour of a 'human rights based approach' to transition.

The third and most important stage is necessity. It is here where the Court can engage with the question of whether a purportedly transitional measure is widely recognised as pursuing a necessary task in the transitional process. If not then there is no reason to treat it differently to any other rights-restrictive measure when it comes to the basis or width of the margin of appreciation. This is particularly important in the religion cases since we have established that 'stabilising the state around an established church', or similar, is not widely recognised as a classic transitional policy.

Where a rights-restrictive practice, which is purportedly justified by reference to the transitional context, is to be examined then the Court should, in the first place, enforce the Convention in such a way as to protect against 'naked, bad faith abuse of power'.[58] However much a state

[57] *Hasan and Chaush* v. *Bulgaria*, para. 86.

[58] P. Mahoney, 'Marvellous Richness of Diversity or Invidious Cultural Relativism', *Human Rights Law Journal* 19(1) (1998) 1, 4.

stressed a special relationship between religion and democratic transition in the context of a case brought against it, a measure that amounted to an unmitigated abuse of power could never be justified. There would be no question of it falling within the state's margin of appreciation since the margin only allows variations in *how*, and not *whether*, to comply with the Convention. This is the first, but not the only, level of protection offered by the Convention. It is (only) at a second level, when a rights-restrictive transitional measure is imposed in 'good faith', for example within the wider context of democratic consolidation, that the margin of appreciation should be considered.[59]

The key here is that only a rights-restrictive transitional measure that contributed towards *democratic* consolidation could benefit from a margin of appreciation.[60] To suggest otherwise would be to radically expand the scope of the margin of appreciation doctrine, provide inadequate supervision of the new Contracting Parties' democratic transition, and undermine the rule of law.

This aligns neatly with the approach taken in PACE Resolution 1096 where, in an effort to avoid complaints reaching the Strasbourg institutions, PACE cautioned that:

> [A] democratic state based on the rule of law must, in dismantling the heritage of former communist totalitarian systems, apply the procedural means of such a state. It cannot apply any other means, since it would

[59] *Ibid.*

[60] On democracy in the ECHR, see ECtHR, *United Communist Party of Turkey* v. *Turkey*, 30 January 1998 (Appl. no. 19392/92) para. 45, where the European Court held that 'Democracy is without doubt a fundamental feature of the European public order ... That is apparent ... firstly, from the Preamble to the Convention ... [The Court] has pointed out several times that the Convention was designed to maintain and promote the ideals and values of a democratic society ... In addition, Articles 8, 9, 10 and 11 of the Convention require that interference with the exercise of the rights they enshrine must be assessed by the yardstick of what is "necessary in a democratic society". The only type of necessity capable of justifying an interference with any of those rights is, therefore, one which may claim to spring from "democratic society". Democracy thus appears to be the only political model contemplated by the Convention and, accordingly, the only one compatible with it'. However note the contrasting views expressed in A. Mowbray, 'The Role of the European Court of Human Rights in the Promotion of Democracy', *Public Law* (1999) 703 and C. Gearty, 'Democracy and Human Rights in the European Court of Human Rights: A Critical Appraisal', *Northern Ireland Legal Quarterly* 51 (2000) 381 and see also S. Marks, 'The European Convention on Human Rights and its "Democratic Society"', *British Yearbook of International Law* (1995) 209 and R. O'Connell, 'Towards a Stronger Concept of Democracy in the Strasbourg Convention', *European Human Rights Law Review* (2006) 281 and S. Wheatley, 'Minorities under the ECHR and the Construction of "a Democratic Society"', *Public Law* (2007) 770.

> then be no better than the totalitarian regime which is to be dismantled. A democratic state based on the rule of law has sufficient means at its disposal to ensure that the cause of justice is served and the guilty are punished ... A state based on the rule of law can also defend itself against a resurgence of the communist totalitarian threat, since it has ample means at its disposal *which do not conflict with human rights and the rule of law.*[61]

There is reason to suppose that the European Court itself is sympathetic to this approach. A point of principle can be extracted from the judgment in the *Holy Synod* case: that transitional societies' common need to remedy unlawful acts of the past cannot justify, in a democratic society, disproportionate state action and further unlawful acts.[62]

As the Court examines the question of necessity in the transitional cases, it should encourage and scrutinise arguments about the basis and, separately, the width of the margin of appreciation. The basis of the margin may relate to the robustness of the domestic mechanisms for verifying the material facts of the case, or to the policy expertise and legitimacy of elected legislatures. The width of the margin in particular cases will be tied to some combination of various factors, including the right at stake, the way that it is invoked, and the legitimate aim the restriction pursues.[63] It is conceded that for some commentators the width of the margin of appreciation is determined too haphazardly to play the role suggested in this chapter. Nevertheless, the various factors that are identified as commonly playing a role in determining its width can, it is submitted, provide a useful framework on which to hang discussion of whether a rights-restrictive measure in the 'religion in transition' case ultimately discloses a violation of the Convention.

[61] PACE Resolution 1096, para. 4 (emphasis added).

[62] ECtHR, *Holy Synod of the Bulgarian Orthodox Church*, para. 142.

[63] On the width of the margin of appreciation, including those with a critical perspective on the doctrine itself, such as Jones and Hutchinson, see: Arai-Takahashi, *The Margin of Appreciation Doctrine*, 206 and E. Brems, 'The Margin of Appreciation Doctrine in the Case Law of the European Court of Human Rights', *Zeitschrift fur Auslandisches offenthiches recht und volkerrecht* 56 (1996) 240, 256–293 and M. Hutchinson, 'The Margin of Appreciation Doctrine in the European Court of Human Rights', *ICLQ* 48 (1999) 638, 640 and T. Jones, 'The Devaluation of Human Rights Under the European Convention', *Public Law* (1995) 430, 438 and Mahoney, 'Marvellous Richness of Diversity', 5 and J. Schokkenbroek, 'The Basis, Nature and Application of the Margin of Appreciation Doctrine in the Case Law of the European Court of Human Rights', *Human Rights Law Journal* 19(1) (1998) 30, 34 and J. A. Sweeney, 'A "Margin of Appreciation" in the Internal Market: Lessons from the European Court of Human Rights', *Legal Issues of Economic Integration* 34(1) (2007) 27, 45.

If relevant and sufficient reasons were provided that such a rights-restrictive measure had support from the national legislature, as an appropriate response to that state's distinctive experience of transition, this would seem to be a reasonable place to recognise a margin of appreciation within which different transitional states might defensibly come to different conclusions.[64] Naturally, however, there would still be 'a European supervision' 'hand in hand' with this.[65] The point is not that the margin would allow states to diverge from the standards of the Convention, but that each national response to democratic transition is not expected to be identical.

Thus, the approach advocated here does not demand that transitional measures per se should benefit from a wide margin of appreciation, but that the transitional context provides further data relevant to the identification of the existing rationales for its basis and width on a case by case basis.

The application of this approach to the 'religion in transition' (and other transitional) cases is advantageous because there are at least two other techniques open to the European Court to respond to distinct and especially difficult issues arising in relation to the role of religion in the transitional context. These techniques, derogations and invocation of the idea of self-defending (or militant) democracy, are considered more fully elsewhere in this volume, thus the examination here will be both brief and pinned to the religious context.

Derogations

First, we know that in emergency situations, the Court has allowed a wide margin of appreciation under Article 15 ECHR.[66] Article 9 is, to use a double-negative, not a non-derogable right.[67] If a transitional democracy

[64] ECtHR, *Ždanoka* v. *Latvia* [GC], 16 March 2006 (Appl. no. 58278/00) para. 134, discussed further below.

[65] ECtHR, *Handyside* v. *UK*, 7 December 1976 (Appl. no. 5493/72) para. 49.

[66] See R. Higgins, 'Derogations Under Human Rights Treaties', *BYIL* 48 (1976–1977) 281 and Jones, 'The Devaluation of Human Rights under the European Convention'; M. O'Boyle, 'The Margin of Appreciation and Derogation under Article 15: Ritual Incantation or Principle', *Human Rights Law Journal* 19(1) (1998) 23, who all note that the margin is particularly, even unnecessarily, wide in relation to the existence of a public emergency.

[67] Arai-Takahashi, *The Margin of Appreciation*, 94, would argue that, in contrast to the manifestation of religion, the internal aspect of it may in fact be 'considered' non-derogable.

had to take measures under Article 15, then the Court's existing jurisprudence would apply. It might be argued that where a rights-restrictive measure, including a measure restrictive of Article 9, is required in order to capitalise on the alleged stabilising effect of religion in a particular society (or its susceptibility to religious extremism), the Contracting Party would have to file a derogation and consequently to show compliance with the conditions of Article 15.

This is unsatisfactory from two perspectives. First, it would be too high a threshold for the rights-restrictive measure to pass, and it might result in the Contracting Party not being able to take steps that are necessary. Second, if the first problem were to be remedied by conceding a wide margin of appreciation on transitional grounds, either on the existence of an emergency situation or the necessity of the measures taken in response to it, the new Contracting Parties would be allowed to evade the scrutiny of the Court too easily and the role of Article 15 would become warped. Thus, although the possibility of a valid derogation in respect of measures on religious grounds remains, it would be in only the most serious of circumstances and could not be responsive enough to the transitional context without compromising the integrity of Article 15.

This advice is not as necessary in relation to two of the international comparators because although Article 4 ICCPR and Article 27 ACHR authorise derogations in times of public emergency, both prohibit derogation from the right to freedom of conscience and religion. The ACHPR does not contain a derogation clause at all, leading to some debate as to whether the system adequately distinguishes between peacetime limitations and derogations in times of war or other public emergency.[68] To the extent that a clear distinction might emerge, the suggestion here would be that derogations would be useful in 'religion in transition' cases, again, only in quite extreme circumstances.

Self-defending democracy

Second, and without resorting to a derogation, a Respondent State in the European system whose democratic transition was under real threat of failure due to anti-democratic religious forces might be able to persuade the European Court to accept the notion of self-defending (or militant) democracy in order to justify rights-restrictive measures. In a series of

[68] See Allo, 'Derogations or Limitations?

cases, the European Court has accepted that democracies whose existence is under imminent threat may take pre-emptive measures against the forces working against it, for example by dissolving political parties (albeit subject to strict scrutiny).

The case of *Refah Partisi* v. *Turkey*[69] is perhaps now the most notorious of the cases on self-defending democracy. Here, the Court did not find a violation of the Convention when a major political party with around four million members, which was already part of a coalition government and which was likely to form a government after the next general election, was dissolved because of its aim of imposing Sharia law on Turkey. The Court held that a political party that was animated by the moral values imposed by a religion cannot be regarded as 'intrinsically inimical' to the fundamental principles of democracy.[70] However, Sharia was, bluntly, held by the Chamber and Grand Chamber to be 'incompatible with the fundamental principles of democracy'.[71] Thus, although this case is steeped in religious contextual factors, the reason for restriction was tied to the preservation of democracy. Moreover, although it can be argued that the historical evolution of the idea of self-defending democracy suggests that it is a species of transitional justice, this does not seem to be how the European Court used it in *Refah Partisi*, since Turkey has been a member of the Council of Europe since 1949.[72]

The limits of self-defending democracy in general, and in the European jurisprudence, are still unclear, and there are risks of abuse.[73] The value of its continued use as a basis for the European Court's reasoning on peacetime limitations is questionable. Given this, there is fruitful debate to be had on the relevance of the self-defending democracy principle to cases

[69] *Refah Partisi (The Welfare Party)* v. *Turkey*.

[70] *Ibid.*, para. 100. [71] *Ibid.*, para. 123.

[72] Council of Europe, 'The Council of Europe in Brief – 47 Countries, one Europe', www.coe.int/aboutCoe/index.asp; Turkey's participation in the Council of Europe was suspended after the military *coup d'état* in 1980 (see Pevehouse, *Democracy from Above*, 48), and arguably only transitioned back to democracy with the general election in 1983. Pevehouse (*ibid.*, 204) would go so far as to classify Turkey as a 'failed case' of democratic consolidation in which membership of international organisations has not created conditions conducive to the survival of democracy. However we should be alert to the distinction between programmatic supra-national efforts at democratic consolidation on the one hand, and the judicial application of transitional justice on the other. Although the Council of Europe may well still be working towards democratic consolidation in Turkey, the European Court's approach to it in *Refah Partisi* was not dominated by questions about the transition itself.

[73] P. Macklem, 'Militant Democracy, Legal Pluralism, and the Paradox of Self-Determination', *International Journal of Constitutional Law* 4(3) (2006) 488, 492.

from the new Contracting Parties.[74] The clearest example of how it might look was the decision of the Grand Chamber in *Ždanoka* v. *Latvia*. In this case the Grand Chamber upheld a restriction on the political activities of a member of the Communist Party of Latvia, in order to defend Latvia against the resurgence of communism during the transitional phase. The applicant was prohibited from standing for election to the Latvian national parliament in 2002, as a result of her active participation in the Communist Party of Latvia after 13 January 1991 (the date they had launched an attempted coup).[75] Despite citing *Refah Partisi* and confirming 'the legitimacy of the concept of a "democracy capable of defending itself"',[76] the substance of the judgment owes a lot more to the Court's appraisal of the transitional context.[77] The threat was of a very different scale to the threat in *Refah Partisi*: the election of one person as opposed to the election of a government. Indeed it might have been better not to have decided it as a self-defending democracy case at all.

The European Court's approach to self-defending democracy is relevant to the 'religion in transition' cases only where the religious organisation subjected to a rights-restrictive measure also has an anti-democratic agenda, and passes the *Refah Partisi* threshold of posing an imminent danger.[78] Where the religious organisation has no anti-democratic agenda, the fact that restricting or prohibiting its activities might be conducive to transitional stability cannot be justified using this body of law or theory. The *Refah Partisi* and *Ždanoka* line of jurisprudence would not shed any further light on *Al-Nashif* or *Holy Synod of the Bulgarian Orthodox Church*, although it *could* potentially have played a role in *Metropolitan Church of Bessarabia* v. *Moldova*.

The Inter-American Commission on human rights does not seem to have been influenced by the European Court's reasoning in *Refah Partisi*,[79] nor does it generally recognise the concept of self-defending

[74] See Chapter 7, this volume. See also, P. Harvey, 'Militant Democracy and the European Convention on Human Rights', *European Law Review* 29(3) (2004) 407 and R. Teitel, 'Militating Democracy: Comparative Constitutional Perspectives', *Michigan Journal of International Law* 29 (2007) 49.

[75] *Ždanoka* v. *Latvia* [GC], para. 22.

[76] *Ibid.*, para. 100. [77] *Ibid.*, paras. 133–135.

[78] One might question whether the blunt equation of Sharia with wholesale incompatibility with the Convention is an appropriately thorough methodology to apply when examining the democratic credentials of a religiously affiliated political party, but the validity of the logical step remains. For a critical reading of the Court's assessment of Sharia in *Refah* see McGoldrick, 'Accommodating Muslims in Europe', 603.

[79] The Dissenting Opinion of Commissioner Zalaquett in IAComHR, *Statehood Solidarity Committee* v. *USA*, 29 December 2003 (Report No. 98/03, Case 11.294) para. 15 refers to

democracy. The Inter-American Court has been critical of the European approach and, in *Yatama* v. *Nicaragua*, it implied that the European Court had 'discounted' the importance of political parties as essential forms of association for the development and strengthening of democracy by its judgment in *Refah Partisi*.[80] The African Commission on Human and Peoples' Rights does not seem to have pursued the thesis of self-defending democracy either. Given the inherent risks of the concept, this is no bad thing.

Conclusion: religion, transition and universality

In the introduction it was suggested that this chapter would attempt to construct a legally sound and theoretically robust approach to the 'religion in transition' cases, which also fully respects the experiences of transitional democracies. In this chapter, we have seen how the existing jurisprudence of the Court can be used to respond to the complex factual matrix of the 'religion in transition' cases, without the Court altering its own conception of justice. A thorough approach to prescription by law, pursuit of a legitimate aim, and discussion of necessity and proportionality via the margin of appreciation doctrine, yields workable results. The main difference between the approach advocated here and 'business as usual' is that it not only recognises, but also strongly recommends, a space for meaningful engagement with the relationship between national transitional justice policies and international human rights.

Although this space, or margin, would allow a more detailed engagement with the realities of transitional democracies, it remains important not to cast the European Court in the role of a dispenser of transitional justice itself. It was suggested above that if the Court were to hold that the transitional context could render certain otherwise 'illegitimate' measures 'legitimate' it would be doing just this.

The approach advocated here would strongly caution against allowing a margin of appreciation in relation to legitimate aims not only on doctrinal grounds related to the proper role of the margin, but also on two related normative grounds: first that the European Court, as an international human rights court, should not explicitly apply transitional justice itself; and, second, that this is because, if it did so, it would undermine

the *Refah Partisi* case, but on the question of electoral rights more generally and not on the specific issue of self-defending democracy.

[80] IACtHR, *Yatama* v. *Nicaragua*, 23 June 2005 (Series C no. 127) para. 215.

the universality of human rights. This second, normative, point would apply equally to the international comparators, whether they do or do not recognise the margin of appreciation as a judicial tool (and most do not).[81] Translated across to the international comparators, the point would be that any 'flexibility' in the system should relate not to the conceptual legitimacy of the aim put forward by the transitional state, but to the necessity of the impugned restrictive measure. Again, to do otherwise, and for the judges of the European Court to dispense transitional justice themselves, would be injurious to the universality of human rights.

Ironically enough, in the early days of the Council of Europe's enlargement, similar concerns were expressed about allowing a margin of appreciation to the new Contracting Parties.[82] Thus, one might argue that the approach for Europe recommended here, which allows for discussion of the transitional context via necessity and the margin of appreciation rather than on the question of the legitimacy of the aim, is no better a guarantee against undermining the universality of human rights. Nevertheless, the hypothesis on which the approach to the 'religion in transition' cases advocated here is based is that because (when it is correctly applied), the margin of appreciation attaches to the reasons given for a measure being necessary, rather than to the definition of the right in question[83] (or to the

[81] In HRC (United Nations Human Rights Committee), *Hertzberg, Mansson, Nikula and Putkonen* v. *Finland*, 2 April 1982 (Communication No. R.14/61, UN Doc. Supp. No. 40 (A/37/40) CCPR/C/15/D/61/1979) para. 10.3 the Human Rights Committee of the ICCPR recognised a 'margin of discretion' on moral issues, but then appeared rather critical of the doctrine in made use of the margin of appreciation doctrine, but in HRC, *Länsman et al* v. *Finland*, 22 November 1996 (Communication No. 511/1992, UN Doc. CCPR/C/52/D/511/1992) para. 9.4. On the ACHR see Chapter 10, this volume, noting that whilst the Inter-American Court has once made reference to it in an Advisory Opinion, it has not since developed this line of reasoning. By contrast the African Commission on Human and Peoples' Rights explicitly recognised that the margin of appreciation informs the African Charter in AfComHPR, *Prince* v. *South Africa*, 31 October 2007 (Communiqué 255/2002), reprinted in African Commission on Human and Peoples' Rights, 'Eighteenth Activity Report', presented at the Sixth Ordinary Session of the African Union Executive Council 24–31 January 2005, EX.CL/167 (VI).

[82] See generally Sweeney, 'Margins of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War Era', discussing inter alia comments made in A. Lester, 'Universality versus Subsidiarity: A Reply', *European Human Rights Law Review* 1 (1998) 73, 76; P. Mahoney, 'Speculating on the Future of the Reformed European Court of Human Rights', *Human Rights Law Journal* 20 (1999) 1, 3.

[83] J. Gerards and H. Senden, 'The Structure of Fundamental Rights and the European Court of Human Rights', *International Journal of Constitutional Law* 7(4) (2009) 619, especially at 647; a notable exception to this is the judgment in ECtHR, *Vo* v. *France* [GC], 8 July 2004 (Appl. no. 53924/00) para. 82, where the European Court recognised a margin of

'legitimacy' of the restrictive aim), it does not undermine the conceptual universality of human rights.

The approach recommended here is important because in the three principal cases examined, *Al-Nashif*, *Metropolitan Church of Bessarabia* and *Holy Synod of the Bulgarian Orthodox Church*, the European Court paid only lip service to the conceptual validity of domestic transitional policies when it held that the measures could be 'legitimate'. On the crucial question of whether the measure was necessary, the Court largely ignored the Respondent States' arguments from a transitional perspective. On the one hand this aloofness from the realities of the new Contracting Parties could be described as 'dynamics of condescension' from Western to Eastern Europe.[84] If there is a good transitional reason why Bulgarian Muslims are more susceptible to extremism than Muslims in other states, then it should be put to the Court. If not, there is no guarantee that suspicion of Muslim preachers such as *Al-Nashif* is not motivated by sectarian concerns emanating from the Balkans' difficult recent history. On the other hand, the Court might have been too generous by finding that the measures in *Metropolitan Church of Bessarabia* and *Holy Synod of the Bulgarian Orthodox Church* were perfectly 'legitimate', but only lacking in 'necessity', since the Court failed to challenge whether the stated aim of the measures was generally thought of as a useful transitional policy.

The approach advocated here calls for international human rights enforcement bodies, including the European Court, to engage far more robustly with the difficult question of when, and in what circumstances, national transitional policies that might secure peace or democratic consolidation are trumped by international human rights concerns. Judge Bonello identified the existence of this dilemma in his dissenting Opinion in *Sejdić and Finci* v. *Bosnia and Herzegovina*, when he argued that the Court had 'canonised' the relevant Convention rights whilst 'discounting' the values of peace and reconciliation. These values were, he argued, 'at least' equally invaluable.[85] Whether his view that, in the particular context, discrimination against Jews and Roma did not violate the Convention is accepted, at least he identified the crux of the issue.

appreciation on the issue of when the right to life begins. See Gerards and Senden, *ibid.*, 648; Sweeney, 'A "Margin of Appreciation" in the Internal Market', 39.

[84] M. Dembour and M. Krzyzanowska-Mierzewska, 'Ten Years On: The Voluminous and Interesting Polish Case Law', *European Human Rights Law Review* 5 (2005) 517.

[85] ECtHR, *Sejdić and Finci* v. *Bosnia and Herzegovina* [GC], 22 December 2009 (27996/06 and 34836/06) dissenting Opinion of Judge Bonello.

The outcome of the three cases naturally depends on both the approach to transition *and* to the approach of the European Court to religion. The *Al-Nashif* case is potentially the odd one out here since it dealt with the presumed susceptibility of one religion, Islam, to extremist influences during the transition. The Court did not strictly need to determine the veracity of this presumption in order to decide whether there had been a violation of Article 8. *Metropolitan Church of Bessarabia* and *Holy Synod of the Bulgarian Orthodox Church* have in common that the rights-restrictive measure was based upon a presumed beneficial role of having a stable state church during periods of democratic transition. In its summary determination that the measure was 'legitimate' the Court did not sufficiently question whether this presumption was valid either.

One might even be slightly surprised by the Court's relatively easy acceptance that these measures were 'legitimate': Teitel has argued that the European Court has pursued an 'extreme concept of secularism' as an element of its vision of a democratic society,[86] citing *Sahin* v. *Turkey* in this regard (where the Grand Chamber upheld a prohibition upon wearing Islamic headscarves at university). The Chamber decision in *Lautsi* v. *Italy*, in which the Chamber found that displaying a crucifix in Italian schools violated the Convention rights of secular parents, seemed to follow in this line.[87] However, the decision of the Grand Chamber to reverse that finding, noted in the introduction above, certainly makes the Court's position more ambiguous.[88] Of course, since the European Court found that the measures were not necessary, the conclusion (if not all the reasoning) in both *Metropolitan Church of Bessarabia* and *Holy Synod of the Bulgarian Orthodox Church* would also broadly conform to the pattern seen in *Sahin* and *Lautsi*. In this way, the conclusions in *Metropolitan Church of Bessarabia* and *Holy Synod of the Bulgarian Orthodox Church* might owe as much to an emerging secular orthodoxy as they do to a lack of engagement with the relationship between domestic transitional justice measures and international human rights. To this extent, it is perhaps less likely that the other international mechanisms would be drawn down this route in their own 'religion in transition' jurisprudence, and might even be more receptive to the broad approach outlined here (minus explicit invocation of the margin of appreciation doctrine).

[86] Teitel, 'Militating Democracy: Comparative Constitutional Perspectives', 59 – discussing the judgment in *Sahin* v. *Turkey*.
[87] ECtHR, *Lautsi* v. *Italy*, 3 November 2009 (Appl. no. 30814/06).
[88] ECtHR, *Lautsi* v. *Italy* [GC], 18 March 2011 (Appl. no. 30814/06).

The relationship between an international human rights court's responses to cases from a transitional context and the universality of human rights is a fertile area of further research. One might argue that it is the universality of human rights, rather than the normative pedigree of transitional justice, which is the greatest brake on such courts' approval of national transitional policies via alterations of their own standards of justice. The extent to which the margin of appreciation in the European system really does square the circle, by responding meaningfully to the transitional context without compromising the universality of human rights, is a demanding and crucial question but, for the purposes of this chapter, it will have to remain only partially articulated.[89]

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[89] Cf. Sweeney, *The European Court of Human Rights in the Post-Cold War Era*.

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